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THE GENERAL STATUTES OF NORTH CAROLINA

Containing General Laws of North Carolina through the Legislative Session of 1971

Prepared under the Supervision of the Department of Justice of the State of North Carolina

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Annotated, under the Supervision of the Department of Justice, by the Editorial Staff of the Publishers

Under the Direction of

D. W. Parrish, Jr., W. M. Willson and Sylvia Faulkner

Volume 2D

1972 Replacement Volume

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Scope of Volume

Statutes:

Full text of Chapters 97 through 105 of the General Statutes of North Carolina, including all enactments through the Legislative Session of 1971 heretofore contained in 1965 Replacement Volume 2D of the General Statutes and the 1971 Cumulative Supplement thereto.

Annotations:

Sources of the annotations to the General Statutes appearing in this volume are:

North Carolina Reports volumes 1-279 (p. 191).
North Carolina Court of Appeals Reports volumes 1-11 (p. 596).
Federal Reporter volumes 1-300.
Federal Reporter 2nd Series volumes 1-443 (p. 1216).
Federal Supplement volumes 1-328 (p. 224).
United States Reports volumes 1-403 (p. 442).
Supreme Court Reporter volumes 1-91 (p. 1976).
North Carolina Law Review volumes 1-49 (p. 591).
Wake Forest Intramural Law Review volumes 2-6 (p. 568).
Opinions of Attorney General.

Abbreviations

(The abbreviations below are those found in the General Statutes which refer to prior codes.)

P. R.	Potter's Revisal (1821, 1827)
R. S.	Revised Statutes (1837)
R. C.	Revised Code (1854)
C. C. P.	Code of Civil Procedure (1868)
Code	Code (1883)
Rev.	Revisal of 1905
C. S.	Consolidated Statutes (1919, 1924)

Preface

Volume 2D, originally published in 1965, accumulated a substantial supplement, including, among other things, complete revisions of the income tax law and of the "Machinery Act," relating to the listing, appraisal and assessment of property and the collection of property taxes. This 1972 replacement volume is issued to incorporate the new material in the bound volume and to eliminate what is obsolete.

Beginning with formal opinions issued by the North Carolina Attorney General on July 1, 1969, such opinions which construe a specific statute will be cited as an annotation to that statute. For a copy of an opinion or of its headnotes write the Attorney General, P.O. Box 629, Raleigh, N.C. 27602.

The recompiled volume has been prepared and published under the supervision of the Department of Justice of the State of North Carolina. The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes, and any suggestions they may have for improving them, to the Department.

ROBERT MORGAN,
Attorney General

March 8, 1972

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ARTICLE 1.

Workmen's Compensation Act.

§ 97-1. Official title.—This Article shall be known and cited as "The North Carolina Workmen's Compensation Act." (1929, c. 120, s. 1.)

Editor's Note. — For case law survey on workmen's compensation, see 41 N.C.L. Rev. 409 (1963); 44 N.C.L. Rev. 1069 (1966); 45 N.C.L. Rev. 983 (1967).

In General. — It was the purpose of the General Assembly in providing for compensation for an employee, that the North Carolina Industrial Commission, created by the Workmen's Compensation Act for that purpose, shall administer its provisions to the end that both employee and employer shall receive the benefits and enjoy the protection of the act. The act contemplates mutual concessions by employee and employer; for that reason, its validity has been upheld, and its policy approved. Winslow v. Carolina Conference Ass'n, 211 N.C. 571, 191 S.E. 403 (1937). See Lee v. American Enka Corp., 212 N.C. 455, 193 S.E. 809 (1937); National Labor Relations Bd. v. Moss Planing Mill Co., 224 F.2d 702 (4th Cir. 1955).

Purpose of Act. — The primary purpose of legislation of this kind is to compel industry to take care of its own wreckage. Barber v. Minges, 223 N.C. 213, 25 S.E.2d 837 (1943).

The purpose of the act is to provide compensation benefits for industrial injuries. Lewis v. W.B. Lea Tobacco Co., 260 N.C. 410, 132 S.E.2d 877 (1963).

The purpose of the Workmen's Compensation Act is not only to provide a swift and certain remedy to an injured workman, but also to insure a limited and determinate liability for employers. Barnhardt v. Yellow Cab Co., 266 N.C. 419, 146 S.E.2d 479 (1966).

The underlying purpose of the Workmen's Compensation Act is to provide compensation for workmen who suffer disability by accident arising out of and in the course of their employment. Henry v. A.C. Lawrence Leather Co., 234 N.C. 126, 66 S.E.2d 693 (1951).

One of the primary objects and purposes of compensation laws is to grant certain and speedy relief to injured employees, or, in case of death, to their dependents. Cabe v. Parker-Graham-Sexton, Inc., 202 N.C. 176, 162 S.E. 223 (1932).

The general purpose of the Workmen's Compensation Act, in respect to compensation for disability, is to substitute, for common-law or statutory rights of action and grounds of liability, a system of money payments by way of financial relief for loss of capacity to earn wages. There is no compensation provided for physical pain or discomfort. Branham v. Denny Roll & Panel Co., 223 N.C. 233, 25 S.E.2d 865 (1943).

One of the purposes of the Workmen's Compensation Act is to relieve against hardship rather than to afford full compensation for injury. The fixing of maximum and minimum awards in industry is a compromise. Kellams v. Carolina Metal Prods., Inc., 248 N.C. 199, 102 S.E.2d 841 (1958).

It is not the purpose of the Workmen's Compensation Act to exculpate or absolve employers from the consequences of their negligent conduct. Tscheiller v. National Weaving Co., 214 N.C. 449, 199 S.E. 623 (1938).

Constitutionality. — The Workmen's Compensation Act of North Carolina has been held to be constitutional by the Supreme Court of that State, and the Supreme Court of the United States has upheld the constitutionality of similar compensation acts. Jenkins v. American Enka Corp., 95 F.2d 755 (4th Cir. 1938).

The contention that the Workmen's

Compensation Act is unconstitutional on the ground that it destroys the right of trial by jury is untenable. McCune v. Rhodes-Rhyne Mfg. Co., 217 N.C. 351, 8 S.E.2d 219 (1940). See Hagler v. Mecklenburg Highway Comm'n, 200 N.C. 733, 158 S.E. 383 (1931); Huffman v. Douglass Aircraft Co., 260 N.C. 308, 132 S.E.2d 614 (1963).

The act is not unconstitutional in denying punitive damages for willful injuries to an employee. McCune v. Rhodes-Rhyne Mfg. Co., 217 N.C. 351, 8 S.E.2d 219 (1940).

Mother of deceased employee contended that she was entitled under the statute of distribution to any sum receivable for death of deceased and that the Workmen's Compensation Act, which deprived her of that right, was unconstitutional. It was held that compensation legislation is a valid exercise of police power. Heavner v. Town of Lincolnton, 202 N.C. 400, 162 S.E. 909, appeal dismissed, 287 U.S. 672, 53 S. Ct. 4, 77 L. Ed. 579 (1932).

The philosophy which supports the Workmen's Compensation Act is that the wear and tear of human beings in modern industry should be charged to the industry, just as the wear and tear of machinery has always been charged. Vause v. Vause Farm Equip. Co., 233 N.C. 88, 63 S.E.2d 173 (1951); Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

And while such compensation is presumably charged to the industry, and consequently to the employer or owner of the industry, eventually it becomes a part of the fair money cost of the industrial product, to be paid for by the general public patronizing such products. Vause v. Vause Farm Equip. Co., 233 N.C. 88, 63 S.E.2d 173 (1951).

The Workmen's Compensation Act is primarily for the protection and benefit of the employee, and he is entitled to know with certainty when his right of action accrues. Hartsell v. Thermoid Co., 249 N.C. 527, 107 S.E.2d 115 (1959).

Application.—The Workmen's Compensation Act deals with the incidents and risks of the contract of employment, in which is included the negligence of the employer in that relation. It has no application outside the field of industrial accident; and does not intend, by its general terms, to take away common-law or other rights which pertain to the parties as members of the general public, disconnected from the employment. Barber v. Minges, 223 N.C. 213, 25 S.E.2d 837 (1943).

Basis of Liability. — The Workmen's Compensation Act takes into consideration certain elements of a mutual concession between the employer and employee by which the question of negligence is eliminated, and liability under the act rests upon the employer upon the condition precedent of an injury by accident occurring in the course of employment and arising out of it. Conrad v. Cook Lewis Foundry Co., 198 N.C. 723, 153 S.E. 266 (1930).

The Workmen's Compensation Act eliminates the question of negligence as a basis for recovery thereunder, but it is not the equivalent of general accident or health insurance, and provides for compensation only for those injuries by accident which arise out of and in the course of the employment. Vause v. Vause Farm Equip. Co., 233 N.C. 88, 63 S.E.2d 173 (1951).

Compensability under the Workmen's Compensation Act is not dependent upon negligence or fault of the employer. Taylor v. Twin City Club, 260 N.C. 435, 132 S.E.2d 865 (1963).

The Workmen's Compensation Act Is Not an Accident and Health Insurance Act. — The legislative intent seems clear that the Workmen's Compensation Act is an industrial injury act, and not an accident and health insurance act. The court should not overstep the bounds of legislative intent and make by judicial legislation the compensation act an accident and health insurance act. Lewter v. Abercrombie Enterprises, Inc., 240 N.C. 399, 82 S.E.2d 410 (1954).

The Workmen's Compensation Act is not the equivalent of general accident or health insurance. Vause v. Vause Farm Equip. Co., 233 N.C. 88, 63 S.E.2d 173 (1951); Taylor v. Twin City Club, 260 N.C. 435, 132 S.E.2d 865 (1963); Lewis v. W.B. Lea Tobacco Co., 260 N.C. 410, 132 S.E.2d 877 (1963).

The Workmen's Compensation Act is not intended to provide general health and accident insurance, but its purpose is to provide compensation for those injuries which result from accidents which arise out of and in the course of the employment. Martin v. Georgia-Pacific Corp., 5 N.C. App. 37, 167 S.E.2d 790 (1969).

The Workmen's Compensation Act is not intended to provide general health and accident insurance. To be compensable the injury must spring from the employment. Hales v. North Hills Constr. Co., 5 N.C. App. 564, 169 S.E.2d 24 (1969).

Construction.—The Workmen's Compensation Act is to be construed liberally to effectuate the broad intent of the act to provide compensation for employees sustaining an injury arising out of and in the course of the employment, and no technical or strained construction should be given to defeat this purpose. Johnson v. Asheville Hosiery Co., 199 N.C. 38, 153 S.E. 591 (1930). See Roberts v. City Ice & Coal Co., 210 N.C. 17, 185 S.E. 438 (1936); Barbour v. State Hospital, 213 N.C. 515, 196 S.E. 812 (1938).

The Workmen's Compensation Act is a radical and systematic change in the common law and must be liberally construed to

accomplish its purposes. Its provisions are superior to the common law in all respects where it deals with the liabilities arising out of the relationship of employer and employee. Essick v. City of Lexington, 232 N.C. 200, 60 S.E.2d 106 (1950).

The Workmen's Compensation Act requires that it be liberally construed to effectuate the objects for which it was passed to provide compensation for workers injured in industrial accidents. Keller v. Electric Wiring Co., 259 N.C. 222, 130 S.E.2d 342 (1963); Ashley v. Rent-A-Car Co., 271 N.C. 76, 155 S.E.2d 755 (1967).

The Workmen's Compensation Act should be liberally construed to the end that the benefit thereof should not be denied upon technical, narrow and strict interpretation. Henry v. A.C. Lawrence Leather Co., 231 N.C. 477, 57 S.E.2d 760 (1950); Guest v. Brenner Iron & Metal Co., 241 N.C. 448, 85 S.E.2d 596 (1955); Graham v. Wall, 220 N.C. 84, 16 S.E.2d 691 (1941); Hartley v. North Carolina Prison Dep't, 258 N.C. 287, 128 S.E.2d 598 (1962); Kellams v. Carolina Metal Prods., Inc., 248 N.C. 199, 102 S.E.2d 841 (1958); Hall v. Thomason Chevrolet, Inc., 263 N.C. 569, 139 S.E.2d 857 (1965); Hall v. W.A. Davis Milling Co., 1 N.C. App. 380, 161 S.E.2d 780 (1968).

However, the rule of liberal construction cannot be extended beyond the clearly expressed language of the act. Gilmore v. Hoke County Bd. of Educ., 222 N.C. 358, 23 S.E.2d 292 (1942).

The Workmen's Compensation Act must be liberally construed to accomplish the humane purpose for which it was passed, i.e., compensation for injured employees. Barnhardt v. Yellow Cab Co., 266 N.C. 419, 146 S.E.2d 479 (1966).

The liberal construction rule is a part of Workmen's Compensation Act. Kiger v. Bahnson Serv. Co., 260 N.C. 760, 133 S.E.2d 702 (1963).

In the absence of other than technical prejudice to the opposing party, the liberal spirit and policy of the Workmen's Compensation Act should not be defeated or impaired by a too strict adherence to procedural niceties. Hall v. Thomason Chevrolet, Inc., 263 N.C. 569, 139 S.E.2d 857 (1965).

The Workmen's Compensation Act should be liberally construed. Bailey v. North Carolina Dep't of Mental Health, 2 N.C. App. 645, 163 S.E.2d 652 (1968).

The Workmen's Compensation Act must be liberally construed and liberally applied. Thomas v. Raleigh Gas Co., 218 N.C. 429, 11 S.E.2d 297 (1940).

The Workmen's Compensation Act should be liberally construed to the end that benefits may not be denied on narrow or technical grounds. Hewett v. Garrett, 274 N.C. 356, 163 S.E.2d 372 (1968).

The Workmen's Compensation Act should be liberally construed to effectuate its purpose to provide compensation for injured employees or their dependents, and its benefits should not be denied by a technical, narrow, and strict construction. Hollman v. City of Raleigh, 273 N.C. 240, 159 S.E.2d 874 (1968).

The rule of liberal construction cannot be employed to attribute to a provision of the act a meaning foreign to the plain and unmistakable words in which it is couched. Henry v. A.C. Lawrence Leather Co., 231 N.C. 477, 57 S.E.2d 760 (1950); Guest v. Brenner Iron & Metal Co., 241 N.C. 448, 85 S.E.2d 596 (1955); Hatchett v. Hitchcock Corp., 240 N.C. 591, 83 S.E.2d 539 (1954).

Nor can the rule of liberal construction be carried to the point of applying the act to employments not within its stated scope, or not within its intent or purpose. Wilson v. Town of Mooresville, 222 N.C. 283, 22 S.E.2d 907 (1942).

The doctrine of liberal construction of the Workmen's Compensation Act arises out of the act itself and relates only to cases falling within the purview of the act. It cannot be invoked to determine when the act applies. Hayes v. Board of Trustees, 224 N.C. 11, 29 S.E.2d 137 (1944).

The Workmen's Compensation Act was an innovating substitution of statute law in a field theretofore left entirely to the common law. Because of the radical and systematic changes in the common law, a statute so markedly remedial in nature must be liberally construed with a view to effectuating its purposes. Wilmington Shipyard, Inc. v. North Carolina State Highway Comm'n, 6 N.C. App. 649, 171 S.E.2d 222 (1969).

It is a fundamental rule that the Workmen's Compensation Act should be liberally construed to the end that the benefits thereof should not be denied upon technical, narrow, and strict interpretation. Owens v. Standard Mineral Co., 10 N.C. App. 84, 177 S.E.2d 775 (1970).

The courts are without authority to enlarge the meaning of the terms used in the Workmen's Compensation Act by the legislature or to extend by construction its scope and intent so as to include persons not embraced by its terms. Hayes v. Board of Trustees, 224 N.C. 11, 29 S.E.2d 137 (1944).

The provisions of the Workmen's Compensation Act are to be liberally construed to effectuate the legislative intent as gathered from the act to award compensation for the injury or death of an employee arising out of and in the course of his employment, irrespective of the question of negligence. Reeves v. Parker-Graham-Sexton, Inc., 199 N.C. 236, 154 S.E. 66 (1930).

The various provisions of the Workmen's Compensation Act are to be construed in their relations to each other as a whole to effectuate the intent of the legislature to provide compensation to an employee for injury arising

out of and in the course of his employment. Rice v. Denny Roll & Panel Co., 199 N.C. 154, 154 S.E. 69 (1930).

The Workmen's Compensation Act will be construed as a whole to effectuate the intent of the General Assembly. Morris v. Laughlin Chevrolet Co., 217 N.C. 428, 8 S.E.2d 484, 128 A.L.R. 132 (1940).

The Industrial Commission has exclusive jurisdiction of the rights and remedies herein afforded. Hedgepeth v. Lumbermen's Mut. Cas. Co., 209 N.C. 45, 182 S.E. 704 (1935); Thomason v. Red Bird Cab Co., 235 N.C. 602, 70 S.E.2d 706 (1952).

Ordinarily, when the pleadings in a common-law tort action disclose that the parties are subject to and bound by the provisions of the North Carolina Workmen's Compensation Act with respect to the injury involved, dismissal is proper, for the Industrial Commission has exclusive jurisdiction in such cases. Neal v. Clary, 259 N.C. 163, 130 S.E.2d 39 (1963).

Findings of fact of the Industrial Commission, supported by competent evidence, were to the effect that defendant's employee was temporarily employed in pumping water from a barge which was being loaded with logs on a navigable river, that the barge careened, that the employee fell or jumped from the shore side of the barge and was actually killed on land as a result of the barge crushing him. It further appeared that the barge was without means of propulsion and was at the time incapable of navigation, and that both the employee and the defendant had accepted, and were amenable to this Chapter. It was held that the North Carolina Industrial Commission had jurisdiction to hear and determine the claim for compensation for the employee's death, its jurisdiction not being ousted by the admiralty and maritime jurisdiction of the United States. Johnson v. Foreman-Blades Lumber Co., 216 N.C. 123, 4 S.E.2d 334 (1939).

What Law Governs. — The rights of employer, employee, and insurance carrier under a workmen's compensation statute are governed by the law of the state of the statute. Betts v. Southern Ry., 71 F.2d 787 (4th Cir. 1934).

Wrongful Death Statute Controls. — The provisions of the North Carolina wrongful death statute, § 28-173, are controlling over the provisions of the Workmen's Compensation Act. Byers v. North Carolina State Highway Comm'n, 3 N.C. App. 139, 164 S.E.2d 535 (1968).

The Workmen's Compensation Act makes no provision for property damage suits, and the Supreme Court has clearly distinguished the recoveries allowable in personal injury damage suits and payments received under the Workmen's Compensation Act. Bowman v. Comfort Chair Co., 271 N.C. 702, 157 S.E.2d 378 (1967).

Double Coverage Not Intended. — If a valid award may be made under the Workmen's Compensation Act, the Longshoremen's and Harbor Workers' Act, 33 USC §§ 901-950, may be dismissed from consideration, since double coverage is not intended. Rice v. Uwharrie Council Boy Scouts of America, 263 N.C. 204, 139 S.E.2d 223 (1964).

Misconduct toward Decedent Not a Bar to Claimant. — In the absence of statute, a claimant will not be barred because of misconduct toward decedent. Smith v. Allied Exterminators, Inc., 11 N.C. App. 76, 180 S.E.2d 390 (1971).

Forfeiture of Workmen's Compensation Death Benefits May Not Be Judicially Imposed. — Section 31A-2, under certain conditions, bars a parent who has abandoned his child from all right to intestate succession in any part of the child's estate, but in the absence of a similar provision with reference to workmen's compensation death benefits, the court cannot judicially impose a forfeiture, no matter how unworthy the beneficiary. Smith v. Allied Exterminators, Inc., 11 N.C. App. 76, 180 S.E.2d 390 (1971).

Pleadings. — Unless the notice of accident required by § 97-22 and § 97-23 is so considered, the Workmen's Compensation Act makes no mention of pleadings. Clark v. Gastonia Ice Cream Co., 261 N.C. 234, 134 S.E.2d 354 (1964).

Judicial Notice. — North Carolina courts will take judicial notice of a public statute of the State, which therefore need not be pleaded, and the North Carolina Workmen's Compensation Act is a public statute. Miller v. Roberts, 212 N.C. 126, 193 S.E. 286 (1937).

Employer and employee held not to come within the provisions of the North Carolina Workmen's Compensation Act. Pennsylvania Threshermen & Farmers' Mut. Cas. Ins. Co. v. Harrill, 106 F. Supp. 332 (W.D.N.C. 1952).

Applied in Davis v. Mecklenburg County, 214 N.C. 469, 199 S.E. 604 (1938).

Cited in Dark v. Johnson, 225 N.C. 651, 36 S.E.2d 237 (1945); Morris v. Wilkins, 241 N.C. 507, 85 S.E.2d 892 (1955); Whitlow v. Seaboard Air Line R.R., 222 F.2d 57 (4th Cir. 1955); Tipton v. Barge, 243 F.2d 531 (4th Cir. 1957); Whitworth v. Lumbermens Mut. Cas. Co., 265 N.C. 530, 144 S.E.2d 616 (1965); Pendergraph v. Celebrezze, 255 F. Supp. 313 (M.D.N.C. 1966).

§ 97-2. Definitions.—When used in this Article, unless the context otherwise requires—

(1) Employment.—The term "employment" includes employment by the State and all political subdivisions thereof, and all public and

quasi-public corporations therein and all private employments in which five or more employees are regularly employed in the same business or establishment or in which one or more employees are employed in activities which involve the use or presence of ionizing radiation, except agriculture and domestic services, and an individual sawmill and logging operator with less than 10 employees, who saws and logs less than 60 days in any six consecutive months and whose principal business is unrelated to sawmilling or logging.

(2) Employee.—The term "employee" means every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written, including aliens, and also minors, whether lawfully or unlawfully employed, but excluding persons whose employment is both casual and not in the course of the trade, business, profession or occupation of his employer, and as relating to those so employed by the State, the term "employee" shall include all officers and employees of the State, except only such as are elected by the people, or by the General Assembly, or appointed by the Governor to serve on a per diem, part-time or fee basis, either with or without the confirmation of the Senate; as relating to municipal corporations and political subdivisions of the State, the term "employee" shall include all officers and employees thereof, except such as are elected by the people: Provided, that the governing body of any municipal corporation or political subdivision may, in its discretion, bring officers elected by the people within the coverage of this Article by adopting an appropriate resolution, and during the time such resolution is in effect any such elected officer shall be deemed to be an "employee" of such municipal corporation or political subdivision under this Article. The term "employee" shall include members of the North Carolina national guard, except when called into the service of the United States, and members of the North Carolina State guard, and members of these organizations shall be entitled to compensation for injuries arising out of and in the course of the performance of their duties at drill, in camp, or on special duty under orders of the Governor. The term "employee" shall include deputy sheriffs and all persons acting in the capacity of deputy sheriffs, whether appointed by the sheriff or by the governing body of the county and whether serving on a fee basis or on a salary basis, or whether deputy sheriffs serving upon a full-time basis or a part-time basis, and including deputy sheriffs appointed to serve in an emergency, but as to those so appointed, only during the continuation of the emergency. The sheriff shall furnish to the board of county commissioners a complete list of all deputy sheriffs named or appointed by him immediately after their appointment, and notify the board of commissioners of any changes made therein promptly after such changes are made. Any reference to an employee who has been injured shall, when the employee is dead, include also his legal representative, dependents, and other persons to whom compensation may be payable: Provided, that the third and fourth sentences herein shall not apply to Alleghany, Avery, Bladen, Carteret, Cherokee, Gates, Hyde, Macon, Pender, Perquimans, Watauga and Wilkes Counties: Provided, further, that any employee as herein defined of a municipality, county, or of the State of North Carolina while engaged in the discharge of his official duty outside the jurisdictional or territorial limits of the municipality, county, or the State of North Carolina and while acting pursuant to authorization or instruction from any superior officer, shall have the same rights under this

Article as if such duty or activity were performed within the territorial boundary limits of his employer.

Every executive officer elected or appointed and empowered in accordance with the charter and bylaws of a corporation, other than a charitable, religious, educational or other nonprofit corporation, shall be an employee of such corporation under this Article.

Any such executive officer of a charitable, religious, educational, or other nonprofit corporation may, notwithstanding any other provision of this Article, be brought within the coverage of its insurance contract by any such corporation by specifically including such executive officer in such contract of insurance and the election to bring such executive officer within the coverage shall continue for the period such contract of insurance is in effect, and during such period such executive officers thus brought within the coverage of the insurance contract shall be employees of such corporation under this Article.

A county agricultural extension service employee holding an appointment as a member of the staff of the United States Department of Agriculture shall not be an employee of the county under this Article.

(3) Employer.—The term "employer" means the State and all political subdivisions thereof, all public and quasi-public corporations therein, every person carrying on any employment and the legal representative of a deceased person or the receiver or trustee of any person. The board of commissioners of each county of the State, for the purposes of this law, shall be considered as "employer" of all deputy sheriffs serving within such county, or persons serving or performing the duties of a deputy sheriff, whether such persons are appointed by the sheriff or by the board of commissioners and whether serving on a fee basis or salary basis. Each county is authorized to insure its compensation liability for deputy sheriffs to the the same extent it is authorized to insure other compensation liability for employees thereof: Provided, that the last two sentences herein shall not apply to Alleghany, Avery, Bladen, Carteret, Cherokee, Gates, Hyde, Macon, Pender, Perquimans, Union, Watauga and Wilkes Counties.

(4) Person.—The term "person" means individual, partnership, association or corporation.

(5) Average Weekly Wages.—"Average weekly wages" shall mean the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury, including the subsistence allowance paid to veteran trainees by the United States government, provided the amount of said allowance shall be reported monthly by said trainee to his employer, divided by 52; but if the injured employee lost more than seven consecutive calendar days at one or more times during such period, although not in the same week, then the earnings for the remainder of such 52 weeks shall be divided by the number of weeks remaining after the time so lost has been deducted. Where the employment prior to the injury extended over a period of less than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed; provided, results fair and just to both parties will be thereby obtained. Where, by reason of a shortness of time during which the employee has been in the employment of his employer or the casual nature or terms of his employment, it is impractical to compute the

average weekly wages as above defined, regard shall be had to the average weekly amount which during the 52 weeks previous to the injury was being earned by a person of the same grade and character employed in the same class of employment in the same locality or community.

But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

Wherever allowances of any character made to an employee in lieu of wages are specified part of the wage contract they shall be deemed a part of his earnings.

Where a minor employee, under the age of 18 years, sustains a permanent disability or dies, the compensation payable for permanent disability or death shall be calculated, first, upon the average weekly wage paid to adult employees employed by the same employer at the time of the accident in a similar or like class of work which the injured minor employee would probably have been promoted to if not injured, or, second, upon such other method as may be used to compute the average weekly wage as will most nearly approximate the amount which the injured employee would be earning as an adult if it were not for the accident. Compensation for temporary total disability shall be computed upon the average weekly wage at the time of the accident, unless the total disability extends more than 52 weeks and then the compensation may be increased in proportion to his expected earnings.

In case of disabling injury or death to a volunteer fireman or member of an organized rescue squad or duly appointed and sworn member of an auxiliary police department organized pursuant to G.S. 160-20.3 under compensable circumstances, compensation payable shall be calculated upon the average weekly wage the volunteer fireman or member of an organized rescue squad or member of an auxiliary police department was earning in the employment wherein he principally earned his livelihood as of the date of injury.

(6) Injury.—"Injury and personal injury" shall mean only injury by accident arising out of and in the course of the employment, and shall not include a disease in any form, except where it results naturally and unavoidably from the accident.

(7) Carrier.—The term "carrier" or "insurer" means any person or fund authorized under G.S. 97-93 to insure under this Article, and includes self-insurers.

(8) Commission.—The term "Commission" means the North Carolina Industrial Commission, to be created under the provisions of this Article.

(9) Disability.—The term "disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.

(10) Death.—The term "death" as a basis for a right to compensation means only death resulting from an injury.

(11) Compensation.—The term "compensation" means the money allowance payable to an employee or to his dependents as provided for in this Article, and includes funeral benefits provided herein.

(12) Child, Grandchild, Brother, Sister.—The term "child" shall include a posthumous child, a child legally adopted prior to the injury of the employee, and a stepchild or acknowledged illegitimate child dependent upon the deceased, but does not include married children

unless wholly dependent upon him. "Grandchild" means a child as above defined of a child as above defined. "Brother" and "sister" include stepbrothers and stepsisters, half brothers and half sisters, and brothers and sisters by adoption, but does not include married brothers nor married sisters unless wholly dependent on the employee. "Child," "grandchild," "brother," and "sister" include only persons who at the time of the death of the deceased employee are under 18 years of age.

(13) Parent.—The term "parent" includes stepparents and parents by adoption, parents-in-law, and any person who for more than three years prior to the death of the deceased employee stood in the place of a parent to him, if dependent on the injured employee.

(14) Widow.—The term "widow" includes only the decedent's wife living with or dependent for support upon him at the time of his death; or living apart for justifiable cause or by reason of his desertion at such time.

(15) Widower.—The term "widower" includes only the decedent's husband who at the time of her death lived with her and was dependent for support upon her.

(16) Adoption.—The term "adoption" or "adopted" means legal adoption prior to the time of the injury.

(17) Singular.—The singular includes the plural and the masculine includes the feminine and neuter.

(18) Hernia.—In all claims for compensation for hernia or rupture, resulting from injury by accident arising out of and in the course of the employee's employment, it must be definitely proven to the satisfaction of the Industrial Commission:

a. That there was an injury resulting in hernia or rupture.
b. That the hernia or rupture appeared suddenly.
c. That it was accompanied by pain.
d. That the hernia or rupture immediately followed an accident.
e. That the hernia or rupture did not exist prior to the accident for which compensation is claimed.

All hernia or rupture, inguinal, femoral or otherwise, so proven to be the result of an injury by accident arising out of and in the course of employment, shall be treated in a surgical manner by a radical operation. If death results from such operation, the death shall be considered as a result of the injury, and compensation paid in accordance with the provisions of G.S. 97-38. In nonfatal cases, if it is shown by special examination, as provided in G.S. 97-27, that the injured employee has a disability resulting after the operation, compensation for such disability shall be paid in accordance with the provisions of this Article.

In case the injured employee refuses to undergo the radical operation for the cure of said hernia or rupture, no compensation will be allowed during the time such refusal continues. If, however, it is shown that the employee has some chronic disease, or is otherwise in such physical condition that the Commission considers it unsafe for the employee to undergo said operation, the employee shall be paid compensation in accordance with the provisions of this Article. (1929, c. 120, s. 2; 1933, c. 448; 1939, c. 277, s. 1; 1943, c. 543; c. 672, s. 1; 1945, c. 766; 1947, c. 698; 1949, c. 399; 1953, c. 619; 1955, c. 644; c. 1026, s. 1; c. 1055; 1957, c. 95; 1959, c. 289; 1961, cc. 231, 235; 1967, c. 1229, s. 1; 1969, c. 206, s. 2; c. 707; 1971, c. 284, s. 1; c. 1231, s. 1.)

I. In General.
II. Employment; Employee; Employer.
A. Employment.
B. Employee.
1. In General.
2. Casual Employees; Employment in the Course of Trade, etc.
3. Employees and Independent Contractors.
4. State and Municipal Employees.
5. Workers on Relief.
C. Employer.
III. Average Weekly Wages.
IV. Injury by Accident Arising Out of and in the Course of the Employment.
A. In General.
B. Accident.
C. Arising Out of and in the Course of Employment.
1. In General.
2. Origin and Cause of Accident.
a. Risks Incident to the Employment Generally.
b. Falls.
c. Heat Exhaustion, Sunstroke, Freezing, etc.
d. Street and Highway Accidents.
e. Assaults and Fights.
f. Horseplay.
3. Time, Place and Circumstances of Accident.
a. Injuries While Acting for Benefit of Self or Third Person.
b. Injuries While Going to and from Work.
(1) General Rule.
(2) Special Errand.
(3) On Employer's Premises.
(4) Where Employer Furnishes Transportation.
(5) Employee on Call at All Times.
c. Injuries before and after Work, on Employer's Premises.
d. Injuries during Lunch Hour.
e. Injuries While Traveling.
f. Deviation, Departure and Abandonment.
4. Evidence and Burden of Proof.
5. Miscellaneous Illustrative Cases.
D. Injury from Disease.
E. Aggravation of Existing Infirmity; Contributing to Injury.
V. Disability.
VI. Compensation.
VII. Child, Grandchild, etc.
VIII. Widow; Widower.
IX. Hernia.

Cross Reference.

As to jurisdiction of Commission dependent on showing of employment of five or more, see note to § 97-13.

I. IN GENERAL.

Editor's Note.—The first 1969 amendment rewrote the last paragraph of subdivision (5) to provide workmen's compensation benefits to members of an auxiliary police department.

The second 1969 amendment deleted "Union" from the list of counties in the first proviso at the end of the first paragraph of subdivision (2).

The first 1971 amendment inserted "or in which one or more employees are employed in activities which involve the use or presence of ionizing radiation" in subdivision (1).

The second 1971 amendment substituted "18" for "twenty-one" in the first sentence of the fourth paragraph of subdivision (5).

Session Laws 1971, c. 284, s. 4, provides: "This act shall be in full force and effect from and after July 1, 1971, and shall apply only to cases originating on and after July 1, 1971."

Section 160-20.3, referred to in subdivision (5) of this section, was repealed by Session Laws 1971, c. 698, s. 2. See now § 160A-282.

Opinions of Attorney General.—Mr. Everette L. Doffermyre, Dunn City Attorney, 40 N.C.A.G. 181 (1969).

Liberal Construction.—Courts favor a liberal construction of the Workmen's Compensation Act in favor of the claimant. Robbins v. Nicholson, 10 N.C. App. 421, 179 S.E.2d 183 (1971).

Burden of Proving Claim Compensable.—Claimant in a proceeding under the

Workmen's Compensation Act has the burden of proving that his claim is compensable under the act. Henry v. A.C. Lawrence Leather Co., 231 N.C. 477, 57 S.E.2d 760 (1950).

Applied in Miller v. Roberts, 212 N.C. 126, 193 S.E. 286 (1937); Edwards v. City of Raleigh, 240 N.C. 137, 81 S.E.2d 273 (1954); McNair v. Ward, 240 N.C. 330, 82 S.E.2d 85 (1954); Rice v. Thomasville Chair Co., 238 N.C. 121, 76 S.E.2d 311 (1953); Harris v. Asheville Contracting Co., 240 N.C. 715, 83 S.E.2d 802 (1954); Burns v. Riddle, 265 N.C. 705, 144 S.E.2d 847 (1965); Cobb v. Eastern Clearing & Grading, Inc., 1 N.C. App. 327, 161 S.E.2d 612 (1968); Crawford v. Pressley, 6 N.C. App. 641, 171 S.E.2d 197 (1969).

Quoted in Duncan v. Carpenter, 233 N.C. 422, 64 S.E.2d 410 (1951); Brinkley v. United Feldspar & Minerals Corp., 246 N.C. 17, 97 S.E.2d 419 (1957); Wesley v. Lea, 252 N.C. 540, 114 S.E.2d 350 (1960); Jackson v. Bobbitt, 253 N.C. 670, 117 S.E.2d 806 (1961); Burgess v. Gibbs, 262 N.C. 462, 137 S.E.2d 806 (1964).

Stated in Fields v. Hollowell, 238 N.C. 614, 78 S.E.2d 740 (1953); Evans v. Asheville Citizens Times Co., 246 N.C. 669, 100 S.E.2d 75 (1957); Byers v. North Carolina State Highway Comm'n, 3 N.C. App. 139, 164 S.E.2d 535 (1968).

Cited in Murphy v. American Enka Corp., 213 N.C. 218, 195 S.E. 536 (1938); Lineberry v. Mebane, 219 N.C. 257, 13 S.E.2d 429, 142 A.L.R. 1033 (1941); Young v. Whitehall Co., 229 N.C. 360, 49 S.E.2d 797 (1948); Worley v. Pipes, 229 N.C. 465, 50 S.E.2d 504 (1948); Sweatt v. Rutherford County Bd. of Educ., 237 N.C. 653, 75 S.E.2d 738 (1953); Watts v. Brewer, 243 N.C. 422, 90 S.E.2d 764 (1956); Smith v. Mecklenburg County Chapter American Red Cross, 245 N.C. 116, 95 S.E.2d 559 (1956); Shealy v. Associated Transport, Inc., 252 N.C. 738, 114 S.E.2d 702 (1960); Davis v. North Carolina Granite Corp., 259 N.C. 672, 131 S.E.2d 335 (1963); Wilmington Shipyard, Inc. v. North Carolina State Highway Comm'n, 6 N.C. App. 649, 171 S.E.2d 222 (1969).

II. EMPLOYMENT; EMPLOYEE; EMPLOYER.

A. Employment.

Having five or more employees is a jurisdictional prerequisite and must appear of record on appeal. Chadwick v. North Carolina Dep't of Conservation & Dev., 219 N.C. 766, 14 S.E.2d 842 (1941).

If a person does not "regularly employ" five or more employees, he is not subject to and bound by the Workmen's Compensation Act. Cousins v. Hood, 8 N.C. App. 309, 174 S.E.2d 297 (1970).

As to what constitutes "five or more employees," etc., see § 97-13(b).

Subdivision (1) of This Section Modified by § 97-19.—As a general proposition the only private employments covered by the Workmen's Compensation Act are those "in which five or more employees are regularly employed in the same business or establishment." But this general rule is subject to the exception created by § 97-19, which was manifestly enacted to protect the employees of financially irresponsible subcontractors who do not carry workmen's compensation insurance, and to prevent principal contractors, immediate contractors, and subcontractors from relieving themselves of liability under the act by doing through subcontractors what they would otherwise do through the agency of direct employees. Withers v. Black, 230 N.C. 428, 53 S.E.2d 668 (1949).

Secondary Liability of Contractor to Employees of Subcontractor.—Where a contractor sublets a part of the contract to a subcontractor without requiring from the subcontractor a certificate that he has procured compensation insurance or has satisfied the Industrial Commission of his financial responsibility as a self-insurer under § 97-93, such contractor is properly held secondarily liable for compensation to an employee of the subcontractor, even though the contractor regularly employs less than five employees. Withers v. Black, 230 N.C. 428, 53 S.E.2d 668 (1949).

Falling Below Minimum Requirement on Date of Injury.—If an employer has five or more "regularly employed" employees, the fact that he fell below the minimum requirement on the actual date of injury would not preclude coverage. Patterson v. L.M. Parker & Co., 2 N.C. App. 43, 162 S.E.2d 571 (1968).

The term "regularly employed" connotes employment of the same number of persons throughout the period with some constancy. Patterson v. L.M. Parker & Co., 2 N.C. App. 43, 162 S.E.2d 571 (1968); Cousins v. Hood, 8 N.C. App. 309, 174 S.E.2d 297 (1970).

Subdivision (1) of this section does not define "regularly employed." Cousins v. Hood, 8 N.C. App. 309, 174 S.E.2d 297 (1970).

Evidence Sufficient to Show Five or More Persons Regularly Employed.—Evidence tending to show that the employer regularly employed three persons in his general mercantile business and that for more than two months prior to the accident in suit he had employed two other persons at stated weekly wages to deliver fertilizers by truck in the operation of his mercantile business, supports the finding of the Industrial Commission that the employer had five or more persons regularly employed in his business and that he was therefore subject to the Workmen's Compensation Act. Hunter v. Peirson, 229 N.C. 356, 49 S.E.2d 653 (1948).

Where claimant's brother was a "regular employee" of defendant service station operator

where he was employed eight days prior to the accident in question to keep one of defendant's stations open at night beyond regular hours to see if this would increase business at the station and had worked for two hours every evening during the eight days, notwithstanding he was a full-time State employee; consequently, defendant employer who also employed four full-time employees at his two service stations "regularly employed" five persons and was subject to the Workmen's Compensation Act. Cousins v. Hood, 8 N.C. App. 309, 174 S.E.2d 297 (1970).

Right to Compensation Depends on Existence of Employer-Employee Relationship.—In Hollowell v. North Carolina Dep't of Conservation & Dev., 206 N.C. 206, 173 S.E. 603 (1934), the court states that "The liability of one to pay, and the right of another to receive, compensation . . . depends . . . upon some appointment or the existence of the relation of employer and employee . . . and is to be determined by the rules governing the establishment of contracts . . . ." It was held that no such relation existed between the defendant and the game warden who was injured as a result of testifying in a criminal prosecution.

Before the provisions of the Workmen's Compensation Act are called into play, the relation of master and servant, or employer and employee, or some appointment, must exist, and this is the initial fact to be established. Hicks v. Guilford County, 267 N.C. 364, 148 S.E.2d 240 (1966).

Acts Constituting Acceptance of Offer of Employment.—Under the circumstances, the act of an employee in reporting to the union office in this State, accepting a referral slip, and starting upon the trip to the job, constituted an acceptance of an offer of employment, so that the contract of employment was made and completed in this State. Warren v. Dixon & Christopher Co., 252 N.C. 534, 114 S.E.2d 250 (1960).

Authority of Driver to Employ Helper.—Where deceased was employed and paid by defendant's driver to assist him in delivering bottled drinks, but the defendant knew of, and consented to, the arrangement between deceased and the driver, evidence is sufficient to support a finding that deceased was an employee of defendant. Michaux v. Gate City Orange Crush Bottling Co., 205 N.C. 786, 172 S.E. 406 (1934).

No Employment before Appointment as Game Warden Accepted.—X requested the State Game Commission to appoint the plaintiff as a deputy game warden. After the papers had been mailed out but before they were accepted by plaintiff, he went with X to assist in breaking bear traps. He was injured while employed in this work. The court affirmed the Commission's holding that there was no employment until after the appointment had been accepted. Birchfield v. Department of Conservation and Dev., 204 N.C. 217, 167 S.E. 855 (1933).

State Compensation Laws Inapplicable to Employment of Purely Admiralty Cognizance. — In London Guarantee & Accident Co. v. Industrial Accident Comm'n, 279 U.S. 109, 49 S. Ct. 296, 73 L. Ed. 632 (1929), the rule was stated as follows: "To hold that a seaman engaged and injured in an employment purely of admiralty cognizance could be required to change the nature or conditions of his recovery under a state compensation law would certainly be prejudicial to the characteristic features of the general maritime law."

Injury to Employee Temporarily Engaged in Pumping Water from Barge.—Employee, hired for other types of work, was temporarily engaged in pumping water from a leaking and powerless barge which was being loaded with logs on the Roanoke River. "The logs started rolling, the barge careened toward the channel," and the employee, on jumping ashore, was crushed by the barge and killed. He and his employer had both accepted the State compensation act. It was held that the claim was properly cognizable by the Commission. The application of the State act to such a situation does not violate the federal Constitution by interference with the uniformity of the general maritime law. Johnson v. Foreman-Blades Lumber Co., 216 N.C. 123, 4 S.E.2d 334 (1939).

Sawmills and Logging Operations.—Plaintiff was injured while serving as a brakeman on a train that was used exclusively for the purpose of moving timber from defendant's land to its mill. The court treated the action as one for negligence and did not mention the Workmen's Compensation Act. Batemen v. Brooks, 204 N.C. 176, 167 S.E. 627 (1933).

B. Employee.

1. In General.

What Employees Excluded.—This Chapter excludes persons whose employment is casual and not in the course of the trade, business, profession or occupation of the employer, and specifically excepts from its provisions casual employees, farm laborers and domestic servants. Burnett v. Palmer-Lipe Paint Co., 216 N.C. 204, 4 S.E.2d 507 (1939).

Question whether employer-employee relationship exists is jurisdictional. Askew v. Leonard Tire Co., 264 N.C. 168, 141 S.E.2d 280 (1965).

And Is Mixed Question of Law and Fact. — The inquiry whether employer-employee relationship exists is a mixed question of fact and law. Askew v. Leonard Tire Co., 264 N.C. 168, 141 S.E.2d 280 (1965).

Its correct determination depends upon the answer to two questions: (1) What are the terms of the agreement—that is, what was the contract between the parties; and (2) what relationship between the parties was created by the contract—was it that of master and servant or that of employer and independent contractor? The first involves a question of fact and the second is a question of law. Askew v. Leonard Tire Co., 264 N.C. 168, 141 S.E.2d 280 (1965).

One who seeks to avail himself of the Workmen's Compensation Act must come within its terms and must be held to proof that he is in a class embraced in the act. Hayes v. Board of Trustees, 224 N.C. 11, 29 S.E.2d 137 (1944); Richards v. Nationwide Homes, 263 N.C. 295, 139 S.E.2d 645 (1965).

Claimant Must Be Employee of Employer from Whom Compensation Is Claimed.—An injured person is entitled to compensation under the Workmen's Compensation Act only if he is an employee of the party from whom compensation is claimed at the time of his injury. Hart v. Thomasville Motors, Inc., 244 N.C. 84, 92 S.E.2d 673 (1956); Richards v. Nationwide Homes, 263 N.C. 295, 139 S.E.2d 645 (1965).

To be entitled to maintain a proceeding for compensation for personal injury under the provisions of the Workmen's Compensation Act, the claimant must be, in fact and in law, an employee of the alleged employer. Askew v. Leonard Tire Co., 264 N.C. 168, 141 S.E.2d 280 (1965).

Employee under Compulsion of Legal Process.—One may be an employee, within the meaning of the Workmen's Compensation Act, though his employment is involuntary and under the compulsion of legal process. Hicks v. Guilford County, 267 N.C. 364, 148 S.E.2d 240 (1966).

Whether an injured person is an employee of the defendant is a matter of proof which may properly be determined in the Supreme Court. Charnock v. Reusing Light & Refrigerating Co., 202 N.C. 105, 161 S.E. 707 (1931) (where plaintiff brought a common-law action to recover for injuries received while riding as a guest).

Executives. — For cases involving executives, decided before the passage of c. 1055 of the 1955 amendment making executives employees, see Hodges v. Home Mtg. Co., 201 N.C. 701, 161 S.E. 220 (1931); Hunter v. Hunter Auto Co., 204 N.C. 723, 169 S.E. 648 (1933); Jones v. Planters' Nat'l Bank & Trust Co., 206 N.C. 214, 173 S.E. 595 (1934); Nissen v. City of Winston-Salem, 206 N.C. 888, 175 S.E. 310 (1934); Rowe v. Rowe-Coward Co., 208 N.C. 484, 181 S.E. 254 (1935); Gassaway v. Gassaway, 220 N.C. 694, 18 S.E.2d 120 (1942); Pearson v. Newt Pearson, Inc., 222 N.C. 69, 21 S.E.2d 879 (1942).

Where a corporate employer with less than five employees procures a policy of compensation insurance, such employer is presumed to have accepted the provisions of the Workmen's Compensation Act, and such policy covers its executive officers notwithstanding the premium on the policy is based on the compensation of a single nonexecutive employee and the parties intended to cover him only, unless notice of nonacceptance by the executive officers is duly filed with the Industrial Commission. Laughridge v. South Mountain Pulpwood Co., 266 N.C. 769, 147 S.E.2d 213 (1966).

Employee Does Not Include Person on Suspended Sentence Who Is Not a Prisoner.—See opinion of Attorney General to Honorable Gilbert H. Burnett, 41 N.C.A.G. 398 (1971).

2. Casual Employees; Employment in the Course of Trade, etc.

Cross Reference.—See note to § 97-13.

When Casual Employee Entitled to Compensation.—Section 97-13 of this Chapter, providing that the act shall not apply to casual employees, is not totally repugnant to this section, providing for compensation for an injury to an employee while "in the course of the trade, business," etc., and an employee is entitled to compensation even if the employment is casual, if he is injured in the course of the trade, business, etc. Johnson v. Asheville Hosiery Co., 199 N.C. 38, 153 S.E. 591 (1930).

The restriction of this act excluding injuries sustained in casual employment will not exclude an applicant under the provisions of the act when he sustains injuries in the course of the general trade, business, etc., of the employer and material or expedient therein, and the painting of the interior of a machine room to give the employees therein a better light or for the protection of the permanent structure, is not a casual employment and is one in the general course of business, and the Workmen's Compensation Act applies to an injury received by a workman engaged in such painting. Johnson v. Asheville Hosiery Co., 199 N.C. 38, 153 S.E. 591 (1930).

Employment Is Not Casual because Intermittent.—The Commission has said: "... we must conclude that the legislature did not contemplate an employment to be continuous in order to bring it within the act, as they certainly would not enact a statute with such requirements that common knowledge would show to be a nullity under such construction." Employment that is definite, whether for a day or for a year, is not casual. 8 N.C.L. Rev. 422.

Employment continuously for five or six weeks in construction of facilities for defendant's plant may not be held to be either casual or not in the course of defendant's business. Smith v. Southern Waste Paper Co., 226 N.C. 47, 36 S.E.2d 730 (1946).

Decedents Held Not Casual Employees. — The evidence tended to show that the defendant operated a general mercantile business, which included the selling and delivery of commercial fertilizers, and that plaintiffs' intestates had been working for a period of more than two months at stated weekly wages in delivering the fertilizers by truck, when they met with a fatal accident arising out of and in the course of their employment. It was held that decedents were not casual employees, and further, the injury arose within the scope of the employer's regular business, and therefore they were employees of defendant within the coverage of the Workmen's Compensation Act. Hunter v. Peirson, 229 N.C. 356, 49 S.E.2d 653 (1948).

3. Employees and Independent Contractors.

Cross Reference.—For further cases involving independent contractors, see note to § 97-19.

Common-Law Meaning of "Employee" and "Independent Contractor" Not Changed. —Except as to public officers the definition of "employee" contained in this section adds nothing to the common-law meaning of the term. Nor does it encroach upon or limit the common-law meaning of "independent contractor." These terms must be given their natural and ordinary meaning in their accepted legal sense. Hayes v. Board of Trustees, 224 N.C. 11, 29 S.E.2d 137 (1944).

The definition of "employee" in subdivision (2) of this section adds nothing to the common-law meaning of the term "employee." Hicks v. Guilford County, 267 N.C. 364, 148 S.E.2d 240 (1966).

The question whether one employed to perform specified work for another is to be regarded as an independent contractor, or as an employee within the operation of the Workmen's Compensation Act, is determined by the application of the ordinary common-law tests. Hicks v. Guilford County, 267 N.C. 364, 148 S.E.2d 240 (1966).

Whether a person is an independent contractor or an employee within the meaning of the Workmen's Compensation Act is to be determined in accordance with the common law. Scott v. Waccamaw Lumber Co., 232 N.C. 162, 59 S.E.2d 425 (1950).

Act Inapplicable to Independent Contractor.—An independent contractor is not a person included within the terms of the act, and the Industrial Commission has no jurisdiction to apply the act to a person who is not subject to its provisions. Richards v. Nationwide Homes, 263 N.C. 295, 139 S.E.2d 645 (1965).

Independent Contractor Defined. — Generally an independent contractor is one who exercises independent employment and contracts to do a piece of work according to his own judgment and method, without being subject to his employer except as to the results of his work. Smith v. Southern Waste Paper Co., 226 N.C. 47, 36 S.E.2d 730 (1946); McCraw v. Calvine Mills, Inc., 233 N.C. 524, 64 S.E.2d 658 (1951).

When one undertakes to do a specific job under contract and the manner of doing it, including employment, payment and control of persons working with or under him, is left entirely to him, he will be regarded as an independent contractor unless the person for whom the work is being done has retained the right to exercise control in respect to the manner in which the work is to be executed. McCraw v. Calvine Mills, Inc., 233 N.C. 524, 64 S.E.2d 658 (1951).

An independent contractor has been defined as one who exercises an independent employment, contracts to do a piece of work according to his own judgment and methods, and without being subject to his employer, except as to the result of the work, and who has the right to employ and direct the action of other workmen in the prosecution of the work without interference or right of control on the part of his employer. Askew v. Leonard Tire Co., 264 N.C. 168, 141 S.E.2d 280 (1965).

Elements of Relationship of Employer and Independent Contractor.—The elements which earmark the relationship of employer and independent contractor, are generally as follows: The person employed (a) is engaged in an independent business, calling, or occupation; (b) is to have the independent use of his skill, knowledge, or training in the execution of the work; (c) is doing a specific piece of work at a fixed price, or for a lump sum or upon a quantitative basis; (d) is not subject to discharge because he adopts one method of doing the work rather than another; (e) is not in the regular employ of the other contracting party; (f) is free to use such assistants as he thinks proper; (g) has full control over such assistants; and (h) selects his own time. The presence of no one of these indicia is controlling, nor is the presence of all required. Hayes v. Board of Trustees, 224 N.C. 11, 29 S.E.2d 137 (1944); Morse v. Curtis, 276 N.C. 371, 172 S.E.2d 495 (1970).

There are many elements to be considered in determining whether a person in the execution of work for another is an employee or independent contractor, and no particular element is controlling. Askew v. Leonard Tire Co., 264 N.C. 168, 141 S.E.2d 280 (1965).

Test of Employee Is Right of Control.—The test is whether the party for whom the work is being done has the right to control the worker with respect to the manner or method of doing the work, as distinguished from the right

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merely to require certain definite results conforming to the contract. If the employer has right of control, it is immaterial whether he actually exercises it. McCraw v. Calvine Mills, Inc., 233 N.C. 524, 64 S.E.2d 658 (1951); Hicks v. Guilford County, 267 N.C. 364, 148 S.E.2d 240 (1966); Scott v. Waccamaw Lumber Co., 232 N.C. 162, 59 S.E.2d 425 (1950); Morse v. Curtis, 276 N.C. 371, 172 S.E.2d 495 (1970). See Hinkle v. City of Lexington, 239 N.C. 105, 79 S.E.2d 220 (1953).

The right of an employer to supervise and control the activities of one working under him determines to a great extent whether that one is an employee. Hunter v. Hunter Auto Co., 204 N.C. 723, 169 S.E. 648 (1933) (where claimant, a secretary in defendant company, was under the supervision of the manager).

In Bryson v. Gloucester Lumber Co., 204 N.C. 664, 169 S.E. 276 (1933), the test was expressed as follows: "Generally speaking, an independent contractor is one who undertakes to produce a given result, but so that in the actual execution of the work he is not under the orders or control of the person for whom he does it, and may use his own discretion in matters and things not specified." "One who represents another only as to the results of a piece of work, and not as to the means of accomplishing it, is an independent contractor and not a servant or employee." See Richards v. Nationwide Homes, 263 N.C. 295, 139 S.E.2d 645 (1965).

In the absence of pertinent statutory definitions, whether a person is an independent contractor, or a subcontractor who is an independent contractor, or an employee within the meaning of the Workmen's Compensation Act is to be determined by the application of the ordinary common-law tests. Richards v. Nationwide Homes, 263 N.C. 295, 139 S.E.2d 645 (1965).

Source of Payment Not Conclusive. —Plaintiff was a private in the national guard. He was paid 50¢ per drill by the State and $1.00 per week by the federal government. Although his services were voluntary, he was required to sign an enlistment contract which subjected him to the direction and control of the State. It was held that claimant was an employee. Baker v. State, 200 N.C. 232, 156 S.E. 917 (1931).

The second sentence of subdivision (2) was added in 1943.—Ed. note.

Employee of Independent Contractor Cannot Recover against Principal.—Compensation is recoverable only against the employer of the injured workman, and therefore if the workman is an employee of an independent contractor, the employer of the independent contractor cannot be held liable for compensation. Scott v. Waccamaw Lumber Co., 232 N.C. 162, 59 S.E.2d 425 (1950).

The distinction between an independent contractor and an employee entitled to benefits under the Workmen's Compensation Act has frequently been considered by the Supreme Court and applied to the particular circumstances of individual cases. See Cooper v. Colonial Ice Co., 230 N.C. 43, 51 S.E.2d 889 (1949), citing Johnson v. Asheville Hosiery Co., 199 N.C. 38, 153 S.E. 591 (1930); Creswell v. Charlotte News Publishing Co., 204 N.C. 380, 168 S.E. 408 (1933); Beach v. McLean, 219 N.C. 521, 14 S.E.2d 515 (1941); Hayes v. Board of Trustees, 224 N.C. 11, 29 S.E.2d 137 (1944); Smith v. Southern Waste Paper Co., 226 N.C. 47, 36 S.E.2d 730 (1946); Creighton v. Snipes, 227 N.C. 90, 40 S.E.2d 612 (1946); Bell v. Williamston Lumber Co., 227 N.C. 173, 41 S.E.2d 281 (1947); Perley v. Ballenger Paving Co., 228 N.C. 479, 46 S.E.2d 298 (1948).

Question of Law. — On undisputed facts the question whether one is independent contractor or employee is one of law reviewable by the court. Beach v. McLean, 219 N.C. 521, 14 S.E.2d 515 (1941).

Whether the facts found by the Commission are supported by competent evidence and whether the facts found by the Commission support the legal conclusion that the injured party was an employee are reviewable by the court as questions of law. Pearson v. Peerless Flooring Co., 247 N.C. 434, 101 S.E.2d 301 (1958).

Claimant Held Employee of Independent Contractor. — In McCraw v. Calvine Mills, Inc., 233 N.C. 524, 64 S.E.2d 658 (1951), the control exercised and exercisable over employees of G, who was a painting contractor engaged to paint defendant's mill, determined that defendant was not the employer of claimant, but that claimant was an employer of G, who was an independent contractor.

McLean was hired by Long Shoals Cotton Mills to move machinery from one mill to another under a contract whereby he furnished his own trucks and labor. He engaged plaintiff for temporary service and plaintiff was injured in the work of dismantling a machine for movement. A representative of the cotton mills was present part of the time but it reserved no right to, nor did it, direct the manner of doing the work. McLean was not regularly employed by the mills but was engaged in machine moving and salvaging as a business and he was here paid on a piece basis. It was held that McLean was an independent contractor and plaintiff was his employee, not an employee of the cotton mills. McLean's insolvency is irrelevant where there is no conflict in the evidence as to his independence. Beach v. McLean, 219 N.C. 521, 14 S.E.2d 515 (1941).

Agreement Changing Status of Independent Contractor to Foreman. — Defendant partners, general contractors, had sublet electrical work to one Elkins who had less than five employees, one of whom was plaintiff

claimant. Elkins, having figured too low, persuaded defendants to let him go ahead under a new agreement whereby defendants were to pay for the materials and labor. There was evidence that one of the defendants was on the job "practically all the time" and that he gave instructions as to changing the location of some fixtures but not otherwise. It was held, three judges dissenting, that there was sufficient evidence to sustain the finding that Elkins became a mere foreman on this job and that plaintiff was defendants' employee. Graham v. Wall, 220 N.C. 84, 16 S.E.2d 691 (1941).

Director of Sawmill Operations Held Supervisory Employee. — Evidence tending to show that defendant lumber company operated a sawmill as a part of its general business, that it owned the sawmill, controlled the premises where the work was performed, determined the amount of work to be done thereat, gave directions on occasion as to dimensions of the lumber to be sawed, and that the person directing the sawmill operations worked exclusively for the lumber company, which had the power to discharge him at any time with or without cause, was held sufficient to support a finding that the director of the sawmill operations was a supervisory employee and not an independent contractor. Scott v. Waccamaw Lumber Co., 232 N.C. 162, 59 S.E.2d 425 (1950).

Electrician Rebuilding Line in "Off" Hours Held Independent Contractor. — Where defendant contracted with plaintiff and two other electricians to rebuild in their "off" hours a part of its electric line for a lump sum of $30.00, the defendant having the holes dug and furnishing the poles, a truck, other tools, and two helpers, requiring that certain trees be not trimmed but disclaiming any knowledge of the work and leaving it up to the electricians, and plaintiff was killed by a live wire while so engaged, and thereafter the remaining electricians secured other help and completed the job, the relationship thus created is that of independent contractor. Hayes v. Board of Trustees, 224 N.C. 11, 29 S.E.2d 137 (1944).

Machinist Constructing Conveyor under Contract as Employee. — Where evidence tended to show that deceased, a machinist, contracted to construct a conveyor from materials furnished by defendant and in accordance with his rough sketch, hourly wage being basis of pay, and parties appeared to have treated contract as one of employment, such evidence was sufficient to sustain finding of Commission that deceased was employee and not independent contractor. Smith v. Southern Waste Paper Co., 226 N.C. 47, 36 S.E.2d 730 (1946).

Mechanic Supervising Installation under Contract as Employee. — Where findings included fact that the seller of materials for construction of dry kilns recommended upon purchaser's request an expert mechanic to supervise their installation under contractual agreement that such mechanic should be considered an employee of the purchaser and mechanic was merely supervising installation of the kilns because purchaser had no foreman with sufficient experience and skill to supervise the installation in accordance with the plans and specifications furnished by the seller, such findings supported legal conclusion that the mechanic was an employee of the purchaser rather than an independent contractor. Pearson v. Peerless Flooring Co., 247 N.C. 434, 101 S.E.2d 301 (1958).

Plaintiff in painting defendant's mill was not an independent contractor where it appeared that defendant directed plaintiff's work, hired his helpers and purchased his supplies. Johnson v. Asheville Hosiery Co., 199 N.C. 38, 153 S.E. 591 (1930).

Hauler Held Independent Contractor. — The evidence tended to show that deceased was a licensed contract hauler, and was engaged to haul sand, gravel and concrete from defendant's bins to defendant's concrete mixer along a route selected by defendant, but that defendant had no control over the number of hours deceased worked or whether deceased drove his own truck or employed a driver, and that deceased paid for his own gas and oil and made his own repairs to his truck. Deceased was paid a stipulated sum per load and was also paid the hourly wage of truck driver employed by defendant for time lost waiting in line when the concrete mixer broke down. Deceased was killed when struck by a train at a grade crossing while hauling for defendant on the route selected. It was held that, upon the evidence, deceased was an independent contractor and not an employee within the meaning of this section, and the judgment of the superior court affirming the award of compensation by the Industrial Commission, was reversed. Perley v. Ballenger Paving Co., 228 N.C. 479, 46 S.E.2d 298 (1948).

Hauling Lumber at Specified Rate per Thousand. — In Bryson v. Gloucester Lumber Co., 204 N.C. 664, 169 S.E. 276 (1933), the court held deceased to be an independent contractor where it appeared that he hauled logs for defendant at a specified rate per thousand, employed his own helpers, and worked in his own way without any direction from defendant.

Salesman as Employee. — Deceased, at the time of his fatal injury, was engaged in selling the products of defendant. Letters to him from defendant's home office were introduced in evidence which contained instructions for the collection of an account which, as an exception, had been charged directly to the purchaser by defendant, and also a letter stating that defendant would fill his orders C.O.D. without

deducting commissions, and at the end of the week would then figure his commissions and send him a check therefor plus any difference "to make up the $25.00 salary," and also stating that a certain sum was due for social security and asking for his social security number. It was held that the evidence, with other evidence in the case, was sufficient to support the finding of the Industrial Commission that the deceased was an employee of the defendant, and not a jobber or independent contractor. Cloninger v. Ambrosia Cake Bakery Co., 218 N.C. 26, 9 S.E.2d 615 (1940).

Operator of Service Station Held Employee of Oil Company. — Deceased operated a service station for defendant on a commission basis, being required to keep the place open at certain hours, being told to whom to give credit, and being under the control of the president of the defendant company. The Commission's conclusion that deceased was an employee was sustained. Russell v. Western Oil Co., 206 N.C. 341, 174 S.E. 101 (1934).

A newsboy engaged in selling papers is held not to be an employee of the newspaper within the meaning of that term as used in this section, the newsboy not being on the newspaper's payroll and being without authority to solicit subscriptions and being free to select his own methods of effecting sales, although some degree of supervision was exercised by the newspaper. Creswell v. Charlotte News Publishing Co., 204 N.C. 380, 168 S.E. 408 (1933).

Deliveryman for Ice Company Held Employee. — Deceased employee was a deliveryman for defendant ice company. Defendant furnished a horse and wagon and all necessary equipment. Each morning in season, deceased obtained a load of ice for which he was charged. It was sold at defendant's regular retail price, and deceased was credited with the amount unsold at the end of the day. These facts were held sufficient to establish an employer-employee relation upon which the award of compensation was based. Cooper v. Colonial Ice Co., 230 N.C. 43, 51 S.E.2d 889 (1949), distinguishing Creswell v. Charlotte News Publishing Co., 204 N.C. 380, 168 S.E. 408 (1933).

Painter Held Employee. — Where plaintiff was a painter of long experience, who had consistently worked for others for fixed hourly wages, and did not hold himself out as a painting contractor, and during his long experience had only once done a painting job for a lump sum, and it was inferred that he was employed by defendant employer because of the quality of his individual work, that he was not to employ or delegate the work to others, and that he was to be paid an hourly wage for such time as he worked, it was held that he was an employee rather than an independent contractor. Askew v. Leonard Tire Co., 264 N.C. 168, 141 S.E.2d 280 (1965).

Findings of Commission Held Insufficient. — Where men working on lumbering jobs were injured it was contended that they were not in the employ of defendant but of independent subcontractors with whom the defendant had written agreements. The Commission found that the purported subcontractors were on the defendant's payroll (one as a superintendent) and that the injured men ate at a camp bearing defendant's name and received their pay by check direct from defendant; accordingly that the men were employees of, and entitled to compensation from, defendants. The Supreme Court remanded the cause for more specific findings of fact as to the making and performance of the alleged contract with "subcontractors" and as to the relationship of the parties, and for a separate finding of law as to who was the employer of claimants. Farmer v. Bemis Lumber Co., 217 N.C. 158, 7 S.E.2d 376 (1940); Cook v. Bemis Lumber Co., 217 N.C. 161, 7 S.E.2d 378 (1940).

4. State and Municipal Employees.

Cross Reference. — As to prisoners, see § 97-13(c).

An employee of the State engaged in the cultivation of food crops on lands of the State used by the State Hospital is an employee of the State within the coverage of this section and § 97-13, and his death from an accident arising out of and in the course of his employment is compensable. Barbour v. State Hospital, 213 N.C. 515, 196 S.E. 812 (1938).

A municipal corporation is subject to the Workmen's Compensation Act, even though it employs less than five employees, under this section, the legislative intent to classify municipal corporations with the State and its political subdivisions being consonant with reason and being indicated by § 97-13, which does not include municipal corporations employing less than five employees in listing employers exempt from the act, and § 97-7, which provides that neither the State nor any municipal corporation nor any subdivision of the State, nor employees of the same, shall have the right to reject the provisions of the act, and it being required that these sections be construed in pari materia to determine the legislative intent. Rape v. Town of Huntersville, 214 N.C. 505, 199 S.E. 736 (1938).

For a related topic, see § 97-13(b).

A worker employed by a city under a contract stipulating the wages to be received by the worker is an employee of the city within the meaning of this section, and the fact that the city obtains the money to pay the wages from the Reconstruction Finance

Corporation is immaterial on the question of the relationship between the worker and the city. Mayze v. Town of Forest City, 207 N.C. 168, 176 S.E. 270 (1934).

A juror, regularly summoned and serving, is not an employee of the county within the meaning of the North Carolina Workmen's Compensation Act. Hicks v. Guilford County, 267 N.C. 364, 148 S.E.2d 240 (1966).

And Act Is Inapplicable to His Injury. — Since in this jurisdiction a juror is not an employee of the county, the Workmen's Compensation Act does not apply to an injury sustained by a juror in the course of his or her service as such. Hicks v. Guilford County, 267 N.C. 364, 148 S.E.2d 240 (1966).

Injury to Deputized Policeman Aiding in Arrest. — Evidence that claimant was injured while attempting to aid a policeman in serving a warrant for a breach of the peace, and that claimant had been duly deputized by the policeman to aid in making the arrest, was sufficient to support the finding of the Industrial Commission that at the time of injury claimant was an employee of defendant town under a valid appointment. Tomlinson v. Town of Norwood, 208 N.C. 716, 182 S.E. 659 (1935).

Injury to Policeman Pursuing Offender beyond Jurisdiction. — Note the effect of the 1949 amendment to subdivision (2) of this section. [The 1949 amendment added the last proviso in the first paragraph of subdivision (2).] For cases decided under this section as it stood prior to the amendment, see Wilson v. Town of Mooresville, 222 N.C. 283, 22 S.E.2d 907 (1942); Taylor v. Town of Wake Forest, 228 N.C. 346, 45 S.E.2d 38 (1947).

See § 160A-293, which protects the rights under the Workmen's Compensation Act of firemen acting outside city limits.

Deputy Sheriff as Employee. — The 1939 amendment including deputy sheriffs within the meaning of the term "employee" as used in this section, is not violative of N.C. Const., Art. I, § 32 or Art. II, § 24. Towe v. Yancey County, 224 N.C. 579, 31 S.E.2d 754 (1944).

For cases dealing with deputies and decided under this section as it stood prior to the amendment, see Saunders v. Allen, 208 N.C. 189, 179 S.E. 754 (1935); Borders v. Cline, 212 N.C. 472, 193 S.E. 826 (1937); Gowens v. Alamance County, 216 N.C. 107, 3 S.E.2d 339 (1939); Clark v. Sheffield, 216 N.C. 375, 5 S.E.2d 133 (1939).

For a discussion of the situation as to deputy sheriffs before the amendment, see 16 N.C.L. Rev. 419.

1939 Amendment Deeming Deputy Sheriff an Employee Not Retroactive. — The provision of c. 277, Laws of 1939, that deputy sheriffs shall be deemed employees of the county for the purpose of determining the rights of the parties under the Workmen's Compensation Act, does not apply to accidents occurring prior to the enactment of the amendment. Clark v. Sheffield, 216 N.C. 375, 5 S.E.2d 133 (1939).

A prisoner is not an employee as defined by this section. Lawson v. North Carolina State Highway & Pub. Works Comm'n, 248 N.C. 276, 103 S.E.2d 366 (1958). See § 97-13(c).

A county board of education is the sole employer of one under contract to teach vocational agriculture in a county school, where such teacher's salary is paid in part from funds furnished as a gift to such board by the State and federal governments, and, as such sole employer, is liable, with its insurance carrier, under this Chapter for the death of such teacher from an injury by accident arising out of and in the course of his employment. Callihan v. Board of Educ., 222 N.C. 381, 23 S.E.2d 297 (1942).

A person employed by a graded school district as teacher and director of athletics is an employee of a political subdivision of the State, and is entitled to the benefits of the compensation act under this section. Perdue v. State Board of Equalization, 205 N.C. 730, 172 S.E. 396 (1934).

5. Workers on Relief.

Person Recovering Federal Relief Not an Employee. — A person furnished work for the relief of himself and family paid with funds provided by the Federal Relief Administration is not an "employee" of the relief administrative agencies within the meaning of this section. Jackson v. North Carolina Emergency Relief Administration, 206 N.C. 274, 173 S.E. 580 (1934). See Barnhardt v. City of Concord, 213 N.C. 364, 196 S.E. 310 (1938).

A different result was reached when the injured party was employed by the superintendent of the water and light department of defendant town and paid from funds loaned defendant by the Reconstruction Finance Corporation. Mayze v. Town of Forest City, 207 N.C. 168, 176 S.E. 270 (1934).

C. Employer.

Deputy Sheriff Employed and Paid by Civic Association. — Deceased deputy sheriff was employed and paid as a local police officer by a civic association whose corporate charter expressly included the power to hire deputies for that service. Compensation insurance was carried by the association and in terms covered both it and the sheriff, who would not be liable under the act. It was proper for the Commission to find that the association was the employer. Clark v. Sheffield, 216 N.C. 375, 5 S.E.2d 133 (1939). The case arose before the 1939 amendment made counties employers of deputy sheriffs.

Deceased Held Employee of Partnership

and Not of Partner. — Evidence was sufficient to support a finding of the Commission that deceased, the driver of a tractor-tank, was an employee of defendant oil company, a partnership, and not of a separate transportation business operated by one of the partners. Moses v. Bartholomew, 238 N.C. 714, 78 S.E.2d 923 (1953).

Lessee of Truck Held Liable for Compensation for Death of Driver.—Deceased was employed by X to drive a truck owned by X, but leased to other haulers and under their control. While in the course of hauling goods for one of the lessees, deceased met his death. The lease contract had provided that X provide compensation insurance. The court, in holding the lessee liable, found that such a contract could not be binding upon the employee as he was not a party to it. Whether the lessee could recover from X the amount the lessee was required to pay was not answered by the court. Roth v. McCord, 232 N.C. 678, 62 S.E.2d 64 (1950).

Assistant Driver Employed by Owner-Lessor of Truck under Trip-Lease Agreement. — Where the owner of a truck drives same on a trip in interstate commerce for an interstate carrier under a trip-lease agreement providing that the carrier's I.C.C. license plates should be used and the carrier retain control and direction over the truck, an assistant driver employed by the owner-lessor is an employee of the carrier within the coverage of the North Carolina Workmen's Compensation Act. Further, if the owner-lessor be considered an independent contractor, but had less than five employees and no compensation insurance coverage, the carrier would still be liable under § 97-19. McGill v. Bison Fast Freight, Inc., 245 N.C. 469, 96 S.E.2d 438 (1957).

III. AVERAGE WEEKLY WAGES.

Editor's Note. — For note on average weekly wage and combination of wages, see 44 N.C.L. Rev. 1177 (1966).

Purpose. — The purpose of the Workmen's Compensation Act is to base compensation upon the normal income which the employee derived from his employment. Lovette v. Reliable Mfg. Co., 262 N.C. 288, 136 S.E.2d 685 (1964).

It seems reasonable that the legislature, having placed the economic loss caused by a workman's injury upon the employer for whom he was working at the time of the injury, would also relate the amount of that loss to the average weekly wages which that employer was paying the employee. Wallace v. Music Shop, II, Inc., 11 N.C. App. 328, 181 S.E.2d 237 (1971).

The dominant intent of subdivision (5) is that results fair and just to both employer and employee be obtained. Joyner v. A.J. Carey Oil Co., 266 N.C. 519, 146 S.E.2d 447 (1966).

Modification of Definition Is for Legislature. — Any modification of subdivision (5) must be made by the legislature. Barnhardt v. Yellow Cab Co., 266 N.C. 419, 146 S.E.2d 479 (1966).

The legislature thought that statutory authority in addition to that contained in the fourth method of subdivision (5) was necessary for the Commission to vary the rule of the first method. Barnhardt v. Yellow Cab Co., 266 N.C. 419, 146 S.E.2d 479 (1966).

Earnings Control "Average Weekly Wages". — Under subdivision (5), "average weekly wages" of the employee "in the employment in which he was working at the time of the injury" are based on his earnings rather than his earning capacity. Liles v. Faulkner Neon & Elec. Co., 244 N.C. 653, 94 S.E.2d 790 (1956).

Compensation Is Based on "Average Weekly Wages". — Under the Workmen's Compensation Act, compensation for the injury or death of an employee is based on his average weekly wages. Lovette v. Reliable Mfg. Co., 262 N.C. 288, 136 S.E.2d 685 (1964).

Without Regard for Artificial Maximums on Income Based on Social Security. — To compute the plaintiff's average weekly wage from a consideration of the fact that he had an artificial maximum of $1680 placed on his earnings because he was retired and drawing social security benefits, would not only produce results unfair to the employee but would ignore the well-established principle that an injured employee's average weekly wage must be computed from his actual earnings in the employment in which he is injured rather than his earning capacity. Wallace v. Music Shop, II, Inc., 11 N.C. App. 328, 181 S.E.2d 237 (1971).

Subdivision (5) provides five possible methods of determining average weekly wages. Barnhardt v. Yellow Cab Co., 266 N.C. 419, 146 S.E.2d 479 (1966).

Limitation on Use of Fourth Method of Computing Average Weekly Wage. — The fourth prescribed method of computing the employee's average weekly wage may not be used unless there has been a finding that use of the second method would produce results unfair and unjust to either the employee or employer. Wallace v. Music Shop, II, Inc., 11 N.C. App. 328, 181 S.E.2d 237 (1971).

When Special Method of Computation Employed. — When, in determining the amount to be awarded the dependents of a deceased employee, the methods of computing the "average weekly wage" enumerated in the first paragraph of subdivision (5) of this section would be unfair because of exceptional circumstances, the Industrial Commission is authorized by the second paragraph of said subdivision to use such other method of computation as would most nearly approximate the amount which the employee would be

earning if living, and the provisions of the second paragraph of the subdivision apply to all three of the methods of computation enumerated in the first paragraph, and such other method of computation may be invoked for exceptional reasons even though the employee had been constantly employed by the employer for 52 weeks prior to the time of the injury causing death. Early v. Basnight & Co., 214 N.C. 103, 198 S.E. 577 (1938). See Liles v. Faulkner Neon & Elec. Co., 244 N.C. 653, 94 S.E.2d 790 (1956).

The words "the foregoing" in the second paragraph of subdivision (5) clearly refer to the preceding paragraph. Clark v. Burton Lines, Inc., 272 N.C. 433, 158 S.E.2d 569 (1968).

Award Based on Total Compensation Customarily Earned. — Claimant was employed as janitor, his compensation for such work being paid in part by the State School Commission, and was also employed in school maintenance work, his compensation for the maintenance work being paid exclusively by the municipal board of education. He was injured while engaged in duties pertaining exclusively to school maintenance work. It was held that an award computed on the basis of the total compensation customarily earned by claimant, rather than the compensation earned solely in school maintenance work, upon the Commission's finding of exceptional conditions, was proper. Casey v. Board of Educ., 219 N.C. 739, 14 S.E.2d 853 (1941).

Effect of Pay Increases within 52 Weeks. — Plaintiff was employed practically continuously for 33 weeks prior to the injury resulting in death, but during that period his wages were twice increased. In the absence of a finding supported by evidence that the average weekly wage for the entire period of employment would be unfair, compensation should have been based thereon, and the computation of the average weekly wage on the basis of the wage during the period after the last increase in pay was not supported by the evidence. Mion v. Atlantic Marble & Tile Co., 217 N.C. 743, 9 S.E.2d 501 (1940).

Reduction in Wages after Sale of Plant. — The plant in which claimant worked was sold. Before sale, claimant was a foreman. After sale, he continued to work in a lower classification and at a lower pay rate. The Supreme Court affirmed the action of the Commission in considering the wage earned as foreman in determining average weekly wage when disablement occurred before claimant had worked 52 weeks at the lower rate. Honeycutt v. Carolina Asbestos Co., 235 N.C. 471, 70 S.E.2d 426 (1952).

"Exceptional Reasons" Justifying Special Method of Computation. — The Industrial Commission found upon supporting evidence that the deceased employee had been employed by defendant employer for a number of years, that he had been promoted successively from truck driver to stock clerk to salesman with increased wages from time to time, and that he had been given a raise in the last position less than three months prior to the time of injury resulting in death, part of the supporting evidence being testimony by the employee's superior that "with the business he was getting" he would have had further increases. It was held that the findings were sufficient in law to constitute "exceptional reasons" within the meaning of subdivision (5) of this section, and the employee's "average weekly wage" was properly fixed at the amount he was earning weekly at the time of the injury, it being patent that the wages he was then receiving were not temporary and uncertain, but constituted a fair basis upon which to compute the award to his dependents. Early v. Basnight & Co., 214 N.C. 103, 198 S.E. 577 (1938).

Unusually severe or totally disabling injuries are not the exceptional reasons contemplated by the fourth method of subdivision (5). Barnhardt v. Yellow Cab Co., 266 N.C. 419, 146 S.E.2d 479 (1966).

Where Employment Extended over Period of Less than 52 Weeks. — The average weekly wages of a college student working part time for a period of 11 weeks in which he worked from 17½ hours to 51 hours a week should be computed by the method provided in the second sentence of subdivision (5) of this section, where the evidence did not warrant a finding of fact or conclusion of law that such method would not obtain results fair and just to both parties. Liles v. Faulkner Neon & Elec. Co., 244 N.C. 653, 94 S.E.2d 790 (1956).

Where the employer does not contend that plaintiff's employment was casual and offers no evidence as to the amount of wages earned by others engaged in similar employment in that community during the 52 weeks previous to plaintiff's injury, the employer may not object that the Commission, in view of the fact that the employee had worked for the employer less than 40 hours at the time of his injury, fixed the employee's average weekly wage in accordance with the compensation under the contract of employment at the time of the injury, there being evidence that the employee had theretofore earned wages in excess of this sum for appreciable periods in other employments of like nature. Harris v. Asheville Contracting Co., 240 N.C. 715, 83 S.E.2d 802 (1954).

"Results Fair and Just" to Both Parties. — Results fair and just, within the meaning of the proviso to the second sentence of subdivision (5), consist of such "average weekly wages" as will most nearly approximate the amount which the injured employee would be earning were it not for the injury, in the employment in which he was working at the time of his injury. Liles v. Faulkner Neon &

Elec. Co., 244 N.C. 653, 94 S.E.2d 790 (1956); Joyner v. A.J. Carey Oil Co., 266 N.C. 519, 146 S.E.2d 447 (1966); Wallace v. Music Shop, II, Inc., 11 N.C. App. 328, 181 S.E.2d 237 (1971).

It is true that all provisions of subdivision (5) must be considered in order to ascertain the legislative intent; and the dominant intent is that results fair and just to both parties be obtained. Ordinarily, whether such results will be obtained by the second method is a question of fact, and in such case a finding of fact by the Commission controls decision. However, this does not apply if the finding of fact is not supported by competent evidence or is predicated on an erroneous construction of the statute. Liles v. Faulkner Neon & Elec. Co., 244 N.C. 653, 94 S.E.2d 790 (1956).

Part-Time Employee. — It was improper for the Commission, in undertaking to apply the method of computing average weekly wages provided in the third sentence of subdivision (5), to determine the average weekly wages of a part-time employee to be the amount he would have earned had he been a full-time employee. Liles v. Faulkner Neon & Elec. Co., 244 N.C. 653, 94 S.E.2d 790 (1956).

A part-time job cannot be converted into a full-time job for the purpose of compensation. Joyner v. A.J. Carey Oil Co., 266 N.C. 519, 146 S.E.2d 447 (1966).

Intermittent Job. — An intermittent part-time job cannot be treated as a continuous one for the purpose of compensation. Joyner v. A.J. Carey Oil Co., 266 N.C. 519, 146 S.E.2d 447 (1966).

Consideration of Amounts Earned by Other Persons in Same Employment. — In a proceeding for compensation for the death of a college student employed part time during vacation and after school for a period of 11 weeks in which he worked from 17½ to 51 hours a week, there was no factual basis for the application of the method of determining average weekly wages provided in the third sentence of subdivision (5), where there was no evidence as to average weekly amount being earned during the 52 weeks previous to decedent's injury by a person of the same grade and character employed in the same class of employment, and no evidence as to the average weekly amount a part-time worker in the same employment had earned during the 52 weeks previous to decedent's injury, while working for the particular employer or any other employer in the same locality or community. Liles v. Faulkner Neon & Elec. Co., 244 N.C. 653, 94 S.E.2d 790 (1956).

Compensation Provided in Contract of Employment. — Where the employer does not contend that plaintiff's employment was casual and offers no evidence as to the amount of wages earned by others engaged in similar employment in that community during the 52 weeks previous to plaintiff's injury, the employer may not object that the Commission, in view of the fact that the employee had worked for the employer less than 40 hours at the time of his injury, fixed the employee's average weekly wage in accordance with the compensation under the contract of employment at the time of the injury, there being evidence that the employee had theretofore earned wages in excess of this sum for appreciable periods in other employments of like nature. Harris v. Asheville Contracting Co., 240 N.C. 715, 83 S.E.2d 802 (1954).

Fourth Method Sets Standard to Which Fair Results Must Relate. — Fourth method of subdivision (5), while it prescribes no precise method for computing "average weekly wages," sets up a standard to which results fair and just to both parties must be related. Barnhardt v. Yellow Cab Co., 266 N.C. 419, 146 S.E.2d 479 (1966).

Although Employee Holds Separate Jobs. — When an employee who holds two separate jobs is injured in one of them, his compensation is based only upon his average weekly wages earned in the employment producing the injury. Joyner v. A.J. Carey Oil Co., 266 N.C. 519, 146 S.E.2d 447 (1966).

Combining Wages from Other Employment Is Not Permitted. — In determining plaintiff's average weekly wage the Commission has no authority to combine his earnings from the employment in which he was injured with those from any other employment. Barnhardt v. Yellow Cab. Co., 266 N.C. 419, 146 S.E.2d 479 (1966).

Unless Employments Are Related. — The wage basis of an employee injured in one of two related employments in which he is concurrently employed should include his earnings from both employments. Most concurrent employment controversies therefore resolve themselves into the question of what employments are sufficiently related to come within the rule. Barnhardt v. Yellow Cab Co., 266 N.C. 419, 146 S.E.2d 479 (1966).

No Specific Provision Allows Aggregation of Wages. — Subdivision (5) contains no specific provision which would allow wages from any two employments to be aggregated in fixing the wage base for compensation. Barnhardt v. Yellow Cab Co., 266 N.C. 419, 146 S.E.2d 479 (1966).

Average Weekly Wages Determined by Earnings in Employment in Which Injured. — Average weekly wages must ordinarily be determined by the employee's actual earnings in the employment in which he was injured during the 52 weeks, or such lesser period as he may have worked, immediately preceding his injury. Lovette v. Reliable Mfg. Co., 262 N.C. 288, 136 S.E.2d 685 (1964).

The intent of the legislature that average weekly wages determined by the fourth method be related to the employment in which the

employee was injured is evidenced by the fifth method which relates only to a volunteer fireman injured "under compensable circumstances." Barnhardt v. Yellow Cab Co., 266 N.C. 419, 146 S.E.2d 479 (1966).

By computing the plaintiff's average weekly wage from his earnings from the employment in which he was injured, the employer's liability is in direct proportion to his payroll and the insurance premiums based thereon. This is fair and just. Wallace v. Music Shop, II, Inc., 11 N.C. App. 328, 181 S.E.2d 237 (1971).

Employer's Report of Accident as Evidence of Average Wage. — While the employer's report of an accident to the Industrial Commission does not constitute a claim for compensation, a statement therein as to the employee's average weekly wage is competent upon the hearing after the filing of claim. Harris v. Asheville Contracting Co., 240 N.C. 715, 83 S.E.2d 802 (1954).

When Commission's Method of Computing Average Wage Conclusive. — In Munford v. West Constr. Co., 203 N.C. 247, 165 S.E. 696 (1932), the court held that the Commission's method of computing the average wage was conclusive if there were any facts to support the Commission's findings. Here it appeared that in the beginning deceased's employment with defendant was irregular, that soon he was put to driving a truck, that other truck drivers received $18.00 per week, but that deceased's average weekly wage was less than that because of his irregular employment. The Commission awarded compensation on the basis of what drivers doing work similar to deceased's received.

Burden on Employer Unfair When Wage Computed by Including Other Employment Earnings. — It would be unfair to the employer and his insurance carrier to compute the average weekly wage of an injured employee by combining his earnings from the employment where he was injured with his earnings from other employment, and thus burden the employer and his insurance carrier with a liability out of proportion to employer's payroll and the insurance premium computed thereon. Wallace v. Music Shop, II, Inc., 11 N.C. App. 328, 181 S.E.2d 237 (1971).

Fifth Method Is Only Exception to Exclusion of other Earnings. — Except for the fifth method of subdivision (5), no wage-computation provision of the Workmen's Compensation Act allows a consideration of any earnings except those earned in the employment in which the employee was injured. Barnhardt v. Yellow Cab Co., 266 N.C. 419, 146 S.E.2d 479 (1966).

And It Uses Only Wages of Fireman's Principal Employment. — In making the exception for volunteer firemen, the North Carolina legislature did not permit a combination of wages, but adopted as its basis the wages of his principal employment. Barnhardt v. Yellow Cab Co., 266 N.C. 419, 146 S.E.2d 479 (1966).

Fair Labor Standards Act Inapplicable to Awards. — The Fair Labor Standards Act, 29 USC §§ 201-219, is not applicable to awards made pursuant to the North Carolina Workmen's Compensation Act. Lovette v. Reliable Mfg. Co., 262 N.C. 288, 136 S.E.2d 685 (1964).

Scope of Review When Commission Finds Results of Computation "Fair and Just". — Where the North Carolina Industrial Commission made a finding that its use of the second method of computing the employee's average weekly wage produced results that were "fair and just to both sides," review was narrowed to a determination of whether the Commission's finding and conclusion in this regard was supported by the evidence. Wallace v. Music Shop, II, Inc., 11 N.C. App. 328, 181 S.E.2d 237 (1971).

IV. INJURY BY ACCIDENT ARISING OUT OF AND IN THE COURSE OF THE EMPLOYMENT.

A. In General.

Editor's Note. — For a collection of cases arising under subdivision (6) of this section, see 10 N.C.L. Rev. 373. For note on the range of compensable consequences of a work-related injury, see 49 N.C.L. Rev. 583 (1971).

The threefold conditions antecedent to the right to compensation under the North Carolina Workmen's Compensation Act are, namely: (1) That claimant suffered a personal injury by accident; (2) that such injury arose in the course of the employment; and (3) that such injury arose out of the employment. Withers v. Black, 230 N.C. 428, 53 S.E.2d 668 (1949); Anderson v. Northwestern Motor Co., 233 N.C. 372, 64 S.E.2d 265 (1951).

To obtain an award of compensation for an injury under the North Carolina Workmen's Compensation Act, an employee must show that he sustained a personal injury by accident, that his injury arose in the course of his employment, and that his injury arose out of his employment. Bryan v. First Free Will Baptist Church, 267 N.C. 111, 147 S.E.2d 633 (1966).

The condition antecedent to compensation is the occurrence of an injury (1) by accident, (2) arising out of and (3) in the course of employment. Wilson v. Town of Mooresville, 222 N.C. 283, 22 S.E.2d 907 (1942); Burton v. American Nat'l Ins. Co., 10 N.C. App. 499, 179 S.E.2d 7 (1971).

To be compensable the injury must spring from the employment. Burton v. American Nat'l Ins. Co., 10 N.C. App. 499, 179 S.E.2d 7 (1971).

To be compensable an injury must spring

from the employment or have its origin therein. Perry v. American Bakeries Co., 262 N.C. 272, 136 S.E.2d 643 (1964).

An injury compensable under the Workmen's Compensation Act must be the result of an accident which arises out of and in the course of the employment. Taylor v. Town of Wake Forest, 228 N.C. 346, 45 S.E.2d 387 (1947).

To make out a valid claim for compensation under the Workmen's Compensation Act the claimant is required to show (1) injury by accident, (2) suffered in the course of decedent's employment, and (3) arising out of his employment by the defendant corporation. Matthews v. Carolina Std. Corp., 232 N.C. 229, 60 S.E.2d 93 (1950).

To establish his claim for the death of decedent, plaintiff must show (1) death resulting from an injury by accident, (2) arising out of and in the course of decedent's employment by the defendant, and (3) not including a disease in any form, except where it results naturally and unavoidably from the accident. Lewter v. Abercrombie Enterprises, Inc., 240 N.C. 399, 82 S.E.2d 410 (1954).

More must be shown than an injury while at work to sustain a claim for compensation. Hargus v. Select Foods, Inc., 271 N.C. 369, 156 S.E.2d 737 (1967).

A compensable death is one which results from an injury by accident arising out of and in the course of the employment. There must be an accident followed by an injury by such accident which results in harm to the employee before it is compensable under this statute. Slade v. Willis Hosiery Mills, 209 N.C. 823, 184 S.E. 844 (1936). See also Ashley v. F-W Chevrolet Co., 222 N.C. 25, 21 S.E.2d 834 (1942); Gilmore v. Hoke County Bd. of Educ., 222 N.C. 358, 23 S.E.2d 292 (1942).

Except in the case of certain occupational diseases, compensation may not be awarded under the Workmen's Compensation Act unless there is proof of a disability due to an injury, which injury was the result of an accident arising out of and in the course of the employment. Rhinehart v. Roberts Super Mkt., Inc., 271 N.C. 586, 157 S.E.2d 1 (1967).

To obtain an award of compensation for an injury under the Workmen's Compensation Act, an employee must establish that his injury caused his disability, unless it is included in the schedule of injuries made compensable by § 97-31 without regard to loss of wage-earning power. Hollman v. City of Raleigh, 273 N.C. 240, 159 S.E.2d 874 (1968).

In order for the death of an employee to be compensable it must result from an injury by an accident arising out of and in the course of the employment. McGill v. Town of Lumberton, 215 N.C. 752, 3 S.E.2d 324 (1939); Poteete v. North State Pyrophyllite Co., 240 N.C. 561, 82 S.E.2d 693 (1954); Cole v. Guilford County, 259 N.C. 724, 131 S.E.2d 308 (1963).

Exception Is Made in Case of Death of One Receiving Compensation for Silicosis. — The clear intent of § 97-61.6 to provide compensation for death occurring within 350 weeks from the date of last exposure to silicosis if the employee was at the time of death receiving compensation for disablement due to silicosis, even though the death does not result from silicosis, must be given effect notwithstanding subdivisions (6) and (10) of this section and § 97-52, since the specific provisions relating to silicosis, which were enacted because of the peculiar course of the disease, must be construed as an exception to the general tenor of the compensation act to provide compensation for death only if it results from an accident arising out of and in the course of the employment. Davis v. North Carolina Granite Corp., 259 N.C. 672, 131 S.E.2d 335 (1963).

Death by suicide is compensable if a work-connected injury causes insanity which in turn induces the suicide. Painter v. Mead Corp., 258 N.C. 741, 129 S.E.2d 482 (1963).

In compensation cases the Commission finds the facts. Lawrence v. Hatch Mill, 265 N.C. 329, 144 S.E.2d 3 (1965).

When Industrial Commission's Findings Conclusive. — Where there is any competent evidence in support of the finding of the Industrial Commission that the accident in question arose out of and in the course of employment, the finding is conclusive on the courts upon appeal. Latham v. Southern Fish & Grocery Co., 208 N.C. 505, 181 S.E. 640 (1935).

If the Commision's findings have evidentiary support in the record, they are conclusive. Lawrence v. Hatch Mill, 265 N.C. 329, 144 S.E.2d 3 (1965).

Where the evidence is such that several inferences appear equally plausible, the finding of the Industrial Commission is conclusive on appeal, and courts are not at liberty to reweigh the evidence and set aside the finding simply because other conclusions might have been reached. Rewis v. New York Life Ins. Co., 226 N.C. 325, 38 S.E.2d 97 (1946).

The finding of fact of the Industrial Commission that the disease causing an employee's death resulted naturally and unavoidably from an accident is conclusive on appeal when supported by competent evidence. Doggett v. South Atlantic Warehouse Co., 212 N.C. 599, 194 S.E. 111 (1937).

Whether an accident arises out of the employment is a mixed question of fact and law, and the finding of the Industrial Commission is conclusive if supported by any competent evidence; otherwise, not. Cole v. Guilford County, 259 N.C. 724, 131 S.E.2d 308 (1963).

Rule of Liberal Construction Does Not Add to Force of Evidence. — The legislature has provided that the Workmen's Compensation

Act shall be liberally construed, but it does not permit either the Commission or the courts to hurry evidence beyond the speed which its own force generates. Lawrence v. Hatch Mill, 265 N.C. 329, 144 S.E.2d 3 (1965).

When Findings Reviewable on Appeal. — If there was no conflicting evidence and the Industrial Commission decided as a matter of law that there was no sufficient competent evidence that the injury to plaintiff was "by accident arising out of and in the course of employment," the question is one of law and is reviewable by the court upon appeal. Massey v. Board of Educ., 204 N.C. 193, 167 S.E. 695 (1933).

Where Record Silent as to Material Fact at Issue. — Where in proceedings under this act there is no finding or adjudication in reference to the contention of the employer that the claimant's injury was occasioned by his willful intention to injure his assailant, a fellow servant, the cause will be remanded for a definite determination of the question. Conrad v. Cook-Lewis Foundry Co., 198 N.C. 723, 153 S.E. 266 (1930).

B. Accident.

An injury, in order to be compensable, must result from an accident, and injuries which are not the result of any fortuitous occurrence but are the natural and probable result of the employment are not compensable. Smith v. Cabarrus Creamery Co., 217 N.C. 468, 8 S.E.2d 231 (1940).

The Workmen's Compensation Act does not provide compensation for injury, but only for injury by accident. O'Mary v. Land Clearing Corp., 261 N.C. 508, 135 S.E.2d 193 (1964); Lawrence v. Hatch Mill, 265 N.C. 329, 144 S.E.2d 3 (1965); Hargus v. Select Foods, Inc., 271 N.C. 369, 156 S.E.2d 737 (1967).

Absent accident (fortuitous event) death or injury of an employee while performing his regular duties in the usual and customary manner is not compensable. O'Mary v. Land Clearing Corp., 261 N.C. 508, 135 S.E.2d 193 (1964); Rhinehart v. Roberts Super Mkt., Inc., 271 N.C. 586, 157 S.E.2d 1 (1967); Jackson v. North Carolina State Highway Comm'n, 272 N.C. 697, 158 S.E.2d 865 (1968).

While there need be no appreciable separation in time between the accident and the resulting injury, there must be some unforeseen or unusual event other than the bodily injury itself. Rhinehart v. Roberts Super Mkt., Inc., 271 N.C. 586, 157 S.E.2d 1 (1967).

There must be an accident followed by an injury by such accident which results in harm to the employee before it is compensable. Jackson v. North Carolina State Highway Comm'n, 272 N.C. 697, 158 S.E.2d 865 (1968).

Where the plaintiff was not injured by accident as contemplated by this section, his injury is not compensable. Gray v. Durham Transfer & Storage, Inc., 10 N.C. App. 668, 179 S.E.2d 883 (1971).

Accident Having Reasonable Relationship to Employment. — An accident has a reasonable relationship to the employment when it is the result of a risk or hazard incident to the employment. Harless v. Flynn, 1 N.C. App. 440, 162 S.E.2d 47 (1968).

Accident and injury are considered separate. Ordinarily, the accident must precede the injury. Harding v. Thomas & Howard Co., 256 N.C. 427, 124 S.E.2d 109 (1962).

Injury and accident are separate, and there must be an accident which produces the injury before the employee can be awarded compensation. O'Mary v. Land Clearing Corp., 261 N.C. 508, 135 S.E.2d 193 (1964); Jackson v. North Carolina State Highway Comm'n, 272 N.C. 697, 158 S.E.2d 865 (1968).

The terms "injury" and "accident," as used in the act, are not synonymous. Rhinehart v. Roberts Super Mkt., Inc., 271 N.C. 586, 157 S.E.2d 1 (1967).

But there is authority indicating that injury by accident and accidental injury are synonymous terms. If so, the injury may be accidental without any requirement that an accident must precede and cause it. Keller v. Electric Wiring Co., 259 N.C. 222, 130 S.E.2d 342 (1963).

"Accident" Defined. — An "accident" within the meaning of this act is an unlooked for and untoward event which is not expected or designed by the injured employee. Conrad v. Cook-Lewis Foundry Co., 198 N.C. 723, 153 S.E. 266 (1930); McNeely v. Carolina Asbestos Co., 206 N.C. 568, 174 S.E. 509 (1934); Slade v. Willis Hosiery Mills, 209 N.C. 823, 184 S.E. 844 (1936); Love v. Town of Lumberton, 215 N.C. 28, 1 S.E.2d 121 (1939); Brown v. Carolina Aluminum Co., 224 N.C. 766, 32 S.E.2d 320 (1944); Edwards v. Piedmont Publishing Co., 227 N.C. 184, 41 S.E.2d 592 (1947); Gabriel v. Town of Newton, 227 N.C. 314, 42 S.E.2d 96 (1947); Hensley v. Farmers Fed'n Cooperative, 246 N.C. 274, 98 S.E.2d 289 (1957); Harding v. Thomas & Howard Co., 256 N.C. 427, 124 S.E.2d 109 (1962).

The term "accident" as used in the Workmen's Compensation Act has been defined as (1) an unlooked for and untoward event which is not expected or designed by the injured employee; (2) a result produced by a fortuitous cause. O'Mary v. Land Clearing Corp., 261 N.C. 508, 135 S.E.2d 193 (1964); Harding v. Thomas & Howard Co., 256 N.C. 427, 124 S.E.2d 109 (1962); Rhinehart v. Roberts Super Mkt., Inc., 271 N.C. 586, 157 S.E.2d 1 (1967).

An "accident" within the contemplation of this Chapter is an unusual and unexpected or fortuitous occurrence, there being no indication that the legislature intended to put

upon the usual definition of this term any further refinements. Smith v. Cabarrus Creamery Co., 217 N.C. 468, 8 S.E.2d 231 (1940).

Accident involves the interruption of the work routine and the introduction thereby of unusual conditions likely to result in unexpected consequences. Harding v. Thomas & Howard Co., 256 N.C. 427, 124 S.E.2d 109 (1962); Lawrence v. Hatch Mill, 265 N.C. 329, 144 S.E.2d 3 (1965); Gray v. Durham Transfer & Storage, Inc., 10 N.C. App. 668, 179 S.E.2d 883 (1971); Southards v. Byrd Motor Lines, 11 N.C. App. 583, 181 S.E.2d 811 (1971).

In the cases where recovery has been allowed, the evidence has shown an interruption of the usual work routine or the introduction of some new circumstance not a part of that routine. Lawrence v. Hatch Mill, 265 N.C. 329, 144 S.E.2d 3 (1965).

This section requires an interruption of the usual work routine or the introduction of some new circumstance not a part of the usual work routine before a compensable injury arises in a hernia case. Gray v. Durham Transfer & Storage, Inc., 10 N.C. App. 668, 179 S.E.2d 883 (1971).

In cases involving back injury or hernia, the elements constituting accident are the interruption of the routine of work and the introduction thereby of unusual conditions likely to result in unexpected consequences. Pardue v. Blackburn Bros. Oil & Tire Co., 260 N.C. 413, 132 S.E.2d 747 (1963).

Injury by Accident Distinguished from Occupational Disease. — An injury by accident, as that term is ordinarily understood, is distinguished from an occupational disease in that the former rises from a definite event, the time and place of which can be fixed, while the latter develops gradually over a long period of time. Henry v. Lawrence Leather Co., 234 N.C. 126, 66 S.E.2d 693 (1951).

Death from injury by accident implies a result produced by a fortuitous cause. Slade v. Willis Hosiery Mills, 209 N.C. 823, 184 S.E. 844 (1936); Hensley v. Farmers Fed'n Cooperative, 246 N.C. 274, 98 S.E.2d 289 (1957); Harding v. Thomas & Howard Co., 256 N.C. 427, 124 S.E.2d 109 (1962); O'Mary v. Land Clearing Corp., 261 NC. 508, 135 S.E.2d 193 (1964); Jackson v. North Carolina State Highway Comm'n, 272 N.C. 697, 158 S.E.2d 865 (1968).

An assault is an "accident" within the meaning of the Workmen's Compensation Act, when from the point of view of the workman who suffers from it it is unexpected and without design on his part, although intentionally caused by another. Withers v. Black, 230 N.C. 428, 53 S.E.2d 668 (1949).

The mere fact that the injury is the result of a willful and criminal assault of a fellow servant does not of itself prevent the injury from being accidental. Conrad v. Cook-Lewis Foundry Co., 198 N.C. 723, 153 S.E. 266 (1930).

Injury Resulting from Fellow Employees' Negligence. — An injury suffered by an employee while engaged in his master's business within the scope of his employment proximately resulting from the negligence of fellow employees is, as to the employee, an "accident" arising out of and in the course of his employment. Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

Extra exertion by the employee, resulting in injury, may qualify as an injury by accident. Jackson v. North Carolina State Highway Comm'n, 272 N.C. 697, 158 S.E.2d 865 (1968).

Ordinarily a death from heart disease is not an injury by accident arising out of and in the course of the employment, nor an occupational disease, so as to be compensable. Bellamy v. Morace Stevedoring Co., 258 N.C. 327, 128 S.E.2d 395 (1962).

Heart Attack. — When one is carrying on his usual work in the usual way and suffers a heart attack, the injury does not arise by accident out of and in the course of employment. Jackson v. North Carolina State Highway Comm'n, 272 N.C. 697, 158 S.E.2d 865 (1968).

Death from heart attacks which occur in the usual course of employment are not compensable. Jackson v. North Carolina State Highway Comm'n, 272 N.C. 697, 158 S.E.2d 865 (1968).

Death of a fireman from heart failure brought on by excitement and exhaustion in fighting a fire, is not the result of an accident within the meaning of the Workmen's Compensation Act, heat, smoke, excitement, and physical exertion being the ordinary and expected incidents of the employment. Neely v. City of Statesville, 212 N.C. 365, 193 S.E. 664 (1937). See Lewter v. Abercrombie Enterprises, Inc., 240 N.C. 399, 82 S.E.2d 410 (1954).

See Session Laws 1949, c. 1078, which amended § 97-53 so as to make certain heart diseases compensable as occupational diseases when contracted by firemen. This act was subsequently held unconstitutional in Duncan v. City of Charlotte, 234 N.C. 86, 66 S.E.2d 22 (1951) and Davis v. City of Winston-Salem, 234 N.C. 95, 66 S.E.2d 28 (1951). See 30 N.C.L. Rev. 98 (1951).

Death from Coronary Occlusion after Making Arrest. — A game warden arrested several men, one of whom offered slight resistance. Later that day, the warden died of a coronary occlusion. It was held that mere resistance of arrest by one who is being taken into custody by an officer does not constitute an accident; it may be considered as one of his duties. Also, heart disease is not an occupational disease. West v. North Carolina Dep't of Conservation & Dev., 229 N.C. 232, 49

S.E.2d 398 (1948), distinguishing Gabriel v. Town of Newton, 227 N.C. 314, 42 S.E.2d 96 (1947). See Lewter v. Abercrombie Enterprises, Inc., 240 N.C. 399, 82 S.E.2d 410 (1954).

Death from Coronary Thrombosis. — Where the evidence does not disclose that the employee was doing work essentially different from that which had been customarily performed by him over the years, his death as a result of a coronary thrombosis is not the result of an accident within the meaning of the North Carolina Workmen's Compensation Act. Ferrell v. Montgomery & Aldridge Sales Co., 262 N.C. 76, 136 S.E.2d 227 (1964).

Rupture of Intervertebral Disc. — To sustain an award of compensation in ruptured or slipped disc cases the injury to be classed as arising by accident must involve more than merely carrying on the usual and customary duties in the usual way. Harding v. Thomas & Howard Co., 256 N.C. 427, 124 S.E.2d 109 (1962); Byrd v. Farmers Fed'n Cooperative, 260 N.C. 215, 132 S.E.2d 348 (1963); Lawrence v. Hatch Mill, 265 N.C. 329, 144 S.E.2d 3 (1965).

An injury to the back from an herniated disc does not arise by accident if the employee at the time is merely carrying on his usual and customary duties in the usual way. Byrd v. Farmers Fed'n Cooperative, 260 N.C. 215, 132 S.E.2d 348 (1963).

A back injury or hernia suffered by an employee does not arise by accident if the employee at the time was merely carrying out his usual and customary duties in the usual way. Lawrence v. Hatch Mill, 265 N.C. 329, 144 S.E.2d 3 (1965).

Evidence that while digging a ditch 12 inches wide by 14 inches deep, claimant came upon a rock some 24 inches long and 12 inches wide, weighing 50 to 100 pounds, that claimant dug around the rock, bent down to pick it up, and, as he twisted to heave it out of the ditch felt a catch in his back, together with expert testimony that the rupture of claimant's spinal disc was caused by the lifting episode and that lifting from such a twisted and cramped position multiplied the intensity of the stress upon the vertebrae, was sufficient to sustain the Commission's findings that the injury resulted from an accident arising out of and in the course of the employment. Keller v. Electric Wiring Co., 259 N.C. 222, 130 S.E.2d 342 (1963).

The evidence tended to show that employee lifted a plate weighing 40 or 50 pounds in the regular and usual course of his employment, and while handing it to the pressman with his body in a twisted position, felt a sharp pain. Expert testimony was introduced to the effect that the employee had ruptured an intervertebral disc and that the lifting of the weight in the manner described was sufficient to have produced the injury. Plaintiff employee admitted that on two different occasions, several years previously, when he arose from a sitting position he had a catch in his back. It was held that the evidence is sufficient to support the finding of the Industrial Commission that the injury resulted from an accident. Edwards v. Piedmont Publishing Co., 227 N.C. 184, 41 S.E.2d 592 (1947).

Hernia. — See post, this note, analysis line IX, "Hernia."

Injury Produced by Inhaling Asbestos Dust. — The word "accident" within the meaning of this act should be construed in its wide and practical sense to give effect to the intent of the act, and an injury produced by inhaling asbestos dust for a period of five months is an accidental injury within the terms of this section, the test being not the amount of time taken to produce the injury but whether it was produced by unexpected and unforeseen, and therefore, accidental means. McNeely v. Carolina Asbestos Co., 206 N.C. 568, 174 S.E. 509 (1934). As to compensation for occupational diseases, see §§ 97-52 to 97-76.

Inhaling Carbon Monoxide Gas. — Deceased died as a result of carbon monoxide gas inhaled by him during the course of one night. It was held that it was error for the Industrial Commission to refuse compensation on the grounds that death resulted from an occupational disease rather than an accident. Cabe v. Parker-Graham-Sexton, Inc., 202 N.C. 176, 162 S.E. 223 (1932).

Infection after Getting Lime Dust in Eye. — Plaintiff, an employee at defendant's water company, got lime dust in his eye as he was dumping lime into a feeder. This had happened many times before, but this time his eye became infected. Recovery was allowed. Love v. Town of Lumberton, 215 N.C. 28, 1 S.E.2d 121 (1939).

As to infections generally, see 26 N.C.L. Rev. 320.

Injury Not Resulting from Accident. — The Industrial Commission found, upon supporting evidence, that claimant became temporarily sick and blind while performing usual manual labor in the usual manner, that his condition improved and he went back to work and that shortly thereafter he again suffered a similar disability. The findings support the conclusion that the injury did not result from an accident arising out of and in the course of claimant's employment within the purview of this Chapter. Buchanan v. State Highway & Pub. Works Comm'n, 217 N.C. 173, 7 S.E.2d 382 (1940).

Evidence tending to show that an employee, while engaged in moving cases of soup in the ordinary manner and free from confining or otherwise exceptional conditions and surroundings, suffered a back injury which was accentuated by a congenital condition, was insufficient to support a finding that the injury resulted from an accident within the purview of the Workmen's Compensation Act. Rhinehart

v. Roberts Super Mkt., Inc., 271 N. C. 586, 157 S.E.2d 1 (1967).

C. Arising Out of and in the Course of Employment.

1. In General.

Editor's Note. — For note on accidents arising out of and in the course of employment of traveling employees, see 23 N.C.L. Rev. 159.

For note on acts done in furtherance of employer's good will as arising out of and in the course of employment, see 33 N.C.L. Rev. 637 (1955).

This Chapter does not contemplate compensation for every injury an employee may receive during the course of his employment but only those from accidents arising out of, as well as in the course of, employment. Where an injury cannot fairly be traced to the employment as a contributing proximate cause, or comes from a hazard to which the workman would have been equally exposed apart from the employment or from a hazard common to others, it does not arise out of the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. Bryan v. Loving Co., 222 N.C. 724, 24 S.E.2d 751 (1943); Pope v. Goodson, 249 N.C. 690, 107 S.E.2d 524 (1959).

Injuries by accident arising out of and in the course of the employment are compensable (Love v. Town of Lumberton, 215 N.C. 28, 1 S.E.2d 121 (1939)) regardless of whether the accident was the result of the employer's negligence, but injuries not resulting from an accident arising out of and in the course of the employment, and diseases which do not result naturally and unavoidably from an accident are not compensable. Lee v. American Enka Corp., 212 N.C. 455, 193 S.E. 809 (1937).

In order for an injury to an employee to be compensable under the Workmen's Compensation Act it must result from an accident arising out of and in the course of employment. Berry v. Colonial Furniture Co., 232 N.C. 303, 60 S.E.2d 97 (1950); Lewis v. W.B. Lea Tobacco Co., 260 N.C. 410, 132 S.E.2d 877 (1963); Taylor v. Twin City Club, 260 N.C. 435, 132 S.E.2d 865 (1963); Gamble v. Stutts, 262 N.C. 276, 136 S.E.2d 688 (1964); Clark v. Burton Lines, Inc., 272 N.C. 433, 158 S.E.2d 569 (1968).

In order to entitle the claimant to compensation the evidence must show that the injury by accident arose out of and in the course of his employment by the defendant. Both are necessary to justify an award of compensation under the Workmen's Compensation Act. Bell v. Dewey Bros., 236 N.C. 280, 72 S.E.2d 680 (1952); Bryan v. First Free Will Baptist Church, 267 N.C. 111, 147 S.E. 2d 633 (1966).

To be compensable the injury must spring from the employment. Lewis v. W.B. Lea Tobacco Co., 260 N.C. 410, 132 S.E.2d 877 (1963).

To be compensable under the Workmen's Compensation Act an injury must result from an accident arising out of and in the course of the employment. Claimant has the burden of showing such injury. Calhoun v. Kimbrell's, Inc., 6 N.C. App. 386, 170 S.E.2d 177 (1969).

Death or injury by accident arising out of and in the course of the employment is an indispensable finding before compensation may be awarded. Andrews v. County of Pitt, 269 N.C. 577, 153 S.E.2d 67 (1967).

Where an employee, while about his work, suffers an injury in the ordinary course of his employment, the cause of which is unexplained but which is a natural and probable result of a risk thereof, and the Commission finds from all the attendant facts and circumstances that the injury arose out of the employment, an award will be sustained. If, however, the cause is known and is independent of, unrelated to, and apart from the employment, compensation will not be allowed. Vause v. Vause Farm Equip. Co., 233 N.C. 88, 63 S.E.2d 173 (1951).

This definition presents a double aspect. "In the course of" refers to the time, place and circumstances under which the accident occurred. This is, in most cases, a fairly simple question. The real difficulty arises in determining whether the accident is one "arising out of the employment." That this is considered as a mixed question of law and fact makes the problem all the more difficult. In the final analysis it means that there must be apparent "to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury." For instance, an injury occasioned by an assault of a coemployee and growing out of differences in regard to the employment was held to be within the definition. But where the assault grew out of personal malice unconnected with the employment, no compensation was awarded. In the further case of an unprovoked assault by a third person upon an employee, the risk having arisen out of the employment, a recovery was allowed. Moreover, if the injury occurs from a prank played by a fellow workman, compensation is given. But if the injured employee engaged in the play, no recovery is permitted. 8 N.C.L. Rev. 418.

Determination Depends on Facts of Each Case. — The question of whether compensation is recoverable under this act depends upon whether the accident complained of arises out of and in the course of the employment of the one injured, and its determination depends largely upon the facts of each particular case as

matters of fact and conclusions of law, and general definitions are unsatisfactory. Harden v. Thomasville Furniture Co., 199 N.C. 733, 155 S.E. 728 (1930).

Common-Law Rules Inapplicable. — The words "out of and in the course of the employment," used in connection with injuries compensable thereunder, are not to be construed by the rules controlling in negligent default cases at common law, but an accidental injury is compensable thereunder if there is a causal relation between the employment and injury, if the injury is one which, after the event, may be seen to have had its origin in the employment, and it need not be shown that it is one which ought to have been foreseen or expected. Conrad v. Cook-Lewis Foundry Co., 198 N.C. 723, 153 S.E. 266 (1930); Ashley v. F-W Chevrolet Co., 222 N.C. 25, 21 S.E.2d 834 (1942).

"Out of and in the Course of" Construed. — An accident arises out of and in the course of the employment when it occurs while the employee is engaged in some activity or duty which he is authorized to undertake and which is calculated to further, directly or indirectly, the employer's business. Perry v. American Bakeries Co., 262 N.C. 272, 136 S.E.2d 643 (1964); Clark v. Burton Lines, Inc., 272 N.C. 433, 158 S.E.2d 569 (1968); Martin v. Georgia-Pacific Corp., 5 N.C. App. 37, 167 S.E.2d 790 (1969).

The phrase "out of and in the course of the employment" embraces only those accidents which happen to a servant while he is engaged in the discharge of some function or duty which he is authorized to undertake and which is calculated to further, directly or indirectly, the master's business. Bryan v. First Free Will Baptist Church, 267 N.C. 111, 147 S.E.2d 633 (1966).

"Out of" and "in the Course of" Distinguished. — The words "out of" refer to the origin or cause of the accident. The words "in the course of" refer to the time, place, and circumstances under which an accident occurs. Plemmons v. White's Serv., 213 N.C. 148, 195 S.E. 370 (1938); Wilson v. Town of Mooresville, 222 N.C. 283, 22 S.E.2d 907 (1942); Brown v. Carolina Aluminum Co., 224 N.C. 766, 32 S.E.2d 320 (1944); Taylor v. Town of Wake Forest, 228 N.C. 346, 45 S.E.2d 387 (1947); Withers v. Black, 230 N.C. 428, 53 S.E.2d 668 (1949); Bell v. Dewey Bros., 236 N.C. 280, 72 S.E.2d 680 (1952); Sweatt v. Rutherford County Bd. of Educ., 237 N.C. 653, 75 S.E.2d 738 (1953); Lewter v. Abercrombie Enterprises, Inc., 240 N.C. 399, 82 S.E.2d 410 (1954); Zimmerman v. Elizabeth City Freezer Locker, 244 N.C. 628, 94 S.E.2d 813 (1956); Hardy v. Small, 246 N.C. 581, 99 S.E.2d 862 (1957); Sandy v. Stackhouse, Inc., 258 N.C. 194, 128 S.E.2d 218 (1962); Bass v. Mecklenburg County, 258 N.C. 226, 128 S.E.2d 570 (1962); Cole v. Guilford County, 259 N.C. 724, 131 S.E.2d 308 (1963); Bryan v. First Free Will Baptist Church, 267 N.C. 111, 147 S.E.2d 633 (1966); Clark v. Burton Lines, Inc., 272 N.C. 433, 158 S.E.2d 569 (1968).

The phrase "arising out of and in the course of employment" encompasses two separate and distinct concepts— "out of" and "in the course of" — both of which must be satisfied in order for particular injuries to be compensable under the act. Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

In interpreting and applying the meaning of the expression, "arising out of and in the course of the employment," as it appears in the Workmen's Compensation Act, it has been uniformly held that the phrases "arising out of" and "in the course of" are not synonymous but involve two ideas and impose a double condition, both of which must be satisfied in order to bring a case within the act. Sweatt v. Rutherford County Bd. of Educ., 237 N.C. 653, 75 S.E.2d 738 (1953).

The phrase "in course of" refers to the time, place and circumstance under which the injury by accident occurred, while the words "out of the employment" refer to the origin or cause of the accident, as springing from the work the employee is to do or out of the service he is to perform. Matthews v. Carolina Std. Corp., 232 N.C. 229, 60 S.E.2d 93 (1950); Berry v. Colonial Furniture Co., 232 N.C. 303, 60 S.E.2d 97 (1950).

To be compensable under the act an injury must arise out of and be received in the course of employment. Two ideas are involved here. The words "in the course of" refer to the time, place, and circumstances surrounding the accident, while the words "arising out of" have reference to the causal connection between the injury and the employment. Davis v. North State Veneer Corp., 200 N.C. 263, 156 S.E. 859 (1931); Parrish v. Armour & Co., 200 N.C. 654, 158 S.E. 188 (1931); Walker v. Wilkins, Inc., 212 N.C. 627, 194 S.E. 89 (1937); McGill v. Town of Lumberton, 215 N.C. 752, 3 S.E.2d 324 (1939); Matthews v. Carolina Std. Corp., 232 N.C. 229, 60 S.E.2d 93 (1950).

These terms have been so often defined by the Supreme Court that they now have an established and well-recognized meaning. Byran v. T.A. Loving Co., 222 N.C. 724, 24 S.E.2d 751 (1943).

An injury compensable under subdivision (6) of this section is one by accident arising out of and in the course of the employment, the words "out of" referring to the origin or cause of the accident, and the words "in the course of" to the time, place and circumstances under which the accident occurred. Ridout v. Rose's 5-10-25¢ Stores, 205 N.C. 423, 171 S.E. 642 (1933).

"In the Course of" the Employment Construed. — The finding that the claimant's injury arose in the course of the employment was required by evidence that it occurred during the hours of the employment and at the place of the employment while the claimant was actually engaged in the performance of the

duties of the employment. Withers v. Black, 230 N.C. 428, 53 S.E.2d 668 (1949).

The words "in the course of" as used in the Workmen's Compensation Act refer to the time, place, and circumstances under which the injury occurs. Guest v. Brenner Iron & Metal Co., 241 N.C. 448, 85 S.E.2d 596 (1955); Alford v. Quality Chevrolet Co., 246 N.C. 214, 97 S.E.2d 869 (1957); Taylor v. Twin City Club, 260 N.C. 435, 132 S.E.2d 865 (1963).

The words "in the course of" have reference to the time, place and circumstances under which the accident occurred. Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968); Robbins v. Nicholson, 10 N.C. App. 421, 179 S.E.2d 183 (1971).

A conclusion that the injury occurred in the course of employment is required where there is evidence that it occurred during the hours of employment and at the place of employment while the claimant was actually in the performance of the duties of the employment. Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

With respect to time, the course of employment begins a reasonable time before actual work begins, and continues for a reasonable time after work ends, and includes intervals during the workday for rest and refreshment. Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

With respect to place, the course of employment includes the premises of the employer. Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

An employee may be in the course of his employment when he is on the way to the place of his duties, leaving the place of his duties at the end of the day, or leaving upon learning that there was no work for him to do. Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

The fact that the employee is not engaged in the actual performance of the duties of his job does not preclude an accident from being one within the course of employment. Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

Where the employee is engaged in activity which he is authorized to undertake and which is calculated to further, directly or indirectly, the employer's business, the circumstances are such as to be within the course of employment. Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

With respect to circumstances, injuries within the course of employment include those sustained while the employee is doing what a man so employed may reasonably do within a time which he is employed and at a place where he may reasonably be during that time to do that thing. Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

An accident arising "in the course of" the employment is one which occurs while the employee is doing what a man so employed may reasonably do within a time during which he is employed and at a place where he may reasonably be during that time to do that thing; or one which occurs in the course of the employment and as the result of a risk involved in the employment, or incident to it, or to conditions under which it is required to be performed. Clark v. Burton Lines., Inc., 272 N.C. 433, 158 S.E.2d 569 (1968).

In tending to his personal physical needs, an employee is indirectly benefiting his employer. Therefore, the course of employment continues when the employee goes to the washroom, takes a smoke break, takes a break to partake of refreshment, goes on a personal errand involving temporary absence from his post of duty, or voluntarily leaves his post to assist another employee. Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

Mealtime is within the course of employment, even where such time is completely free for the employees. Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

It is the conjunction of all three of the factors — time, place and circumstances — that brings a particular accident within the concept of course of employment. If, in addition to this, the accident arose out of employment, then any injury resulting therefrom is compensable under the act. Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

"Arising Out of" Defined.—"Arising out of" has been defined to mean coming from the work the employee is to do, or out of the services he is to perform, and as a natural result of one of the risks of the employment. The injury must spring from the employment or have its origin therein. Bolling v. Belk-White Co., 228 N.C. 749, 46 S.E.2d 838 (1948); Hinkle v. City of Lexington, 239 N.C. 105, 79 S.E.2d 220 (1953); Lewter v. Abercrombie Enterprises, Inc., 240 N.C. 399, 82 S.E.2d 410 (1954); Taylor v. Twin City Club, 260 N.C. 435, 132 S.E.2d 865 (1963); Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968). See Vause v. Vause Farm Equip. Co., 233 N.C. 88, 63 S.E.2d 173 (1951).

The accident "arises out of" the employment when it occurs in the course of the employment and is the result of a risk involved therein or incident thereto, or to the conditions under which it is required to be performed. There must be some causal connection between the employment and the injury. Bolling v. Belk-White Co., 228 N.C. 749, 46 S.E.2d 838 (1948); Perry v. American Bakeries Co., 262 N.C. 272, 136 S.E.2d 643 (1964).

An injury "arises out of" the employment when it occurs in the course of the employment and is a natural and probable consequence or incident of it, so that there is some causal relation between the accident and the performance of some service of the employment. Rewis v. New York Life Ins. Co., 226 N.C. 325, 38 S.E.2d 97 (1946); Withers v.

Black, 230 N.C. 428, 53 S.E.2d 668 (1949); Taylor v. Twin City Club, 260 N.C. 435, 132 S.E.2d 865 (1963).

The term "arising out of employment" is broad and comprehensive and perhaps not capable of precise definition. It must be interpreted in the light of the facts and circumstances of each case, and there must be some causal connection between the injury and the employment. Plemmons v. White's Service, 213 N.C. 148, 195 S.E. 370 (1938); Berry v. Colonial Furniture Co., 232 N.C. 303, 60 S.E.2d 97 (1950); Perry v. American Bakeries Co., 262 N.C. 272, 136 S.E.2d 643 (1964); Clark v. Burton Lines, Inc., 272 N.C. 433, 158 S.E.2d 569 (1968).

The term "arising out of the employment" within the meaning of the Workmen's Compensation Act refers to the origin or cause of the accident, and while it must be interpreted in the light of the facts and circumstances of each case and may not be precisely defined, there must be some causal connection between the injury and the employment. Taylor v. Town of Wake Forest, 228 N.C. 346, 45 S.E.2d 387 (1947).

"Arising out of" means arising out of the work the employee is to do, or out of the service he is to perform. The risk must be incidental to the employment. Bell v. Dewey Bros., 236 N.C. 280, 72 S.E.2d 680 (1952); Hinkle v. City of Lexington, 239 N.C. 105, 79 S.E.2d 220 (1953); Poteete v. North State Pyrophyllite Co., 240 N.C. 561, 82 S.E.2d 693 (1954); Bryan v. First Free Will Baptist Church, 267 N.C. 111, 147 S.E.2d 633 (1966).

In order for an accident to arise out of the employment it is not required that a hazard of the employment be the sole cause of the accident, but it is sufficient if the physical aspects of the employment contribute in some reasonable degree toward bringing about or intensifying the condition which renders the employee susceptible to the accident and consequent injury. Vause v. Vause Farm Equip. Co., 233 N.C. 88, 63 S.E.2d 173 (1951).

The words "out of" as used in the Workmen's Compensation Act refer to the origin or cause of the accident and import that there must be some causal relation between the employment and the injury, but not that the injury ought to have been foreseen or expected. Guest v. Brenner Iron & Metal Co., 241 N.C. 448, 85 S.E.2d 596 (1955).

For an accident to arise out of the employment there must be some causal connection between the injury and the employment. When an injury cannot fairly be traced to the employment as a contributing proximate cause, or if it comes from a hazard to which the employee would have been equally exposed apart from the employment, or from the hazard common to others, it does not arise out of the employment. In such a situation the fact that the injury occurred on the employer's premises is immaterial. Cole v. Guilford County, 259 N.C. 724, 131 S.E.2d 308 (1963); Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

"Arising out of" employment relates to the origin or cause of the accident. Taylor v. Twin City Club, 260 N.C. 435, 132 S.E.2d 865 (1963).

In the phrase "arising out of and in the course of the employment," the words "out of" refer to the origin or cause of the accident. Robbins v. Nicholson, 10 N.C. App. 421, 179 S.E.2d 183 (1971).

Whether the injury "arouse out of" the employment is to be decided on the facts of the individual case and cannot be precisely defined. Robbins v. Nicholson, 10 N.C. App. 421, 179 S.E.2d 183 (1971).

Where any reasonable relationship to employment exists, or employment is a contributory cause, the court is justified in upholding the award as "arising out of employment." Kiger v. Bahnson Serv. Co., 260 N.C. 760, 133 S.E.2d 702 (1963); Williams v. Brunswick County Bd. of Educ., 1 N.C. App. 89, 160 S.E.2d 102 (1968).

Unless the injury can be fairly traced to the employment as a contributing proximate cause, it does not arise out of the employment. Eaton v. Klopman Mills, Inc., 2 N.C. App. 363, 163 S.E.2d 17 (1968).

The phrase "arising out of" has reference to the origin or cause of the accident. But this is not to say that the accident must have been caused by the employment. Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

When one speaks of an event "arising out of employment," the initiative, the moving force, is something other than the employment; the employment is thought of more as a condition out of which the event arises than as the force producing the event in affirmative fashion. Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

Where any reasonable relationship to the employment exists, or employment is a contributory cause, the court is justified in upholding the award as "arising out of employment." Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

An injury arises out of the employment when it is a natural and probable consequence or incident of the employment and a natural result of one of its risks, so that there is some causal relation between the injury and the performance of some service of the employment. Clark v. Burton Lines, Inc., 272 N.C. 433, 158 S.E.2d 569 (1968).

The test for determining whether an accidental injury arises out of an employment is this: "There must be some causal relation between the employment and the injury; but if the injury is one which, after the event, may be seen to have had its origin in the employment, it need not be shown that it is

one which ought to have been foreseen or expected." Withers v. Black, 230 N.C. 428, 53 S.E.2d 668 (1949); Hinkle v. City of Lexington, 239 N.C. 105, 79 S.E.2d 220 (1953).

While there must be some causal connection between the employment and the injury, nevertheless it is sufficient if the injury is one which, after the event, may be seen to have had its origin in the employment, and it need not be shown that it is one which should have been foreseen or expected. Vause v. Vause Farm Equip. Co., 233 N.C. 88, 63 S.E.2d 173 (1951); Taylor v. Twin City Club, 260 N.C. 435, 132 S.E.2d 865 (1963); Starr v. Charlotte Paper Co., 8 N.C. App. 604, 174 S.E.2d 342 (1970).

There is no requirement that the injury should be foreseen if it resulted from the employment nor does the employment have to be the "sole" cause of the injury. Robbins v. Nicholson, 10 N.C. App. 421, 179 S.E.2d 183 (1971).

If the injury is one which, after the event, may be seen to have had its origin in the employment, it need not be shown that it is one which ought to have been foreseen or expected. Robbins v. Nicholson, 10 N.C. App. 421, 179 S.E.2d 183 (1971).

Rule of Causal Relation. — An injury to be compensable must be shown to have resulted from an accident arising out of and in the course of the employment. This principle has come to be known and referred to as the rule of causal relation, i.e., that injury to be compensable must spring from the employment. This rule of causal relation is the very sheet anchor of the Workmen's Compensation Act. It has kept the act within the limits of its intended scope — that of providing compensation benefits for industrial injuries, rather than branching out into the field of general health insurance benefits. Duncan v. City of Charlotte, 234 N.C. 86, 66 S.E.2d 22 (1951); Perry v. American Bakeries Co., 262 N.C. 272, 136 S.E.2d 643 (1964).

There must be some causal relation between the employment and the injury. Bass v. Mecklenburg County, 258 N.C. 226, 128 S.E.2d 570 (1962); Taylor v. Twin City Club, 260 N.C. 435, 132 S.E.2d 865 (1963); Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968); Robbins v. Nicholson, 10 N.C. App. 421, 179 S.E.2d 183 (1971).

An accident arises out of the employment if there is a causal relation between the accident and the employment. Stubblefield v. Watson Elec. Constr. Co., 277 N.C. 444, 177 S.E.2d 882 (1970).

The requirement that an injury to be compensable must be shown to have resulted from an accident arising out of and in the course of the employment is known and referred to as the "rule of causal relation." Bryan v. First Free Will Baptist Church, 267 N.C. 111, 147 S.E.2d 633 (1966).

The rule of causal relation is the very sheet anchor of the Workmen's Compensation Act, and prevents the act from being a general health and insurance benefit act. Bryan v. First Free Will Baptist Church, 267 N.C. 111, 147 S.E.2d 633 (1966).

Mixed Question of Law and Fact. — Whether an injury by accident arises out of and in the course of the employment is a mixed question of law and of fact. Hardy v. Small, 246 N.C. 581, 99 S.E.2d 862 (1957); Bryan v. First Free Will Baptist Church, 267 N.C. 111, 147 S.E.2d 633 (1966).

Whether an accident arose out of the employment is a mixed question of law and fact. Sandy v. Stackhouse, Inc., 258 N.C. 194, 128 S.E.2d 218 (1962); Bass v. Mecklenburg County, 258 N.C. 226, 128 S.E.2d 570 (1962); Clark v. Gastonia Ice Cream Co., 261 N.C. 234, 134 S.E.2d 354 (1964); Perry v. American Bakeries Co., 262 N.C. 272, 136 S.E.2d 643 (1964).

Whether an employee sustained an injury by accident arising out of and in the course of his employment with the defendant employer resulting in his death is a mixed question of law and fact, and the finding of the Commission as to the factual portion is conclusive if supported by any competent evidence. McManus v. Chick Haven Farms, 4 N.C. App. 177, 166 S.E.2d 526 (1969).

Whether an accident arises "out of the employment" is a mixed question of law and fact to be determined in the light of the facts and circumstances of each case, but the term requires that there be some causal connection between the injury and the employment or that the risk be incidental to the employment. Ridout v. Rose's 5-10-25¢ Stores, 205 N.C. 423, 171 S.E. 642 (1933).

Whether an accident arose out of the employment is not exclusively a question of fact. It is a mixed question of law and fact, but there must be some causal relation between the employment and the injury. Matthews v. Carolina Std. Corp., 232 N.C. 229, 60 S.E.2d 93 (1950); Poteete v. North State Pyrophyllite Co., 240 N.C. 561, 82 S.E.2d 693 (1954); Alford v. Quality Chevrolet Co., 246 N.C. 214, 97 S.E.2d 869 (1957).

Injury Must Be Fairly Traceable to Employment as Contributing Proximate Cause. — It is settled law that where an injury cannot fairly be traced to the employment as a contributing proximate cause, it does not arise out of the employment. Poteete v. North State Pyrophyllite Co., 240 N.C. 561, 82 S.E.2d 693 (1954); Hardy v. Small, 246 N.C. 581, 99 S.E.2d 862 (1957); Bass v. Mecklenburg County, 258 N.C. 226, 128 S.E.2d 570 (1962); Bryan v. First Free Will Baptist Church, 267 N.C. 111, 147 S.E.2d 633 (1966).

To be compensable an injury must spring from the employment or have its origin therein.

Clark v. Burton Lines, Inc., 272 N.C. 433, 158 S.E.2d 569 (1968).

Where the death cannot fairly be traced to the employment as a contributing proximate cause, it does not arise out of the employment. Lewter v. Abercrombie Enterprises, Inc., 240 N.C. 399, 82 S.E.2d 410 (1954).

Acts of negligence of the employee do not bar compensation for an original injury arising out of and in the course of employment. Starr v. Charlotte Paper Co., 8 N.C. App. 604, 174 S.E.2d 342 (1970).

No Common-Law Action against Negligent Fellow Employee. — An employee who sustains an "injury arising out of and in the course of employment," caused by the negligence of a fellow employee who was acting within "the course of employment," as that term is used in subdivision (6), may not maintain an action at common law against the negligent employee. Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

Fact That Injury Could Not Have Been Anticipated Is Immaterial. — If it can be seen that the injury had its origin in the employment, it arises out of such employment, and the fact that it could not have been anticipated is immaterial. Conrad v. Cook-Lewis Foundry Co., 198 N.C. 723, 153 S.E. 266 (1930).

Ordinarily, when an employee is off duty the relationship of master and servant is suspended; therefore, there is no causal relation between the employment and an accident which happens during such time. Sandy v. Stackhouse, Inc., 258 N.C. 194, 128 S.E.2d 218 (1962).

Natural Consequences of Primary Injury Arising Out of Employment Also Arise Out of Employment. — When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to claimant's own intentional conduct. Starr v. Charlotte Paper Co., 8 N.C. App. 604, 174 S.E.2d 342 (1970).

Thus, Subsequent Injury May Be Compensable If Direct Result of Compensable Primary Injury. — A subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury. Starr v. Charlotte Paper Co., 8 N.C. App. 604, 174 S.E.2d 342 (1970).

Plaintiff's compensable spinal injury which caused permanent paralysis of his legs was a proximate cause of burns received by plaintiff on the lower portions of his body when a cigarette he had been smoking set the clothing on his bed on fire. Plaintiff suffered the burns because of a loss of feeling and sensitivity in the lower portions of his body as a result of the original compensable accident, and the act of leaving the cigarette where it could set fire to the bedclothing was insufficient to break the chain of causation between the original injury and the burns sustained. Starr v. Charlotte Paper Co., 8 N.C. App. 604, 174 S.E.2d 342 (1970).

And Original Injury Need Not Be Sole Cause of Second Injury. — There is a distinction between the proximate cause doctrine in workmen's compensation cases and that applied in cases of tort. The proximate cause doctrine requires that the original injury be one of the direct and natural causes of a subsequent injury. It is not necessary, however, in order that a plaintiff recover hospital and medical expenses, that the original injury be the sole cause of the second injury. Starr v. Charlotte Paper Co., 8 N.C. App. 604, 174 S.E.2d 342 (1970).

2. Origin and Cause of Accident.

a. Risks Incident to the Employment Generally.

No Recovery for Injury Not Arising Out of Risk Incidental to Employment. — Even though one be engaged in duties involving peculiar risks, one may not recover for any injury not arising out of those risks. Harden v. Thomasville Furniture Co., 199 N.C. 733, 155 S.E. 728 (1930) (where a night watchman was shot by a fellow employee because of a domestic affair).

Where an employee, while about his work, suffers an injury in the ordinary course of the employment, the cause of which is unexplained but which is a natural and probable result of a risk thereof, and the Industrial Commission finds from all the attendant facts and circumstances that the injury arose out of the employment, an award will be sustained. If, however, the cause is known and is independent of, unrelated to, and apart from the employment — the result of a hazard to which others are equally exposed — compensation will not be allowed. Cole v. Guilford County, 259 N.C. 724, 131 S.E.2d 308 (1963).

The causative danger must be peculiar to the work and not common to the neighborhood, and it must be incidental to the character of the business and not independent of the relation of master and servant. Sandy v. Stackhouse, Inc., 258 N.C. 194, 128 S.E.2d 218 (1962).

Injury Due to Peculiar Hazard of Employee's Location. — A causal relation exists between the accident and the employment when the duties of the employment require the employee to be in a place at which he is exposed to a risk of injury to which he would not otherwise be subject, and while there he is injured by an accident due to the peculiar hazard of that location. Stubblefield v. Watson Elec. Constr. Co., 277 N.C. 444, 177 S.E.2d 882 (1970).

When Risk Is Incidental to Employment. — An injury caused by a risk incidental to the employment is compensable, and "it may be said to be incidental to the employment when it is either an ordinary risk directly connected with the employment, or an extraordinary risk which is only indirectly connected with the service owing to the special nature of the employment." Goodwin v. Bright, 202 N.C. 481, 163 S.E. 576 (1932).

Accident Caused Partly or Solely by Idiopathic Condition. — Where the accident and resultant injury arise out of both the idiopathic condition of the workman and hazards incident to the employment, the employer is liable. But not so where the idiopathic condition is the sole cause of the injury. Cole v. Guilford County, 259 N.C. 724, 131 S.E.2d 308 (1963).

Risk of Injury from Lightning. — The generally recognized rule is that where the injured employee is by reason of his employment peculiarly or specially exposed to a risk of injury from lightning — that is, one greater than other persons in the community — death or injury resulting from this source usually is compensable as an injury by accident arising out of and in the course of the employment. Pope v. Goodson, 249 N.C. 690, 107 S.E.2d 524 (1959).

Where a carpenter, caught in a storm while working, went to a nearby house under construction by his employer to get out of the rain and, while standing near a window talking with his employer and wearing wet clothes, and a carpenter's nail apron with nails therein, was killed by lightning, all damage to the clothes and marks on the body being from the waist down, with the nail apron knocked off, a hole burned in it, and a majority of the nails in it fused, the evidence was sufficient to support the conclusion that the circumstances of the carpenter's employment peculiarly exposed him to the risk of injury from lightning greater than that of others in the community, and to sustain an award of compensation. Pope v. Goodson, 249 N.C. 690, 107 S.E.2d 524 (1959).

Claimant was in the plant of his employer when it was struck by a tornado and was injured as a result of the partial collapse of the building. It was held that the accident resulting in the injury did not arise out of the employment, there being no causal relation between the employment and the accident. Walker v. Wilkins, 212 N.C. 627, 194 S.E. 89 (1937); Marsh v. Bennett College for Women, 212 N.C. 662, 194 S.E. 303 (1937).

Death from Bite of Mad Dog. — Where intestate died of hydrophobia resulting from a dog bite received by him while engaged in his duties as attendant in a filling station, it was held that claimant was not entitled to compensation for the employee's death, since there was no causal connection between the employment and the bite of a dog running at large, and the accident was not from a risk incidental to the employment. Plemmons v. White's Serv., 213 N.C. 148, 195 S.E. 370 (1938).

Employee Drowned in Attempt to Extricate Car from Employer's Millrace. — Where deceased, whose duty it was to keep his employer's millrace clean, was drowned in an attempt to extricate a car and its occupants that had plunged into the water, there was sufficient evidence to support a finding that the accident arose out of and in the course of the employment. Southern v. Morehead Cotton Mills Co., 200 N.C. 165, 156 S.E. 861 (1931).

Employee Shot by Hunter. — Plaintiff was shot in the eye by a hunter while he was working on his employer's truck. The injury did not result from a cause peculiar to the employment in which plaintiff was engaged. Whitley v. North Carolina State Highway Comm'n, 201 N.C. 539, 160 S.E. 827 (1931); Bain v. Travora Mfg. Co., 203 N.C. 466, 166 S.E. 301 (1932).

Employee in Moving Vehicle Struck by Flying Object. — Where a deliveryman was driving a truck in the course of his employment and, while passing a group of boys playing baseball, a baseball struck the windshield and a piece of glass from the windshield struck him in the eye, resulting in serious injury, it was held that the injury resulted from an accident arising out of and in the course of the employment, within the meaning of this section. Perkins v. Sprott, 207 N.C. 462, 177 S.E. 404 (1934), distinguishing Whitley v. North Carolina State Highway Comm'n, 201 N.C. 539, 160 S.E. 827 (1931) and Bain v. Travora Mfg. Co., 203 N.C. 466, 166 S.E. 301 (1932), apparently on the ground that in those cases the plaintiff was struck by the bullet, whereas here, the glass and not the ball directly injured plaintiff.

Risks Not Incidental to Employment of Night Watchman. — Deceased was a night watchman. While in a small store on defendant's premises which was operated by a third person, he was shot by one who attempted to rob the store. It was held that the injury bore no relation to deceased's employment. Smith v. Newman Mach. Co., 206 N.C. 97, 172 S.E. 880 (1932).

For note on death of night watchman as arising out of and in the course of employment, see 34 N.C.L. Rev. 607 (1956).

b. Falls.

When Fall Constitutes Compensable Accident. — It has been held that a fall is an accident, and where it is not shown to have resulted from the employee's physical infirmity or from external force unconnected with the employment, it may be found by the Commission to arise out of the employment. No affirmative evidence as to what caused the fall is necessary to support the finding. Here the

employee, reaching up to a rack in the course of her work, lost her balance and fell. Robbins v. Bossong Hosiery Mills, 220 N.C. 246, 17 S.E.2d 20 (1941), distinguishing cases of heart failure, dizzy spells, etc.

A fall itself is usually regarded as a compensable accident. Cole v. Guilford County, 259 N.C. 724, 131 S.E.2d 308 (1963); Taylor v. Twin City Club, 260 N.C. 435, 132 S.E.2d 865 (1963).

The rule that compensation will be awarded in unexplained-fall cases is applied in North Carolina. Taylor v. Twin City Club, 260 N.C. 435, 132 S.E.2d 865 (1963).

The effects of a fall are compensable if the fall results from an idiopathic cause and the employment has placed the employee in a position which increases the dangerous effects of the fall. Taylor v. Twin City Club, 260 N.C. 435, 132 S.E.2d 865 (1963).

If a fall and the resultant injury arise solely from an idiopathic cause, or a cause independent of the employment, the injury is not compensable. Taylor v. Twin City Club, 260 N.C. 435, 132 S.E.2d 865 (1963).

The fall itself is the unusual, unforeseen occurrence which is the accident. Taylor v. Twin City Club, 260 N.C. 435, 132 S.E.2d 865 (1963).

Hence, Evidence of Such Occurrence Is Unnecessary. — To prove an accident in industrial injury cases, it is not essential that there be evidence of any unusual or untoward condition or occurrence causing a fall which produces injury. Taylor v. Twin City Club, 260 N.C. 435, 132 S.E.2d 865 (1963).

Circuit Circumstances Permitting Inference That Fall Arose Out of and in Course of Employment. — Employee was suffering from a disease which subjected him to fainting spells. While in the men's washroom he called to a person in an adjacent booth, "Please help me to the window, I am about to faint." The floor was of tile and very slick when wet. It was washed each morning. The employee was afterwards found on the roof of the adjacent building, directly beneath the open windows. The circumstances permit the inference that employee slipped and fell to his death. Rewis v. New York Life Ins. Co., 226 N.C. 325, 38 S.E.2d 97 (1946). Compensation allowed in a similar case. See DeVine v. Dave Steel Co., 227 N.C. 684, 44 S.E.2d 77 (1947), where the employee was subject to fainting spells, but it was not shown that the fatal fall resulted from such a spell.

Injuries sustained in a fall in which the employee's leg unexplainedly gave way were held to be attributable solely to the employee's idiopathic condition, and thus recovery was denied. Cole v. Guilford County, 259 N.C. 724, 131 S.E.2d 308 (1963).

Injury Caused by Epileptic Seizure. — The evidence tended to show that plaintiff employee was subject to epileptic fits, that while driving the employer's truck in the course of his employment he felt a seizure approaching, stopped the truck on the side of the road, opened the door and lay down on the seat of the truck with his head on the seat opposite the steering wheel and his feet hanging out of the truck, that he immediately suffered an epileptic seizure causing him to lose consciousness, and that when he "came to" his body was on the outside of the truck and his hands on the steering wheel. The expert medical testimony was to the effect that the employee had suffered broken bones caused by the fall from the seat of the truck and that the fall resulted from the epileptic seizure. It was held that the evidence disclosed that the sole cause of the employee's moving from a position of safety to his injury was the epileptic seizure, and therefore the fall was independent of, unrelated to, and apart from the employment, and the evidence could not support a finding of the Industrial Commission that the injury resulted from an accident arising out of the employment. Vause v. Vause Farm Equip. Co., 233 N.C. 88, 63 S.E.2d 173 (1951).

c. Heat Exhaustion, Sunstroke, Freezing, etc.

Where the employment subjects a workman to a special or particular hazard from the elements, such as excessive heat or cold, likely to produce sunstroke or freezing, death or disability resulting from such cause usually comes within the purview of the compensation acts. On the other hand, where the employee is not by reason of his work peculiarly exposed to injury by sunstroke or freezing, such injuries are not ordinarily compensable. The test is whether the employment subjects the workman to a greater hazard or risk than that to which he otherwise would be exposed. Fields v. Tompkins-Johnston Plumbing Co., 224 N.C. 841, 32 S.E.2d 623 (1945).

Death from Heat Exhaustion or Sunstroke. — Determination of the Industrial Commission that employee's death resulting from heat exhaustion or sunstroke was an injury which arose out of and in course of employment was held supported by the evidence, where evidence showed that the general outside temperature was 104° Fahrenheit, and employee's work required that he be in close proximity to melted lead which increased the temperature in the partly finished building where employee was working on day of his death. Fields v. Tompkins-Johnston Plumbing Co., 224 N.C. 841, 32 S.E.2d 623 (1945).

Where a bus driver was compelled to change a tire on defendant's bus during very cold weather and he contracted pneumonia, the Commission's ruling denying recovery was

affirmed. Carter v. Carolina Coach Co., 208 N.C. 849, 182 S.E. 493 (1935).

As to pneumonia, see also post, this note, analysis line IV, D, "Injury from Disease."

d. Street and Highway Accidents.

Editor's Note. — For note on street accidents arising out of and in the course of employment, see 32 N.C.L. Rev. 373 (1954).

In General. — Plaintiff got into his car to leave defendant's plant. A night watchman beckoned to him, and in getting out of the car to learn what the watchman wanted, plaintiff slipped on a fruit peeling. Recovery was denied, the court saying, "When an injury cannot fairly be traced to the employment as a contributing proximate cause or comes from a hazard to which the workman would have been equally exposed apart from the employment, or from a hazard common to others, it does not arise out of the employment." Lockey v. Cohen, Goldman & Co., 213 N.C. 356, 196 S.E. 342 (1938).

An injury caused by a highway accident is compensable if the employee at the time of the accident is acting in the course of his employment and in the performance of some duty incident thereto. Hardy v. Small, 246 N.C. 581, 99 S.E.2d 862 (1957) (farm employee killed while crossing highway on return from barn).

Cemetery Caretaker Making Rounds of Funeral Homes. — Where a cemetery caretaker employed by the city, who had no telephone, regularly and daily made rounds of the funeral homes at night to determine what graves needed to be dug the next day, the Supreme Court held as compensable injury sustained by him when he was hit by an automobile while engaged in making these rounds. The employer was said to have consented to the making of the trip because of the established custom of the caretaker. Williams v. Brunswick County Bd. of Educ., 1 N.C. App. 89, 160 S.E.2d 102 (1968).

Cemetery Keeper Crossing Street on Way to Funeral Home. — When as an incident of his employment as cemetery keeper and in the performance of a duty connected therewith, as shown by the established custom, the decedent crossed the street en route to a funeral home, the hazard of the journey may properly be regarded as within the scope of the Workmen's Compensation Act. Hinkle v. City of Lexington, 239 N.C. 105, 79 S.E.2d 220 (1953).

Injury Occurring on Highway Close to Employer's Premises. — North Carolina has allowed compensation where the injury occurred on the highway close to employer's premises and the employee was using the only means of ingress and egress to and from the work he was to perform, saying that the hazards of that route become the hazards of the employment. Williams v. Brunswick County Bd. of Educ., 1 N.C. App. 89, 160 S.E.2d 102 (1968).

Recovery was denied where the injury was sustained in a highway accident, away from the premises, some five hours after the employee left work. Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

e. Assaults and Fights.

Cross Reference. — See note to § 97-12.

Editor's Note. — See note on injury from personal assault, 19 N.C.L. Rev. 108.

In General. — In speaking of cases allowing compensation for injuries received as a result of fights on the job, the court has said: "These cases are bottomed on the sound judicial recognition of this industrial truth: 'Where men are working together at the same work, disagreements may be expected to arise about the work, the manner of doing it, as to the use of tools, interference with one another, and many other details which may be trifling or important. Infirmity of temper, or worse, may be expected, and occasionally blows and fighting. When the disagreement arises out of the work in which two men are engaged, and as a result of it one injures the other, it may be inferred that the injury arose out of employment.' " Withers v. Black, 230 N.C. 428, 53 S.E.2d 668 (1949).

Assault "Arising Out of and in the Course of" Employment. — Where in a proceeding under this act the evidence tends to show that the employee was a moulder in the employer's foundry, and that he struck his negro assistant with a shovel after the assistant had spoken words to him he deemed insulting, whereupon the assistant left the employment and returned and shot the claimant while he was doing his work, causing permanent injury, the evidence is sufficient to bring the case within the intent and meaning of the terms "injury by accident arising out of and in the course of the employment." Conrad v. Cook-Lewis Foundry Co., 198 N.C. 723, 153 S.E. 266 (1930).

Assault Arising from Dispute over Work. — Where the evidence discloses that two employees had no personal contacts outside of the employment, and there was evidence that the dispute between them arose over the work they were performing for their common employer, the evidence was sufficient to sustain the finding by the Industrial Commission that an assault made by the one upon the other arose out of the employment. Withers v. Black, 230 N.C. 428, 53 S.E.2d 668 (1949).

Where a workman is injured by a fellow employee because of a dispute about the manner of doing the work he is employed to do, the accident to the injured workman grows out of the employment and is compensable. Withers v. Black, 230 N.C. 428, 53 S.E.2d 668 (1949).

Where there was friction and enmity between two employees, growing out of criticism of the work of one of them by the

other and complaint thereof to the employer, and the employee whose work was criticized assaulted his fellow worker from anger and revenge over such criticism, which resulted in the death of the one assaulted, such death occurred from an accident in the course of the employment. Hegler v. Cannon Mills Co., 224 N.C. 669, 31 S.E.2d 918 (1944).

Shooting of three employees by mentally disturbed coemployee while they were at work in locker plant arose out of and in the course of employment though shooting was "triggered" by a draft board incident, where shooter stated that reason for shooting was resentment of "domination" by coemployees. Zimmerman v. Elizabeth City Freezer Locker, 244 N.C. 628, 94 S.E.2d 813 (1956).

Assault upon Employee Collecting Accounts. — Where there is evidence that it was the employee's duty to collect accounts of his employer for goods sold upon the installment plan and that the employee endeavored to collect an account from a debtor and was struck by another also owing an account to the employer, the injury resulting in death, the evidence is sufficient to sustain a finding by the Industrial Commission that the injury was the result of an accident arising out of and in the course of the employment, and such a finding of fact is conclusive and binding. Winberry v. Farley Stores, 204 N.C. 79, 167 S.E. 475 (1933).

Bill Collector Killed by Debtor. — Where deceased, a collector, was killed by defendant's debtor while he was trying to collect a bill, an award granting compensation was affirmed. Winberry v. Farley Stores, 204 N.C. 79, 167 S.E. 475 (1933).

Assault by Robber. — Deceased was required to report at defendant's mill before the other employees. It was known that many hoboes slept near the boiler room where he worked. He was murdered by a robber while he was engaged in his duties and before any other employees reported for work. It was held that the injury arose out of the employment. Goodwin v. Bright, 202 N.C. 481, 163 S.E. 576 (1932). In accord, see West v. East Coast Fertilizer Co., 201 N.C. 556, 160 S.E. 765 (1931) (where deceased, night watchman, was killed by a robber).

Fall Suffered While Running from Assailant. — A fellow employee, who was drunk at the time, ran plaintiff away from his work. He returned, only to run again when he saw his assailant approaching. Plaintiff's foreman was present. In leaving the second time, employee fell and broke his leg. The Commission's award of compensation was affirmed. The injury had its origin in plaintiff's employment. It is immaterial that it was unexpected. Wilson v. Boyd & Goforth, 207 N.C. 344, 177 S.E. 178 (1934).

Assault by Foreman in Discharging Employee. — See McCune v. Rhodes-Rhyne Mfg. Co., 217 N.C. 351, 8 S.E.2d 219 (1940).

Dispute over Matters Foreign to Employment. — Evidence tending to show that a night watchman employed to watch over one section of a highway under construction came over to a night watchman employed to watch over another section thereof, and engaged in an altercation relating to matters foreign to the employment, and that one of them killed the other as a result thereof, is sufficient to support the finding of the Industrial Commission that the deceased's death was not the result of an accident arising out of and in the course of the employment, and therefore such finding is conclusive on the courts. McNeill v. C.A. Ragland Constr. Co., 216 N.C. 744, 6 S.E.2d 491 (1940).

If one employee assaults another solely from anger, hatred, revenge, or vindictiveness, not growing out of or as an incident to the employment, the injury is to be attributed to the voluntary act of the assailant, and not as an incident of the employment. But if the assault is incidental to some duty of the employment, the injuries suffered thereby may properly be said to arise out of the employment. Ashley v. F-W Chevrolet Co., 222 N.C. 25, 21 S.E.2d 834 (1942), wherein finding held to sustain award.

Killing as Result of Personal Enmity Alone. — In order for compensation to be recovered for the death of an employee under this act it is required that the injury causing death result from an accident arising out of and in the course of the employment, as a proximate cause, and where compensation is sought for the killing of one employee by another for purely personal and unrelated grounds, or when one was employed at night and the other by day, and the killing at night was a result of personal enmity alone, and these facts are found by the Commission and approved by the trial judge, the judgment denying the right of compensation will be affirmed on appeal. Harden v. Thomasville Furniture Co., 199 N.C. 733, 155 S.E. 728 (1930).

Game Warden Killed by Person against Whom He Testified in Criminal Action. — Where decedent, a game warden, was killed by a person against whom he had testified in a criminal action for violation of the game law, the court held that the injury did not arise out of and in the course of employment. Hollowell v. North Carolina Dep't of Conservation & Dev., 206 N.C. 206, 173 S.E. 603 (1934).

f. Horseplay.

Where Injured Employee Did Not Participate in Horseplay Injury Is Compensable. — Where the injured employee does not participate in the sportive acts of his

fellow employee, the injury is compensable. Chambers v. Union Oil Co., 199 N.C. 28, 153 S.E. 594 (1930), commented upon in 9 N.C.L. Rev. 105 (where claimant was accidentally shot by the discharge of a gun which a fellow truck driver carried in his truck; the claimant was putting oil in his own truck at the time).

If an employee is injured as a result of the horseplay of a fellow workman the injured employee is not precluded from recovering his damages under this act if he did not participate therein. Chambers v. Union Oil Co., 199 N.C. 28, 153 S.E. 594 (1930).

In construing subdivision (6) of this section the words "arising out of the employment" in regard to injuries compensable are broad and comprehensive, and must be determined in the light and circumstances of each case, and the act, applying only to industries employing more than five workmen, contemplates the gathering together of workmen of varying characteristics, and the risks and hazards of such close contact, joking and pranks by the workmen, are incidents to the business and grow out of it, and are ordinary risks assumed by the employer under the act. Chambers v. Union Oil Co., 199 N.C. 28, 153 S.E. 594 (1930). See also Wilson v. Town of Mooresville, 222 N.C. 283, 22 S.E.2d 907 (1942).

Injuries occurring after the employee has ceased his horseplay and returned to work are compensable. Michaux v. Gate City Orange Crush Bottling Co., 205 N.C. 786, 172 S.E. 406 (1934) (the court affirmed the Commission's award of compensation to deceased, who was killed in trying to catch his employer's truck, which had left him while he was wrestling with a stranger).

3. Time, Place and Circumstances of Accident.

a. Injuries While Acting for Benefit of Self or Third Person.

Acts which are necessary to the health and comfort of an employee while at work, though personal to himself and not technically acts of service, such as visits to the washroom, are incidental to the employment. Rewis v. New York Life Ins. Co., 226 N.C. 325, 38 S.E.2d 97 (1946).

Evidence tending to show that the employee was suffering from a disease which weakened him and subjected him to frequent fainting spells, that during the course of his employment he went to the men's washroom, and while there felt faint, and in seeking fresh air, went to the open window, slipped on the tile floor, and fell through the window to his death, held sufficient to support the finding of the Industrial Commission that his death was the result of an accident arising out of and in the course of his employment. Rewis v. New York Life Ins. Co., 226 N.C. 325, 38 S.E.2d 97 (1946).

Injury during Vacation Pleasure Trip Furnished by Employer. — An accidental injury received by an employee while riding in a truck on a vacation pleasure trip does not arise out of the employment notwithstanding that the employer furnished the vacation trip as a matter of goodwill and personal relations among the employees and paid the entire expenses of the trip in accordance with its agreement entered into at the time of the employment as a part of the remuneration and inducement to its employees. Berry v. Colonial Furniture Co., 232 N.C. 303, 60 S.E.2d 97 (1950).

Where, as a matter of goodwill, an employer at his own expense provides an occasion for recreation or an outing for his employees and invites them to participate, but does not require them to do so, and an employee is injured while engaged in the activities incident thereto, such injury does not arise out of the employment. Perry v. American Bakeries Co., 262 N.C. 272, 136 S.E.2d 643 (1964); Burton v. American Nat'l Ins. Co., 10 N.C. App. 499, 179 S.E.2d 7 (1971).

The fact that a pleasure trip for the benefit of the employee is without expense to the employee does not entitle him to compensation for injury received while on such trip, even if all or a portion of the expense is borne by the employer as a gesture of goodwill. Lewis v. W.B. Lea Tobacco Co., 260 N.C. 410, 132 S.E.2d 877 (1963); Burton v. American Nat'l Ins. Co., 10 N.C. App. 499, 179 S.E.2d 7 (1971).

Attending a good-will picnic at the invitation of the employer was held not to invoke the relation of the master and servant where the employee did no work and was not paid for attendance, nor penalized for nonattendance, nor ordered to go. Barber v. Minges, 223 N.C. 213, 25 S.E.2d 837 (1943).

Employee Injured While Washing His Personal Car. — Claimant, employed as a night watchman, was injured on the employer's premises during his hours of duty when his trouser leg was caught on the bumper of his car, causing him to fall, as he was washing his personal car for his own purposes with the implied consent of the employer. There was no causal relationship between his employment and the injury, and therefore the injury did not arise out of the employment and was not compensable. Bell v. Dewey Bros., 236 N.C. 280, 72 S.E.2d 680 (1952).

Employee off Duty and on Personal Errand. — The Commission found facts which clearly showed that the deceased employee, although temporarily assigned to work in a distant town in another state, with board and room furnished by the power company for which the emergency work was being done, was off duty and upon a personal errand, unrelated to any duty in connection with his employment when he was struck by an automobile and killed. Sandy v. Stackhouse, Inc., 258 N.C. 194, 128 S.E.2d 218 (1962).

Voluntarily Helping Another Employee. — Claimant was employed as a lumber piler and was instructed to stay away from the saws, but there was evidence that on the day of his injury he was instructed to leave his regular job and to perform some work in the vicinity of one of the saws, and that while waiting at the place designated he started to assist another employee, in the absence of the regular sawyer, in cutting off a board, and suffered an injury when his hand came in contact with the saw. Two men were usually required to operate the saw. The court held that the evidence was sufficient to sustain the finding of the Industrial Commission that the injury arose out of and in the course of his employment. Riddick v. Richmond Cedar Works, 227 N.C. 647, 43 S.E.2d 850 (1947).

Employee Assisting Another Contractor on Same Job. — Evidence to the effect that a deceased employee was working under the direct supervision and instruction of his superior in attempting to make repairs on a drum that actually belonged to another contractor working on the same job and that the two contractors on prior occasions had assisted each other without charges sustained the finding that the injury arose out of and in the course of employment. Butler v. Jones Plumbing & Heating Co., 244 N.C. 525, 94 S.E.2d 556 (1956).

Injury While Acting for Benefit of Third Persons. — Whether an injury to an employee received while performing acts for the benefit of third persons arises out of the employment depends upon whether the acts of the employee are for the benefit of the employer to any appreciable extent, or whether the acts are solely for the benefit or purpose of the employee or a third person. Guest v. Brenner Iron & Metal Co., 241 N.C. 448, 85 S.E.2d 596 (1955).

An injury to an employee while he is performing acts for the benefit of third persons is not compensable if the acts are performed solely for the benefit or purpose of the employee or third person. Burton v. American Nat'l Ins. Co., 10 N.C. App. 499, 179 S.E.2d 7 (1971). See also Lewis v. W.B. Lea Tobacco Co., 260 N.C. 410, 132 S.E.2d 877 (1963).

At the suggestion of her foreman, plaintiff joined with other employees to have a group picture taken for the sole benefit of the photographer. This was done during shifts. Plaintiff was injured by the collapse of the seat prepared by the photographer. It was held that it was error for the Commission to find that the injury arose out of the employment. Beavers v. Lily Mill & Power Co., 205 N.C. 34, 169 S.E. 825 (1933).

An injury to an employee while he is performing acts for the benefit of third persons is not compensable unless the acts benefit the employer to an appreciable extent. Lewis v. W.B. Lea Tobacco Co., 260 N.C. 410, 132 S.E.2d 877 (1963); Hales v. North Hills Constr. Co., 5 N.C. App. 564, 169 S.E.2d 24 (1969); Burton v. American Nat'l Ins. Co., 10 N.C. App. 499, 179 S.E.2d 7 (1971).

Where an employee at the time of his injury is performing acts for his own benefit, and not connected with his employment, the injury does not arise out of his employment. This is true even if the acts are performed with the consent of the employer and the employee is on the payroll at the time. Lewis v. W.B. Lea Tobacco Co., 260 N.C. 410, 132 S.E.2d 877 (1963); Burton v. American Nat'l Ins. Co., 10 N.C. App. 499, 179 S.E.2d 7 (1971).

If employee's acts are not connected with his employment but are for the benefit of himself and third persons at the time of his injury, he is not entitled to compensation, even if he is injured while he is required by his employer to be away from his home and place of regular employment for a period of time on a mission for his employer. Lewis v. W.B. Lea Tobacco Co., 260 N.C. 410, 132 S.E.2d 877 (1963); Burton v. American Nat'l Ins. Co., 10 N.C. App. 499, 179 S.E.2d 7 (1971).

Hence, where evidence that an employee customarily acted as chauffeur, cook and valet to an official of company on the official's trips to his cottage at a resort and that while on such a trip he went on a hunting trip with the official's sons and was fatally injured in an automobile accident, was insufficient to support a finding that the accident arose out of the employment. Lewis v. W.B. Lea Tobacco Co., 260 N.C. 410, 132 S.E.2d 877 (1963).

Findings of fact by the Industrial Commission that deceased employee drove his employer's truck to the city dump to dispose of trash from the employer's plant, and that the employee was killed at the city dump while trying to help a third party operate the dump mechanism on the third party's truck, were held to support the Commission's determination that deceased was not acting for the benefit of his employer to any appreciable extent and that deceased's injuries did not arise out of and in the course of his employment. Short v. Slane Hosiery Mills, 4 N.C. App. 290, 166 S.E.2d 479 (1969).

Assistance to Third Person in Reciprocity for Aid Requested for Employer's Benefit. — An employee sent to fix flat tires went to a filling station and requested free use of its air pump, but before inflation of the tires was completed, the filling station operator asked him to help push a stalled car, and while he was doing so he was struck by another car, resulting in permanent injury. It was held that the courtesies and assistance extended by the employee were in reciprocity for the courtesy of free air requested by the employee for the employer's benefit, so that the employee had reasonable ground to apprehend that refusal to

render the assistance requested of him might well have resulted in like refusal of the courtesy requested by him, and therefore the findings supported the conclusion that the accident arose out of and in the course of employment. Guest v. Brenner Iron & Metal Co., 241 N.C. 448, 85 S.E.2d 596 (1955).

b. Injuries While Going to and from Work.

(1) General Rule.

Editor's Note. — For note on injuries sustained by employee while going to and from work, see 36 N.C.L. Rev. 367 (1958).

Injury Suffered Going to or Returning from Work. — As a general rule an injury suffered by an employee while going to or returning from his work does not arise out of and in the course of his employment. Bray v. W.H. Weatherly & Co., 203 N.C. 160, 165 S.E. 332 (1932) (where plaintiff driver was injured in going after defendant's truck to start the day's work); Hardy v. Small, 246 N.C. 581, 99 S.E.2d 862 (1957); Humphrey v. Quality Cleaners & Laundry, 251 N.C. 47, 110 S.E.2d 467 (1959); Williams v. Brunswick County Bd. of Educ., 1 N.C. App. 89, 160 S.E.2d 102 (1968).

An injury sustained by an employee while going to or from work does not arise in the course of his employment and is not compensable unless the employer is under a contractual duty to transport employee or furnishes the means of transportation as an incident of the contract of employment. Whittington v. A.J. Schnierson & Sons, 255 N.C. 724, 122 S.E.2d 724 (1961).

Such an injury occurs during the period of employment but not in the course of it. Hunt v. State, 201 N.C. 707, 161 S.E. 203 (1931) (deceased was killed while driving his own car to defendant's camp. Compensation began from time he left home, but the expense of the trip was borne by himself); Lassiter v. Carolina Tel. & Tel. Co., 215 N.C. 227, 1 S.E.2d 542 (1939) (where deceased was killed while being transported to work in a vehicle gratuitously furnished).

Off Employer's Premises. — Where the evidence tended to show that plaintiff's intestate, a civilian guard of a construction company, stationed at a main gate of a marine base to direct traffic and parking about such gate and on the highway immediately adjoining, was at the time of the accident on his way to his place of employment to report for work and was killed, after alighting from a bus, on the public highway immediately in front of such main gate, as he attempted to cross the highway ahead of an oncoming car, an award was error, as deceased was not on the premises of his employer and his injury and death did not arise out of and in the course of his employment. Bryan v. T.A. Loving Co., 222 N.C. 724, 24 S.E.2d 751 (1943).

The disallowance of recovery in the usual coming and going case is based, not upon the ground that the circumstances (i.e., the employee's going to or leaving work) are not within the course of employment, but upon considerations of time and place. In addition, the question of arising out of is not satisfied in many of these cases, especially where the injury is due to the hazards of the public highway — risks common to the general public. Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

While recovery may be denied where an injury is sustained while the employee is going to or coming from work, such denial is not upon the ground that going and coming are circumstances not within the course of employment. To the contrary, such activity is within the course of employment if the time and place requisites are satisfied, and injuries sustained while engaged therein are compensable if the injury arose out of employment, i.e., that they were due to an employment-connected risk. Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

The period of employment covers the working hours and such reasonable time as is required to pass to and from the employer's premises. Yates v. Hajoca Corp., 1 N.C. App. 553, 162 S.E.2d 119 (1968).

When travel is contemplated as part of the work the rule is that the employment included not only the actual doing of the work but also a reasonable margin of time and space necessary to be used in passing to and from the place where the work is to be done, when the latter is expressly or impliedly included in the terms of the employment. Alford v. Quality Chevrolet Co., 246 N.C. 214, 97 S.E.2d 869 (1957); Yates v. Hajoca Corp., 1 N.C. App. 553, 162 S.E.2d 119 (1968).

Employees whose work entails travel away from the employer's premises are held in the majority of jurisdictions to be within the course of their employment continuously during the trip, except when a distinct departure on a personal errand is shown. Brewer v. Powers Trucking Co., 256 N.C. 175, 123 S.E.2d 608 (1962); Kiger v. Bahnson Serv. Co., 260 N.C. 760, 133 S.E.2d 702 (1963); Clark v. Burton Lines, Inc., 272 N.C. 433, 158 S.E.2d 569 (1968).

Continuity between Employment and Travel. — If it be conceded the course of employment included the travel home, then certainly there must be reasonable continuity between the employment and the travel. Alford v. Quality Chevrolet Co., 246 N.C. 214, 97 S.E.2d 869 (1957); Yates v. Hajoca Corp., 1 N.C. App. 553, 162 S.E.2d 119 (1968).

Findings to the effect that the deceased employee was furnished a car for transportation to and from his work, that he quit work about 7:00 P.M., met a friend for dinner, took repeated drinks throughout the evening, made several trips, on one of which he

drove approximately 100 miles per hour, in search of a girl to join the party, and some five hours thereafter started for home in the employer's car, and was killed in a wreck occurring on the direct route from the employer's place of business to the employee's home, held to show an abandonment of employment rather than a deviation from it, and therefore the accident did not arise in the course of the employment. Alford v. Quality Chevrolet Co., 246 N.C. 214, 97 S.E.2d 869 (1957).

An employee is not engaged in the prosecution of his employer's business while operating his personal car to the place where he is to perform the duties of his employment, nor while leaving his place of employment to go to his home. Ellis v. American Serv. Co., 240 N.C. 453, 82 S.E.2d 419 (1954).

Policeman Killed While Returning to Work from Leave of Absence. — Where the evidence showed that a policeman was killed in an accident, while returning to work from a leave of absence, the conclusion that he did not sustain injury by accident arising out of and in the course of his employment was sustained. McKenzie v. City of Gastonia, 222 N.C. 328, 22 S.E.2d 712 (1942).

Farm Employee Killed While Crossing Highway on Return from Barn to Home. — Where farm employee, who lived on farm, was killed while crossing highway when returning from barn, to which he had gone to feed livestock, to area of house in which he lived, the injury arose out of and in the course of his employment. Hardy v. Small, 246 N.C. 581, 99 S.E.2d 862 (1957).

(2) Special Errand.

When Employee Is Employed in Special Errand Employment Begins When He Leaves Home. — While on his way to work, plaintiff was injured in crossing the street to purchase supplies for defendant school. This was done at the request of the principal. It was held that plaintiff was employed in a special errand for his master. In such case employment begins from the time the employee leaves his home. Massey v. Board of Educ., 204 N.C. 193, 167 S.E. 695 (1933).

Driving Employer's Truck from Employee's Home to Place of Employment.— In Phifer v. Foremost Dairy, 200 N.C. 65, 156 S.E. 147 (1930), deceased was killed in a collision as he was driving a truck, owned and maintained by his employer, from his home to his place of employment. It was found that transportation to and from work was an incident of the employment. It was held that the accident arose out of and in the course of deceased's employment.

(3) On Employer's Premises.

Injury on Employer's Premises May Be Compensable. — In Hunt v. State, 201 N.C. 707, 161 S.E. 203 (1931), a distinction is made between the time an employee gets back to work and the beginning of employment. "True, the moment when he begins his work is not necessarily the moment when he gets into the employment, because a reasonable margin must be allowed him to get to the place of work if he is on the premises of the employer or on some access to the premises which the employer has provided." Cf. Bryan v. T.A. Loving Co., 222 N.C. 724, 24 S.E.2d 751 (1943), ante, this note, analysis line IV, C, 3, b, (1), "General Rule."

As an exception to the general rule, known as the "going and coming rule," that injuries sustained by an employee while going to or from work are not ordinarily compensable, the great weight of authority holds that injuries sustained by an employee while going to or from his place of work upon premises owned or controlled by his employer are generally deemed to have arisen out of and in the course of the employment within the Workmen's Compensation Act and are compensable, provided the employee's act involves no unreasonable delay. Bass v. Mecklenburg County, 258 N.C. 226, 128 S.E.2d 570 (1962); Maurer v. Salem Co., 266 N.C. 381, 146 S.E.2d 432 (1966).

Where an employee sustains injury going to or from his place of work on employer's premises or premises controlled by employer, the injury is compensable, provided no unreasonable delay is chargeable to employee. Williams v. Brunswick County Bd. of Educ., 1 N.C. App. 89, 160 S.E.2d 102 (1968).

Injury on Parking Lot Provided by Employer. — Where the employer provides a parking lot on its premises next to its factory and permits its employees to park their cars in the lot, an injury received by an employee in a fall while she was walking from her parked car on her way to the other part of the employer's premises where she actually worked, is an injury arising out of and in the course of her employment within the purview of this section. Davis v. Devil Dog Mfg. Co., 249 N.C. 543, 107 S.E.2d 102 (1959).

It is usually held that an injury on a parking lot owned or maintained by the employer for his employees is an injury on the employer's premises. Maurer v. Salem Co., 266 N.C. 381, 146 S.E.2d 432 (1966); Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

Injuries sustained in automobile mishaps in company parking lots arise out of employment. Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

Adjacent Premises Used as Means of Ingress and Egress. — Employment may be said to begin when the employee reaches the entrance to the employer's premises where the work is to be done; but it is clear that in some

cases the rule extends to include adjacent premises used by the employee as a means of ingress and egress with the express or implied consent of the employer. Harless v. Flynn, 1 N.C. App. 448, 162 S.E.2d 47 (1968).

(4) Where Employer Furnishes Transportation.

Where Employer Furnishes Transportation as Incident to Contract of Employment. — While ordinarily an employer is not liable under this Chapter for an injury suffered by an employee while going to or returning from work, the employer may be held liable when he furnishes the means of transportation as an incident to the contract of employment. Smith v. City of Gastonia, 216 N.C. 517, 5 S.E.2d 540 (1939).

North Carolina has long held as compensable injuries sustained by employees while on the way to or returning from work where the employer provides the means of transportation. Williams v. Brunswick County Bd. of Educ., 1 N.C. App. 89, 160 S.E.2d 102 (1968).

Where Employer Makes Allowances to Cover Cost of Transportation. — Injuries sustained in an automobile accident by employees while on their way to or from their work in an automobile owned by one of them arise out of and in the course of their employment when, under the terms of the employment and as an incident to the contract of employment, allowances are made by the employer to cover the cost of such transportation. Puett v. Bahnson Co., 231 N.C. 711, 58 S.E.2d 633 (1950). See Phifer v. Foremost Dairy, 200 N.C. 65, 156 S.E. 147 (1930) (where defendant provided deceased with a truck for use in defendant's business and in taking deceased to and from work); Edwards v. T.A. Loving Co., 203 N.C. 189, 165 S.E. 356 (1932) (where deceased's contract of service provided for transportation by the employer).

An injury suffered by an employee while going to or from his work arises out of and in the course of employment when the employee, under the terms of the employment and, as an incident to the contract of employment, is paid an allowance to cover the cost of such transportation. Williams v. Brunswick County Bd. of Educ., 1 N.C. App. 89, 160 S.E.2d 102 (1968).

Transportation Furnished in Accordance with Custom. — Where employer hired two employees to ride on truck to help the driver unload and, on the last trip, the driver consented to let the employees off at the place on his route nearest their homes, in accordance with established custom, and one of the employees attempted to alight before the truck had completely stopped, contrary to express orders, and fell to his mortal injury, the evidence was sufficient to sustain the finding that the accident arose out of and in the course of the employment. Latham v. Southern Fish & Grocery Co., 208 N.C. 505, 181 S.E. 640 (1935).

"**The test in such cases** is whether the vehicle furnished by employer is one which the employees are required, or as a matter of right are permitted, to use by virtue of their contract, or whether it is furnished gratuitously for the mere accommodation of the workmen." Lassiter v. Carolina Tel. & Tel. Co., 215 N.C. 227, 1 S.E.2d 542 (1939), affirming award denying compensation where transportation was furnished gratuitously. See Porter v. Noland Co., 215 N.C. 724, 2 S.E.2d 853 (1939).

Abandoning Vehicle Furnished by Employer. — Where an employer was under obligation to transport its employees from the woods where they worked to a camp, and provided for that purpose a safety car attached to its railroad train, having forbidden its employees to use the more hazardous log train, and deceased was killed in attempting to get on the log train and thus return to camp, the employee was killed as result of injury by accident arising out of and in the course of his employment. Archie v. Greene Bros. Lumber Co., 222 N.C. 477, 23 S.E.2d 834 (1943).

Where making a trip to a farm to load poultry and a return trip to the place of business of the employer after the poultry was loaded constituted a substantial part of the services for which claimant was employed, the transfer of claimant from the truck of the employer to his own automobile in order that he might have it so that he could return home after he made his required report at the office of his employer, did not constitute a distinct departure on a personal errand, disassociated from his master's business, where claimant's home was located on the most direct route between the farm and the plant, and when the collision occurred claimant was proceeding on this direct route to the place of business of his employer. Brewer v. Powers Trucking Co., 256 N.C. 175, 123 S.E.2d 608 (1962).

Riding in Another Vehicle at Direction of Employer's Foreman. — The evidence tended to show that defendant's employees were required to check in at the office in the morning, were then transported to the job, and after completion of the day's work were transported back to the office where they received instructions as to the next day's work before checking out, their working time being computed from the time of checking in until the time of checking out, that on the date in question they were carried to the job in a truck, but that the president's car was sent to bring them back because of rain, that when deceased started to get in the car there were already six persons, including the driver, in the car, that the foreman said he could crowd in the car or ride in with another employee who was driving his own car, and deceased rode in with the other employee, and was fatally injured in an

accident occurring after they had reached the city in which defendant's place of business was maintained and while they were on their way to defendant's office to check out. The evidence was sufficient to support the finding of the Industrial Commission that death resulted from an accident arising out of and in the course of the employment, the general rule of nonliability for an accident occurring while an employee is being transported to or from work in a conveyance of a third person over which the employer has no control not being applicable upon the evidence. Mion v. Atlantic Marble & Tile Co., 217 N.C. 743, 9 S.E.2d 501 (1940).

(5) Employee on Call at All Times.

Injury to Police Officer on Call at All Times. — In Davis v. Mecklenburg County, 214 N.C. 469, 199 S.E. 604 (1938), the court affirmed a decision denying recovery where a rural policeman on call at all times was killed in an automobile accident while driving his own car from his home to police headquarters to report for his regular working day. The Commission had stated that the facts that he was on 24-hour duty and had the power to make arrests were not in themselves grounds for making an exception to the rule against recovery for to-and-from accidents.

A different result was reached in Smith v. City of Gastonia, 216 N.C. 517, 5 S.E.2d 540 (1937). There the deceased was a motorcycle policeman with fixed hours of active patrol duty as well as a general obligation to make arrests at other hours when law violations came to his notice and to be "on call" at all times. His cycle was furnished by the city and he had the entire care of it. He was privileged to keep it at home and did so, and was riding home after regular hours when he was killed in a collision. The Commission properly found that the death was compensable.

c. Injuries before and after Work, on Employer's Premises.

Employee Injured While at Plant after Hours on Private Business. — Where claimant, a foreman, returned to the employer's plant after his regular working hours, to attend to certain private business, but before entering upon such business he assisted with certain work of the employer, and then sat down on a wall to rest, whereupon he fell and was injured, it was held that the evidence was insufficient to sustain a finding that plaintiff's injury arose out of and in the course of his employment. Poteete v. North State Pyrophyllite Co., 240 N.C. 561, 82 S.E.2d 693 (1954).

d. Injuries during Lunch Hour.

Editor's Note. — On mealtime injuries, see 17 N.C.L. Rev. 458.

Illustrative Cases — Compensation Denied. — Findings to the effect that during lunch hour the employees were free to go as they pleased, that deceased employee had stopped his work for the lunch period and, in attempting to board a truck moving within the premises of the employer, fell and was fatally injured, with further evidence that the employee had been given no order and had no duty connected either with the truck or its contents, and was acting according to his own will, was held insufficient to show affirmatively that the injury resulted from a hazard incident to the employment, and supported the ruling of the Industrial Commission that it did not arise out of the employment. Matthews v. Carolina Std. Corp., 232 N.C. 229, 60 S.E.2d 93 (1950).

An employee who was hit by a car while crossing highway to eat lunch on employer's parking lot did not sustain an injury arising out of and in the course of employment. Horn v. Sandhill Furniture Co., 245 N.C. 173, 95 S.E.2d 521 (1956).

e. Injuries While Traveling.

Editor's Note. — On injuries to traveling employees, see 23 N.C.L. Rev. 159.

Employees whose work entails travel away from the employer's premises are held in the majority of jurisdictions to be within the course of their employment continuously during the trip, except when a distinct departure on a personal errand is shown. Martin v. Georgia-Pacific Corp., 5 N.C. App. 37, 167 S.E.2d 790 (1969).

Trip Made Primarily for Personal or Social Reasons. — Injuries received while on a trip being made primarily for personal or social reasons and not in performance of duty are not compensable, although the employer is incidentally benefited by the trip. Ridout v. Rose's 5-10-25¢ Stores, 205 N.C. 423, 171 S.E. 642 (1933) (deceased went with another to visit the other's girl and while on the visit stopped to get certain goods for his employer).

Traveling employees, whether or not on call, usually do receive protection when the injury has its origin in a risk created by the necessity of sleeping and eating away from home. The hotel fire cases are the best illustration of this. Closely related are the injuries sustained in the process of getting meals. Martin v. Georgia-Pacific Corp., 5 N.C. App. 37, 167 S.E.2d 790 (1969).

A traveling salesman is taken away from his home or headquarters by his employment; and, because of the nature of his work, he usually cannot return home each night. He must of necessity eat and sleep in various places in order to further the business of his employer; and the employer recognizes these necessities and usually pays the expenses of his lodging and meals. While lodging in a hotel or preparing to eat, or while going to or retuning

from a meal, he is performing an act incident to his employment, unless he steps aside from his employment for personal reasons. Such an employee is in continuous employment, day and night. This does not mean that he cannot step aside from his employment for personal reasons, or reasons in no way connected with his employment, just as might an ordinary employee working on a schedule of hours at a fixed location. He might rob a bank; he might attend a dance; or he might engage in other activities equally conceivable for his own pleasure and gratification, and ordinarily none of these acts would be beneficial or incidental to his employment and would constitute a stepping aside from the employment. Martin v. Georgia-Pacific Corp., 5 N.C. App. 37, 167 S.E.2d 790 (1969).

Injury to Salesman on Weekend Trip. — Evidence that plaintiff, a traveling salesman, used his employer's car for a weekend trip and was injured in a wreck in returning was held to support the finding of the Industrial Commission that the accident did not arise out of and in the course of the employment, notwithstanding that the injured employee, at the destination of the trip, met and conversed with a representative of the employer without appointment or direction of the employer, primarily in regard to a personal matter. Porter v. Noland Co., 215 N.C. 724, 2 S.E.2d 853 (1939).

When a traveling man slips in the street or is struck by an automobile between his hotel and a restaurant, the injury has been held compensable, even though the accident occurred on a Sunday evening, or involved an extended trip occasioned by employee's wish to eat at a particular restaurant. Martin v. Georgia-Pacific Corp., 5 N.C. App. 37, 167 S.E.2d 790 (1969).

Injuries arising out of the necessity of sleeping in hotels or eating in restaurants away from home are usually held compensable. Martin v. Georgia-Pacific Corp., 5 N.C. App. 37, 167 S.E.2d 790 (1969).

Fishing Trip. — Injury to a Boy Scout executive by accident while on a fishing trip on the high seas while attending an executive's conference arises out of and in the course of his employment when the executive is directed to attend the conference with all expenses paid by a Boy Scout council, and the council prepares an agenda of recreational projects, including deep sea fishing, and impliedly requires each executive to select one of the projects as an aid to his advancement and better qualifications to carry on his work in scouting. Rice v. Uwharrie Council Boy Scouts of America, 263 N.C. 204, 139 S.E.2d 223 (1964).

f. Deviation, Departure and Abandonment.

Employee Need Not Be in Exact Spot Designated by Employer. — The Workmen's Compensation Act must be liberally construed, and the term "out of the employment" will not preclude recovery for an accident occurring while an employee is not in the exact spot designated by the employer if the employee is at the place he is required to be in the performance of his duties. Howell v. Standard Ice & Fuel Co., 226 N.C. 730, 40 S.E.2d 197 (1946).

Need Not Be Actually Engaged in Performance of His Duties. — The fact that deceased was not actually engaged in the performance of his duties as watchman, at the time he was pushed over and injured unintentionally by a fellow employee in a hurry, does not perforce defeat his claim for compensation under this act where both employees had checked in for work, were on the premises and where they had a right to be. Brown v. Carolina Aluminum Co., 224 N.C. 766, 32 S.E.2d 320 (1944).

Evidence that claimant was not sure that the mill in which he was employed would be operated on the day in question and that he rode to work with another employee, requesting his son to follow in his car to ride him home in case the mill was not operated, and that upon getting to work and ascertaining that the mill would be operated, he put his lunch in the room where he worked and went to a platform at the front of the mill to tell his son not to wait for him, and that he there slipped on ice and fell to his injury is sufficient to support the finding that the injury resulted from an accident arising out of and in the course of his employment. Gordon v. Thomasville Chair Co., 205 N.C. 739, 172 S.E. 485 (1934).

Violation of Orders. — Deceased was killed in rising from basement to ground floor on a mechanical crate conveyor. Steps were provided by employer, and none of the employees rode the conveyor when the foreman was around. It was held that the denial of compensation was proper in that deceased stepped aside from the sphere of his employment in getting on the conveyor. Teague v. Atlantic Co., 213 N.C. 546, 196 S.E. 875 (1938). Cf. Archie v. Greene Bros. Lumber Co., 222 N.C. 477, 23 S.E.2d 834 (1943), ante, this note, analysis line IV, C, 3, b, (4), "Where Employer Furnishes Transportation."

Recovery was denied on the same grounds where a painter dropped his brush in a river and in violation of the foreman's orders went in after it and was drowned. Morrow v. State Highway & Pub. Works Comm'n, 214 N.C. 835, 199 S.E. 265 (1938).

Where an employee is employed solely for a particular job, such as operating a chain saw, and is positively forbidden to perform another job connected with the work, such as operating a tractor, an injury received while performing the forbidden task does not arise out of a hazard of the employment, and is not

compensable. Taylor v. Dixon, 251 N.C. 304, 111 S.E.2d 181 (1959).

Deviation from Employment in Emergency. — Deceased slept on employer's premises. On the night of the accident, some machinery had broken and deceased voluntarily went after a foreman who could fix it. No one had requested deceased to do this, although evidence showed he expected to receive pay for his time. He was killed by a passing car while on his way to get the foreman. It was held that the breakdown of machinery could not be classified as sufficient emergency to justify recovery. Davis v. North State Veneer Corp., 200 N.C. 263, 156 S.E. 859 (1931).

Acting at Request of Superior. — In Hilderbrand v. McDowell Furniture Co., 212 N.C. 100, 193 S.E. 294 (1937), recovery was denied where deceased was killed while attending a furniture market at the request of his superior. It was shown that the deceased was invited to attend, not for the purpose of learning anything helpful to his work, but to enable him to have a pleasure trip.

Return to Employment after Deviation. — After working steadily for 15 hours, claimant stopped to eat and get a haircut. He then returned to his employer's truck. He was injured in taking the truck to defendant's place of business. It was held that the temporary deviation from the course of duty was not an abandonment. Besides, the accident occurred after the employee had resumed his work. Jackson v. Dairymen's Creamery, 202 N.C. 196, 162 S.E. 359 (1932).

Salesman Going Out of His Way to Buy Cigars. — In Parrish v. Armour & Co., 200 N.C. 654, 158 S.E. 188 (1931), the injured employee was a salesman and collector, who was furnished with a car, and who had no fixed hours of employment. One evening, while on his way to make a business visit, he deviated less than a mile to buy some cigars, which he regarded as expedient to the purpose of his visit. While going from the drugstore, he was injured. Compensation award was affirmed; the accident arose out of and in the course of the employment.

Selection of More Hazardous Route. — The evidence tended to show that claimant, in the performance of his duty to go to a guard tower outside of a high wire fence, elected to climb over the fence rather than go around by the gate, which would require approximately 200 yards of travel, and was injured when he jumped from the top of the fence to avoid falling therefrom. It was held that the evidence sustained the award of compensation, and the contention that claimant climbed the fence for his own convenience rather than as a part of his duties was untenable, since the mere fact that an employee selected the more hazardous route in the performance of his duties does not defeat recovery. Hartley v. North Carolina Prison Dep't, 258 N.C. 287, 128 S.E.2d 598 (1962).

Illustrative Cases—Compensation Allowed. — Claimant was an employee in D's mill. Her work ceased at 11 o'clock one day, but she was not permitted to leave until 11:30. During this interval she was injured as she returned from downstairs to see about getting a friend a job. It was held that plaintiff's mission was "not such a departure from the employer's business . . . that it was not in the course of the employment." Bellamy v. Great Falls Mfg. Co., 200 N.C. 676, 158 S.E. 246 (1931).

When plaintiff injured his arm in raising a window to obtain a bottle of milk which he had purchased from defendant's confectionery wagon and set aside to cool, recovery was allowed, the court saying that plaintiff's conduct did not constitute such a deviation as to deprive him of the benefits of the act. Pickard v. E.M. Holt Plaid Mills, 213 N.C. 28, 195 S.E. 28 (1938).

Illustrative Cases—Compensation Denied. — The findings of fact of the Industrial Commission, supported by the evidence, were to the effect that deceased employee was a night watchman, that his duties were to make periodic inspection and to attend the furnaces and to get up steam, that on the night in question he procured his son to help him, that he instructed his son to do certain of his duties in the boiler room, that he placed a small box and plank on a walkway eight or nine feet high, with one end of the plank resting on the box, and lay down on the plank, that his son called him in time to make a periodic inspection some 30 minutes later, and that in getting up from his recumbent position, while his son was engaged in the performance of the employee's active duties in the boiler room, the employee fell from the walkway and was fatally injured. The facts did not compel the conclusion, as a matter of law, that at the time of injury the employee had not deviated from or abandoned his employment, and therefore the award of the Industrial Commission denying compensation was upheld. Stallcup v. Carolina Wood Turning Co., 217 N.C. 302, 7 S.E.2d 550 (1940).

Deceased, a delivery boy, went to employer's storeroom after groceries. He stopped by a private bedroom and was killed by the accidental discharge of a gun which he had found in the room. The evidence was held sufficient to support the Commission's finding that the accident did not arise out of and in the course of the employment. Smith v. S.E. Hauser & Co., 206 N.C. 562, 174 S.E. 455 (1934).

4. Evidence and Burden of Proof.

Burden of Proof Is on Claimant. — The person claiming the benefit of compensation has the burden of showing that the injury complained of resulted from an accident arising

out of and in the course of the employment. Henry v. A.C. Lawrence Leather Co., 231 N.C. 477, 57 S.E.2d 760 (1950); Taylor v. Twin City Club, 260 N.C. 435, 132 S.E.2d 865 (1963).

To establish a compensable claim, the burden is on claimant to prove he sustained an injury by accident arising out of and in the course of his employment. O'Mary v. Land Clearing Corp., 261 N.C. 508, 135 S.E.2d 193 (1964).

Competency of Evidence. — "It must not only appear by competent evidence that the injury was received in the course of the employment, but also that it arose out of the employment as well. Hearsay evidence is not competent to establish either fact." Plyler v. Charlotte Country Club, 214 N.C. 453, 199 S.E. 622 (1938). In this case recovery was denied where a caddy cut his toe and died of infection. The only evidence to show that he was working at the time of the accident was some of his own statements, to all of which objection was properly entered.

Where no objection is made before the hearing commissioner to the introduction of hearsay evidence, the objection must be treated as waived and the evidence may be considered. The principle on which hearsay evidence is excluded by rules of evidence relates to its competency, not to its relevancy. Maley v. Thomasville Furniture Co., 214 N.C. 589, 200 S.E. 438 (1938) (where objection was entered for the first time before the full Commission. The court also held in this case that where deceased, a sawyer, was seen standing beside his running machine with a small cut on his arm freshly bleeding and where he subsequently died of blood poisoning from this injury, there was sufficient circumstantial evidence to support the Commission's award allowing compensation).

Sufficiency of Evidence Is Question of Law. — The question whether the evidence is sufficient to support the findings is one of law to be determined by the courts. Lawrence v. Hatch Mill, 265 N.C. 329, 144 S.E.2d 3 (1965).

Proof That Employee Was at Place of Employment Doing Usual Work Is Insufficient. — It must be kept in mind that while an accident arising out of an employment usually occurs in the course of it, it does not necessarily or invariably do so. Nor does an accident which occurs in the course of an employment necessarily or inevitably arise out of it. Therefore proof that an employee was at his place of employment and was doing his usual work at the time of the injury, without more, is insufficient to support an award of compensation. Sweatt v. Rutherford County Bd. of Educ., 237 N.C. 653, 75 S.E.2d 738 (1953).

Where Cause of Injury Not Explained. — Where an employee, while about his work, suffers an injury in the ordinary course of employment, the cause of which is not explained, but which is a natural and probable result of a risk thereof, and the Commission finds from the evidence that the injury arose out of the employment, an award will be sustained. Vause v. Vause Farm Equip. Co., 233 N.C. 88, 63 S.E.2d 173 (1951); Poteete v. North State Pyrophyllite Co., 240 N.C. 561, 82 S.E.2d 693 (1954); Cole v. Guilford County, 259 N.C. 724, 131 S.E.2d 308 (1963); Taylor v. Twin City Club, 260 N.C. 435, 132 S.E.2d 865 (1963).

When an accident occurred in the course of employment, and there is no affirmative evidence that it arose from a cause independent of the employment, an award will be sustained. Taylor v. Twin City Club, 260 N.C. 435, 132 S.E.2d 865 (1963).

Employee Found Dead or Injured at His Place of Employment. — Deceased was required to report to work before daylight. On the particular morning in question, he was told to return later in the day. At daylight he was found in a dying condition at the base of an unlighted platform on defendant's premises. Deceased had to cross the platform to leave the premises. It was held that there was sufficient evidence to sustain the finding that the accident arose out of deceased's employment. Morgan v. Cleveland Cloth Mills, 207 N.C. 317, 177 S.E. 165 (1934).

Death by violent means is prima facie evidence of death by accident. The burden of proving suicide is upon the party seeking to establish it. McGill v. Town of Lumberton, 215 N.C. 752, 3 S.E.2d 324 (1939).

Death from Pistol Shot. — Where claimants' evidence tended to show that deceased was employed as chief of police of defendant municipality and that deceased died as a result of a shot from a pistol while he was in office, proof of death by violence raises a presumption of accidental death, casting the burden of going forward with the evidence upon the employer and insurance carrier to show that deceased killed himself, when relied on by them, and claimants' evidence is sufficient to support the finding of the Industrial Commission that death resulted from an accident arising out of and in the course of the employment. McGill v. Town of Lumberton, 218 N.C. 586, 11 S.E.2d 873 (1940).

Evidence tending to show that deceased came to his death as a result of a pistol wound while at a place where he had a right to be in the course of his employment, without evidence that he was authorized to keep a pistol or use it in the business of the employer, is insufficient to support an award of compensation on the ground that in the absence of a showing of suicide it will be presumed that the death resulted from an accident, since, even so, there is neither presumption nor evidence to support the necessary basis for compensation that the accident arose out of the employment. Bolling

v. Belk-White Co., 228 N.C. 749, 46 S.E.2d 838 (1948).

Evidence Held Sufficient. — Where the claimant, while working in an upholstering plant, discovered that an upholstering tack had gone through his shoe and cut his toe, and subsequently infection set in, the Commission's finding that the injury arose out of and in the course of the employment was conclusive. Kearns v. Biltwell Chair & Furniture Co., 222 N.C. 438, 23 S.E.2d 310 (1942).

Evidence that claimant received an injury while attempting, alone, to elevate and hold a 175 pound cabinet in place while another workman secured it to the wall, and that three men were usually assigned to the installation of such cabinets on the construction job, was sufficient to sustain a finding that claimant suffered a compensable injury by accident arising out of and in the course of his employment. Davis v. Summitt, 259 N.C. 57, 129 S.E.2d 588 (1963).

Findings of fact by the Industrial Commission were supported by competent evidence and supported its conclusion of law that the deceased's injuries resulting in death did not arise out of and in the course of his employment. Thornton v. J.A. Richardson Co., 258 N.C. 207, 128 S.E.2d 256 (1962).

Evidence Held Insufficient. — In Plyler v. Charlotte Country Club, 214 N.C. 453, 199 S.E. 622 (1938), the evidence was insufficient to support finding that injury arose out of employment.

Evidence held insufficient to sustain the finding of injury by accident. Lawrence v. Hatch Mill, 265 N.C. 329, 144 S.E.2d 3 (1965).

5. Miscellaneous Illustrative Cases.

Injury Sustained While Taking Medical Test. — An injury sustained by an employee while taking a medical test or examination, which test or examination is required by law in order for the employee to continue to hold her job, does not constitute an accident arising out of and in the course of her employment within the meaning of this section. King v. Arthur, 245 N.C. 599, 96 S.E.2d 846 (1957).

For comment, see 36 N.C.L. Rev. 110 (1957).

Electric Shock. — The record disclosed competent evidence sufficient to support the Industrial Commission in finding death was caused by electric shock by accident arising out of and in the course of employment. Blalock v. City of Durham, 244 N.C. 208, 92 S.E.2d 758 (1956).

Death of Policeman Held Compensable. — See Andrews v. Town of Princeville, 245 N.C. 669, 97 S.E.2d 110 (1957).

Injury to Minister Moving from Parsonage. — Where claimant, who was employed as a minister by defendant church and was furnished a parsonage as part of his remuneration, agreed for the benefit of the church to move out of the parsonage two weeks before the termination of his employment in order that repairs might be made and while he was moving his stove from the parsonage he suffered a back injury, the injury could not be traced to his employment as minister, since the evidence plainly showed his injury arose out of the performance of an act personal to himself and his family. Bryan v. First Free Will Baptist Church, 267 N.C. 111, 147 S.E.2d 633 (1966).

Arrest Held outside Scope of Employment of Jailer. — Deceased who was employed by the sheriff as his deputy and by the county commissioners as jailer, met his death in attempting to arrest one who had just shot his own wife at a house two doors from the rear of the jail. The Commission was of opinion that death resulted from accident arising out of and in the course of his employment either as deputy sheriff or as jailer or as "deputy-sheriff jailer." The statute did not then treat deputies as employees of the county (see subdivision (2) of this section) and the Supreme Court remanded the case for a finding specifically on whether the accident was in the course of his employment as jailer. Gowens v. Alamance County, 214 N.C. 18, 197 S.E. 538 (1938). The Commission then found that question in the affirmative but was later overruled on the ground that the attempted arrest was clearly "outside the scope of his employment as jailer."

Highway Patrolman Using Airplane to Search for Escaped Convict. — Two highway patrolmen were killed while in an airplane searching for an escaped convict. The award of the commissioner granting compensation was reversed by the full Commission, and reinstated on appeal to the superior court. The Supreme Court affirmed the award. The case turned on the question of the authority of the patrolmen to attempt to apprehend the fugitive. The court found such authority, and held that the use of an airplane was not a novel or unusual method of carrying out such a purpose. Galloway v. Department of Motor Vehicles, 231 N.C. 447, 57 S.E.2d 799 (1950).

Employee Mowing Lawn at Employer's Residence. — Where the claimant was employed to drive a delivery truck and to do janitorial work both in the employer's place of business and at the employer's home, and was injured while mowing the lawn at the employer's residence, the injury was not compensable, and was not covered by a compensation insurance policy which provided coverage solely in connection with the employer's business having a definite location. Burnett v. Palmer-Lipe Paint Co., 216 N.C. 204, 4 S.E.2d 507 (1939).

D. Injury from Disease.

Cross Reference. — As to heart attack or stroke as result of accident, see ante, this note, analysis line IV, B, "Accident."

Injury from Occupational Disease. — Where claimant worked in an asbestos plant for six or seven years, and a dust removing system was not installed until about a year before claimant's discharge when a medical examination disclosed that he was suffering from asbestosis, the evidence showed the injury was the result of an occupational disease not compensable under the Workmen's Compensation Act prior to its amendment by Laws 1935, c. 123. Swink v. Carolina Asbestos Co., 210 N.C. 303, 186 S.E. 258 (1936). See §§ 97-52 to 97-76.

When this problem first came to the Supreme Court, a line of reasoning was pursued which made the act applicable to some cases of occupational disease. In McNeely v. Carolina Asbestos Co., 206 N.C. 568, 174 S.E. 509 (1934), an action was brought at common law on the ground that, due to defendant's negligence over a period of months, plaintiff had contracted pulmonary asbestosis. The court held that since defendant was negligent, plaintiff's injury was not incidental to his employment and, furthermore, was not deprived of its accidental character by the mere fact of its requiring several months to develop. Accordingly, recovery was denied plaintiff in his suit at common law because the injury was declared to be covered by the act. This decision was followed in Johnson v. Hughes & S. Dairies, Inc., 207 N.C. 544, 177 S.E. 632 (1935). Cf. Sullivan's case, 265 Mass. 497, 164 N.E. 457 (1929).

Occupational Disease Act Constitutes Implied Amendment to This Section. — The Occupational Disease Act, § 97-52 et seq., constitutes an implied amendment to this section. Under that act, specified occupational diseases are compensable. In adopting this amendment, the legislature "was not making provision for compensation for 'injuries by accident' as that term is ordinarily understood. Provision for that type of injury had already been made in the original act. It was considering those diseases the causative origin of which is occupational and designating those which are to be deemed within the new and extended definition of 'injury by accident' it was then providing." Henry v. Lawrence Leather Co., 234 N.C. 126, 66 S.E.2d 693 (1951).

Compensation for Disease Resulting from Accident Not Precluded. — Section 97-52, providing that only the occupational diseases therein specified should be compensable, relates only to occupational diseases, which are those resulting from long and continued exposure to risks and conditions inherent and usual in the nature of the employment, and this section does not preclude compensation for a disease not inherent in or incident to the nature of the employment when it results from an accident arising out of and in the course of the employment. MacRae v. Unemployment Compensation Comm'n, 217 N.C. 769, 9 S.E.2d 595 (1940).

The employer is responsible for any disease resulting naturally and unavoidably from an accident. Williams v. Thompson, 200 N.C. 463, 157 S.E. 430 (1931) (where plaintiff injured his eye and later unavoidably contracted gonorrhea ophthalmia in the injured organ). Clark v. Carolina Cotton & Woolen Mills, 204 N.C. 529, 168 S.E. 816 (1933) (evidence was sufficient to support the finding that plaintiff's fall resulted in myelitis). See 10 N.C.L. Rev. 407; MacRae v. Unemployment Compensation Comm'n, 217 N.C. 769, 9 S.E.2d 595 (1940).

Hemorrhagic Pachymeningitis Resulting from Blow on Head. — Plaintiff while about his employer's business, was struck on the back of the head by hides he was jerking from hooks about 10 feet from the floor, and had to stop work for a very short time. As a result of the blow plaintiff contracted hemorrhagic pachymeningitis which caused his total disability. It was held to be an injury by accident, arising out of and in the course of his employment within this section. Eller v. Lawrence Leather Co., 222 N.C. 23, 21 S.E.2d 809 (1942).

Accident and Exposure as Contributing to Death from Acute Nephritis. — The evidence before the Industrial Commission tended to show that the deceased employee, for whose death compensation was sought, had been in exceptionally good health up to the time of the accident, that he fell from a platform, breaking his leg, and lay where he fell for about a half hour, exposed to the cool weather, that he was then discovered and carried into the office, where he had to wait some two hours for medical attention. There was expert testimony to the effect that the exposure was a contributing factor causing acute nephritis resulting in death, and that the accident and exposure accelerated the employee's death. It was held that the evidence was sufficient to support the finding of the Industrial Commission that the disease resulted naturally and unavoidably from the accident. Doggett v. South Atl. Warehouse Co., 212 N.C. 599, 194 S.E. 111 (1937).

Gonorrhea Ophthalmia Resulting from Accident. — The definition of injury given in § 97-2(6) also provides that it "shall not include a disease in any form, except where it results naturally and unavoidably from the accident." In applying this in Williams v. Thompson, 200 N.C. 463, 157 S.E. 430 (1931), the Commission evinced a willingness to construe definitions liberally. Plaintiff, a truck driver, sustained an injury to his eye while cleaning a carburetor. The injury irritated his eye and resulted in ulcer. Seven days after the accident the plaintiff was treated by a doctor, who gave the plaintiff some lotion to use. He visited the doctor three times. Then gonorrhea ophthalmia

showed up, which was on the thirteenth day after the accident. As a result of the infection the plaintiff lost one eye and suffered a partial loss of use in the other eye. Compensation was allowed. The Commission said that the disease was "natural" because one infection opened the way for other infections. There was more trouble with the word "unavoidably." The Commission quotes from the opinions rendered in other jurisdictions to illustrate that "unavoidably" does not mean "absolutely inescapable," but that "a thing is generally considered unavoidable when common prudence and foresight cannot prevent it." And since no evidence was presented that the plaintiff had been careless, and since the plaintiff had no reason to suspect a possible infection of this nature, the disease was found to have resulted unavoidably from the accident. This liberal construction tends to effectuate the general purpose of the Workmen's Compensation Act. 8 N.C.L. Rev. 421.

As to falls due to dizziness, vertigo, epilepsy and like causes as compensable accidents, see 26 N.C.L. Rev. 320. See also ante, this note, analysis line IV, C, 2, b, "Falls."

Ordinarily, heart disease is not an injury and death therefrom is not ordinarily compensable. West v. North Carolina Dep't of Conservation & Dev., 229 N.C. 232, 49 S.E.2d 398 (1948); Duncan v. City of Charlotte, 234 N.C. 86, 66 S.E.2d 22 (1951); Lewter v. Abercrombie Enterprises, Inc., 240 N.C. 399, 82 S.E.2d 410 (1954).

In heart cases the decisions require a showing that the exertion was in some way unusual or extraordinary. Lewter v. Abercrombie Enterprises, Inc., 240 N.C. 399, 82 S.E.2d 410 (1954).

Dilatation of the Heart Due to Unusual Exertion. — A policeman 56 years of age, who was in good health and without any physical defect or disease, arrested a young man, who, because of intoxication violently and viciously resisted, and after the officer subdued him and transported him to the jail, the officer and another had to carry the prisoner up three flights of stairs because the elevator was out of order. The officer collapsed with acute dilatation of the heart due to the unusual exertion. This injury to the heart muscle was chronic and progressive and the policeman suffered a fatal heart attack some 10 months thereafter. It was held that the evidence warranted the conclusion that the injury to the heart resulted not from inherent weakness or disease but from an unusual and unexpected happening, and that therefore death resulted from an accident within the meaning of this section. Gabriel v. Town of Newton, 227 N.C. 314, 42 S.E.2d 96 (1947). See Lewter v. Abercrombie Enterprises, Inc., 240 N.C. 399, 82 S.E.2d 410 (1954).

Evidence Insufficient to Show Coronary Occlusion Arose Out of and in Course of Employment. — Evidence that plaintiff suffered a coronary occlusion while rolling a heavy rope net in the course of his employment, with medical expert testimony that the exercise could not be the cause of the condition, although the attack might have been accelerated or precipitated by the exertion, was insufficient to sustain a finding that the coronary occlusion and resulting myocardial infarction arose out of and in the course of the employment. Bellamy v. Morace Stevedoring Co., 258 N.C. 327, 128 S.E.2d 395 (1962).

Contracting Contagious Disease. — Tuberculosis contracted from exposure to the cough of one actively infected who was seated in close proximity at work is not an occupational disease but may be found to have resulted naturally and unavoidably from an accident. MacRae v. Unemployment Compensation Comm'n, 217 N.C. 769, 9 S.E.2d 595 (1940). See 10 N.C.L. Rev. 407.

Employee Contracting Pneumonia. — Where an employee got wet in washing certain machines, although furnished with special clothes, and while removing ashes, was in the sunshine and open air, and the sudden change in temperature caused him to contract pneumonia, from which he died, it was held that the death was not the result of an accidental injury. Slade v. Willis Hosiery Mills, 209 N.C. 823, 184 S.E. 844 (1936).

E. Aggravation of Existing Infirmity; Contributing to Injury.

Injury Aggravating Preexisting Infirmity or Disease Is Compensable. — When an employee afflicted with a preexisting disease or infirmity suffers a personal injury by accident arising out of and in the course of his employment, and such injury materially accelerates or aggravates the preexisting disease or infirmity and thus proximately contributes to the death or disability of the employee, the injury is compensable even though it would not have caused death or disability to a normal person. Anderson v. Northwestern Motor Co., 233 N.C. 372, 64 S.E.2d 265 (1951).

Blow or Strain Aggravating Existing Heart Disease. — Findings to the effect that the employee suffered an injury arising out of and in the course of the employment, which injury aggravated a preexisting heart condition and caused death, will support an award for compensation and burial expenses. Wyatt v. Sharp, 239 N.C. 655, 80 S.E.2d 762 (1954).

Evidence Insufficient to Show Death as Natural Result of Accident. — Deceased broke his leg from a fall on the job. He was then 65 and had arteriosclerosis, arthritis, and heart trouble. While laid up he suffered with a bladder ailment which two attending

physicians thought was caused or aggravated by his inactivity in bed. Over seven months later he died from the heart ailment and arthritis which a different attending physician thought possibly or even probably would have been aggravated by a bladder condition such as reported by the physicians who first looked after him but of which the witness had no knowledge. He thought the accident to have been only a remote cause of his death, however. It was held that the evidence was insufficient to support the Commission's finding that deceased died while totally disabled from the accident and as a natural result of it. Gilmore v. Hoke County Bd. of Educ., 222 N.C. 358, 23 S.E.2d 292 (1942).

V. DISABILITY.

"Disability" Construed. — The term "disability," as used in the Workmen's Compensation Act, means incapacity because of injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of injury. Watkins v. Central Motor Lines, 279 N.C. 132, 181 S.E.2d 588 (1971).

How Disability Measured. — Disability, under the Workmen's Compensation Act, is measured by the capacity or incapacity of the employee to earn the wages he was receiving at the time of the injury, by the same or any other employment. And the fact that the same wages are paid by the employer because of long service, does not alter the rule. Branham v. Denny Roll & Panel Co., 223 N.C. 233, 25 S.E.2d 865 (1943); Dail v. Kellex Corp., 233 N.C. 446, 64 S.E.2d 438 (1951); Hill v. DuBose, 234 N.C. 446, 67 S.E.2d 371 (1951).

The disability of an employee is to be measured by his capacity or incapacity to earn the wages he was receiving at the time of the injury. Loss of earning capacity is the criterion. If there is no loss of earning capacity, there is no disability within the meaning of the act. Dail v. Kellex Corp., 233 N.C. 446, 64 S.E.2d 438 (1951).

Loss of earning capacity is the criterion. Compensation must be based upon loss of wage-earning power rather than the amount actually received. It was intended by this section to provide compensation only for loss of earning capacity. Hence the finding that claimant had earned $7 per week for the period from November 25, 1949, to July 18, 1950, was not the proper basis for determining the award. Hill v. DuBose, 234 N.C. 446, 67 S.E.2d 371 (1951); Ashley v. Rent-A-Car Co., 271 N.C. 76, 155 S.E.2d 755 (1967).

An award of compensation based upon a finding as to the amount the claimant had earned since the date on which total permanent disability had ceased, rather than upon his capacity or ability to earn, is erroneous. Hill v. DuBose, 237 N.C. 501, 75 S.E.2d 401 (1953).

"Disability" Signifies Impairment of Wage-Earning Capacity. — To obtain an award of compensation for an injury under the Workmen's Compensation Act, an employee must establish that his injury caused him disability, unless it is included in the schedule of injuries made compensable by § 97-31 without regard to loss of wage-earning power. As used here, the term "disability" signifies an impairment of wage-earning capacity rather than a physical impairment. Anderson v. Northwestern Motor Co., 233 N.C. 372, 64 S.E.2d 265 (1951).

Under the Workmen's Compensation Act, disability refers not to physical infirmity but to a diminished capacity to earn money. Hall v. Thomason Chevrolet, Inc., 263 N.C. 569, 139 S.E.2d 857 (1965); Burton v. Peter W. Blum & Son, 270 N.C. 695, 155 S.E.2d 71 (1967); Ashley v. Rent-A-Car Co., 271 N.C. 76, 155 S.E.2d 755 (1967).

"Disability," as used in the Workmen's Compensation Act, means impairment of wage-earning capacity rather than physical impairment. Morgan v. Thomasville Furniture Indus., 2 N.C. App. 126, 162 S.E.2d 619 (1968); Snead v. Sandhurst Mills, Inc., 8 N.C. App. 447, 174 S.E.2d 699 (1970).

Definition Read into § 97-38. — The definition of the word "disability" as it is defined in subdivision (9) of this section must be read into § 97-38 in lieu of the word "disability" therein. Burton v. Peter W. Blum & Son, 270 N.C. 695, 155 S.E.2d 71 (1967).

Capacity to Earn Is Test of "Disability". — Capacity to earn the same wages, and not the particular employer's policy or willingness to pay wages for an undetermined time, is the test of disability. Ashley v. Rent-A-Car Co., 271 N.C. 76, 155 S.E.2d 755 (1967).

There is no "disability" if the employee is receiving the same wages in the same or any other employment. That "in the same" employment he is not required to perform all the physical work theretofore required of him can make no difference. Even so, if this be not "the same employment" then it clearly comes within the term "other employment." To remove the employment from one classification necessarily shifts it to the other. Furthermore, there is no language used in this section or in any other part of the statute which even suggests that "other employment" must be with a different employer. Branham v. Denny Roll & Panel Co., 223 N.C. 233, 25 S.E.2d 865 (1943).

Definition Not Applicable to Cases of Asbestosis or Silicosis. — The definition of "disability" contained in this section is not applicable to cases of disablement from asbestosis or silicosis. "Disability" resulting from asbestosis or silicosis means the event of becoming actually incapacitated from performing normal labor in the last occupation

in which remuneratively employed. Thus, one actually incapacitated by asbestosis or silicosis is entitled to compensation under § 97-29 even though he may be earning the same or greater wages in a different employment. Honeycutt v. Carolina Asbestos Co., 235 N.C. 471, 70 S.E.2d 426 (1952). See §§ 97-54, 97-55.

Presumption of End of Disability. — If an award is made by the North Carolina Industrial Commission, payable during disability, there is a presumption that disability lasts until the employee returns to work and likewise a presumption that disability ends when the employee returns to work at wages equal to those he was receiving at the time his injury occurred. Watkins v. Central Motor Lines, 279 N.C. 132, 181 S.E.2d 588 (1971).

Receipt of Same Wages after Injury Creates Rebuttable Presumption. — Receipt of the same wages after injury should create no stronger presumption that disability has ended than the presumption which arises on an employee's returning to work. In both instances a rebuttable presumption of fact arises. Ashley v. Rent-A-Car Co., 271 N.C. 76, 155 S.E.2d 755 (1967).

But Is Not Conclusive Proof That No "Disability" Exists. — The amount of wages received by the employee after his injury should be strong evidence of his capacity or incapacity to earn wages, but receipt of wages in the amount received before the injury cannot be conclusive proof that no "disability" exists. Ashley v. Rent-A-Car Co., 271 N.C. 76, 155 S.E.2d 755 (1967).

Employer Given Benefit of any Wages Earned after Injury. — Subdivision (9) is drawn so as to give the employer the benefit of wages which plaintiff, after his injury, is able to earn from any other source. Barnhardt v. Yellow Cab Co., 266 N.C. 419, 146 S.E.2d 479 (1966).

VI. COMPENSATION.

"Compensation," means money relief afforded according to a scale established and for the persons designated in this Chapter. Ivey v. North Carolina Prison Dep't, 252 N.C. 615, 114 S.E.2d 812 (1960); Bowman v. Comfort Chair Co., 271 N.C. 702, 157 S.E.2d 378 (1967).

Involves More Than Burial Expenses. — The definition of compensation in this section includes burial expenses, but it takes the whole to constitute compensation and not one of its parts. Compensation for wrongful death involves more than the burial of the body. Ivey v. North Carolina Prison Dep't, 252 N.C. 615, 114 S.E.2d 812 (1960).

Types of Compensation. — The Workmen's Compensation Act provides primarily for four several types of compensation to be paid to employees covered by the act. They are:

1. Compensation for disability, dependent as to amount upon whether the injury produces a permanent total, a permanent partial, a total temporary or a partial temporary incapacity. §§ 97-29, 97-30.

2. Compensation in stipulated amounts for loss of some part of the body such as a finger or toe, a leg or arm. § 97-31.

3. Compensation for death. § 97-38.

4. Compensation for bodily disfigurement. § 97-31. Branham v. Denny Roll & Panel Co., 223 N.C. 233, 25 S.E.2d 865 (1943).

Payment of medical or hospital expenses constitutes no part of compensation to an employee or his dependents under the provisions of the Workmen's Compensation Act. Whitted v. Palmer-Bee Co., 228 N.C. 447, 46 S.E.2d 109 (1948). See Thompson v. Virginia & C.S.R.R., 216 N.C. 554, 6 S.E.2d 38 (1939); Morris v. Laughlin Chevrolet Co., 217 N.C. 428, 8 S.E.2d 484, 128 A.L.R. 132 (1940).

VII. CHILD, GRANDCHILD, ETC.

Subdivision (12) recognizes a distinction between actual and legal dependency. A legal dependence is sufficient and the law fixes that type of responsibility on the father of an illegitimate. Hewett v. Garrett, 274 N.C. 356, 163 S.E.2d 372 (1968).

Common Law Discarded. — The philosophy of the common law, which denied an illegitimate child any rights, legal or social, as against its father, and imposed no duty upon the father with respect to the child, is discarded by this statute. Hewett v. Garrett, 274 N.C. 356, 163 S.E.2d 372 (1968); Hewett v. Garrett, 1 N.C. App. 234, 161 S.E.2d 157 (1968).

When an illegitimate child qualifies as a child, the status for compensation purposes continues until the child becomes 18 years of age or unless she marries before reaching that age. Hewett v. Garrett, 274 N.C. 356, 163 S.E.2d 372 (1968).

The dependency which this statute recognizes as the basis of the right of the child to compensation grows out of the relationship, which in itself imposes upon the father the duty to support the child, and confers upon the child the right to support by its father. The status of the child, social or legal, is immaterial. Hewett v. Garrett, 274 N.C. 356, 163 S.E.2d 372 (1968); Hewett v. Garrett, 1 N.C. App. 234, 161 S.E.2d 157 (1968).

The dependency referred to in subdivision (12) is treated as a legal rather than as a factual concept. Hewett v. Garrett, 1 N.C. App. 234, 161 S.E.2d 157 (1968).

The wholly dependent provision of subdivision (12) applies only in case of married children. It does not apply to acknowledged illegitimates or other children who are unmarried and who are under 18. Hewett v. Garrett, 274 N.C. 356, 163 S.E.2d 372 (1968).

Posthumous Illegitimate Child. — Deceased supported a housekeeper who bore him a posthumous illegitimate child. The Supreme Court reversed the Commission's opinion that the child was not a dependent. It stated that the "dependency which the statute recognizes as a basis of the right of the child to compensation grows out of the relationship, which in itself imposes upon the father the duty to support the child, and confers upon the child the right to support by its father. The status of the child, social or legal, is immaterial." Lippard v. Southeastern Express Co., 207 N.C. 507, 177 S.E. 801 (1935).

VIII. WIDOW; WIDOWER.

A second or subsequent marriage is presumed legal until the contrary is proven and the burden of the issue is upon a plaintiff who attempts to establish a property right which is dependent upon the invalidity of such a marriage. The plaintiff cannot recover because of the failure of defendant to carry the burden. Kearney v. Thomas, 225 N.C. 156, 33 S.E.2d 871 (1945).

Divorce and Remarriage in Another State. — On the conflict of laws question where there has been a divorce and remarriage in another state, and a subsequent controversy develops as to which is the "widow," see Rice v. Rice, 336 U.S. 674, 69 S. Ct. 751, 93 L. Ed. 957 (1949); 28 N.C.L. Rev. 265.

Widower Conclusively Presumed to Be Wholly Dependent. — At the time of her death, deceased lived with her husband but did not contribute to his support. Section 97-39 places a widower among those conclusively presumed to be wholly dependent. This is repugnant to subdivision (15) of this section. It was held that § 97-39 operates to repeal so much of subdivision (15) of this section as is inconsistent with it. Martin v. Glenwood Park Sanatorium, 200 N.C. 221, 156 S.E. 849 (1930).

IX. HERNIA.

Hernia Not Discovered Until Some Days after Commencement of Pain. — It is sufficient for the Commission to find the facts required under this section and award compensation if the pain immediately followed the accident although the hernia was not discovered until diagnosis by a physician some days thereafter. Ussery v. Erlanger Cotton Mills, 201 N.C. 688, 161 S.E. 307 (1931).

Sudden Appearance of Lesion and Enlargement of Inguinal Ring. — Plaintiff was a plumbing foreman. He had been instructed to lay off his workmen and to finish a job with one other employee. In helping the other employee lift a heavy pipe, he felt a pain in his abdomen. He consulted a physician who found an enlargement of the left inguinal ring and a bulge but no protrusion. The doctor strapped plaintiff and gave him a truss. Eighteen days later an actual hernia was found. An award granting compensation for hernia was affirmed, the court saying that the accident consisted of the plaintiff's having to do unusual work and that the lesion and enlargement of the inguinal ring, from which the fully developed hernia naturally comes, did result immediately. Moore v. Engineering & Sales Co., 214 N.C. 424, 199 S.E. 605 (1938).

Hernia Must Follow Accident. — In every case it must definitely appear that the hernia resulted immediately from an accident. Ussery v. Erlanger Cotton Mills, 201 N.C. 688, 161 S.E. 307 (1931).

Unusual Circumstances or Exertion Required. — As illustrative of the position requiring unusual circumstances or exertion, see Moore v. Engineering & Sales Co., 214 N.C. 424, 199 S.E. 605 (1938).

A back injury or hernia suffered by an employee does not arise by accident if the employee at the time was merely carrying out his usual and customary duties in the usual way. Pardue v. Blackburn Bros. Oil & Tire Co., 260 N.C. 413, 132 S.E.2d 747 (1963).

In cases involving back injury or hernia, the elements constituting accident are the interruption of the routine of work and the introduction thereby of unusual conditions likely to result in unexpected consequences. Pardue v. Blackburn Bros. Oil & Tire Co., 260 N.C. 413, 132 S.E.2d 747 (1963).

A hernia suffered by an employee does not arise by accident if the employee at the time was merely carrying out his usual and customary duties in the usual way. Gray v. Durham Transfer & Storage, Inc., 10 N.C. App. 668, 179 S.E.2d 883 (1971); Southards v. Byrd Motor Lines, 11 N.C. App. 583, 181 S.E.2d 811 (1971).

The mere fact that plaintiff was handling a different commodity than usual, without more, and that the weather was hot, are not enough to satisfy the requirement of an "interruption of the work routine and the introduction of unusual conditions likely to result in unpredicted consequences." Nor is the mere fact that plaintiff was in a hurry. Southards v. Byrd Motor Lines, 11 N.C. App. 583, 181 S.E.2d 811 (1971).

Where the evidence showed that a hernia occurred while the employee was performing his work in the customary and usual manner, and there was no evidence of any unusual condition or any slipping or falling by the employee, there was no evidence to justify a finding that the hernia resulted from an accident, and an award of compensation must be reversed. Hensley v. Farmers Fed'n Cooperative, 246 N.C. 274, 98 S.E.2d 289 (1957); Holt v. Cannon Mills Co., 249 N.C. 215, 105 S.E.2d 614 (1958).

If an employee, while performing his regular duties in the "usual and customary manner," receives an injury resulting in a hernia, such injury is not compensable. Faires v. McDevitt & Street Co., 251 N.C. 194, 110 S.E.2d 898 (1959).

Evidence Justifying Finding of Compensable Hernia. — In Moore v. Engineering & Sales Co., 214 N.C. 424, 199 S.E. 605 (1938), it was held that claimant's injury resulted from an accident within the contemplation of the Workmen's Compensation Act and that the evidence justified the Industrial Commission in finding that hernia appeared "suddenly" within the meaning of this section.

Evidence held sufficient to sustain the finding of the Industrial Commission that the hernia was compensable under subdivision (18) of this section. Rice v. Thomasville Chair Co., 238 N.C. 121, 76 S.E.2d 311 (1953).

Claimant in delivering milk to a cafe had to lift a box of chipped ice from the storage box. On this occasion he felt a sharp abdominal pain as he lifted and "he got sick" but, after a short rest, worked till noon when he reported that he had strained his side and went home. Hernia appeared a few days later. The employer contended that the injury was not caused by accident but only by the doing of regular work in the regular way and that accident involves external force. It was held that the sudden and unexpected rupture was not a natural and probable consequence of the work but an accidental injury and compensable. Smith v. Cabarrus Creamery Co., 217 N.C. 468, 8 S.E.2d 231 (1940).

Evidence tending to show that the employee was a carpenter and customarily did the work of a carpenter, that in removing concrete forms carpenters usually "stripped" the forms and laborers lifted and removed them, that on the occasion in question other carpenters and helpers had been withdrawn from the job, that the lifting of the forms was usually and customarily done by two men, and that while the employee was attempting to lift one of the forms by himself, requiring extreme exertion and strain in confined and difficult place of work, he felt a sharp pain which continued until he had received medical treatment for the hernia, is held sufficient to support a finding of the Industrial Commission that the employee suffered an injury by accident arising out of and in the course of his employment, resulting in the hernia. Faires v. McDevitt & Street Co., 251 N.C. 194, 110 S.E.2d 898 (1959).

§ 97-3. Presumption that all employers and employees have come under provisions of Article.—From and after July 1, 1929, every employer and employee, except as herein stated, shall be presumed to have accepted the provisions of this Article respectively to pay and accept compensation for personal injury or death by accident arising out of and in the course of the employment, and shall be bound thereby, unless he shall have given, prior to any accident resulting in injury or death, notice to the contrary in the manner herein provided. (1929, c. 120, s. 4.)

Cross Reference. — See § 97-13 and note.

Presumption of Acceptance of Act. — In Pilley v. Greenville Cotton Mills, 201 N.C. 426, 160 S.E. 479 (1931), it is said: "Under the Workmen's Compensation Act every employer and employee, except as therein stated, is presumed to have accepted the provisions of the act and to pay and accept compensation for personal injury or death as therein set forth. The plaintiff, not being in the excepted class, is bound by the presumption." Miller v. Roberts, 212 N.C. 126, 193 S.E. 286 (1937). See Lee v. American Enka Corp., 212 N.C. 455, 193 S.E. 809 (1937).

An allegation that the employee had not accepted the provisions of the act is immaterial for the reason that this section provides in substance that every employer and employee coming within the purview of the act is presumed to have accepted the provisions thereof. Hanks v. Southern Pub. Util. Co., 204 N.C. 155, 167 S.E. 560 (1933).

But Allegation That Employers Were Not Operating under Act Is Not Demurrable. — The plaintiff instituted a common-law action, alleging that the defendants "were not operating under the Workmen's Compensation Act." It was held that the demurrer to plaintiff's complaint should have been overruled because the above allegation lays the foundation for proof to rebut the presumption of acceptance of the act. Calahan v. Roberts, 208 N.C. 768, 182 S.E. 657 (1935).

And is not necessary to allege facts showing defendant's nonacceptance of the act. Cooke v. Gillis, 218 N.C. 726, 12 S.E.2d 250 (1940).

When Presumption Not Operative. — Where the evidence does not show that the employer has regularly in service the requisite number of employees in the same business within this State, the presumption under this section is not operative. Thompson's Dependents v. Johnson Funeral Home, 205 N.C. 801, 172 S.E. 500 (1934).

Rebuttal of Presumption. — Notwithstanding the presumption contained in this section, there are provisions in the act whereby employers, as well as employees, may except themselves from the

operation thereof, and the presumption of acceptance may be rebutted by proof of nonacceptance. Calahan v. Roberts, 208 N.C. 768, 182 S.E. 657 (1935).

Action against Third Party. — In the absence of evidence that the employee or the employer had given notice of nonacceptance of the Workmen's Compensation Act, it must be presumed that both employee and employer are bound by the provisions of the act. However, where employee was injured by the negligence of the third-party tort-feasor and employee filed no claim for compensation against employer but instituted common-law action against third party, it was held that, since employee filed no claim against his employer under the act, he has waived his rights thereunder and may proceed directly against the third party, and the provisions of the act provide no defense against such suit to the third party. Ward v. Bowles, 228 N.C. 273, 45 S.E.2d 354 (1947).

An infant employee is bound by the terms of the North Carolina Workmen's Compensation Act regardless of his age. Lineberry v. Mebane, 219 N.C. 257, 13 S.E.2d 429 (1941).

In general, doctrines of waiver and estoppel do not apply in workmen's compensation cases and they may not be invoked to defeat rights granted, or to avoid burdens imposed thereunder. Ashe v. Barnes, 255 N.C. 310, 121 S.E.2d 549 (1961).

Ordinarily, the parties may not by agreement or conduct extend the provisions of this Chapter, but continued and definite recognition of the relationship of employer and employee, based on knowledge of the work performed, and acceptance of benefits of that status, may work an estoppel after loss. Pearson v. Pearson, 222 N.C. 69, 21 S.E.2d 879 (1942).

Applied in McNeely v. Carolina Asbestos Co., 206 N.C. 568, 174 S.E. 509 (1934); Arp v. Wood & Co., 207 N.C. 41, 175 S.E. 719 (1934); Lee v. American Enka Corp., 212 N.C. 455, 193 S.E. 809 (1937); Tscheiller v. National Weaving Co., 214 N.C. 449, 199 S.E. 623 (1938); McNair v. Ward, 240 N.C. 330, 82 S.E.2d 85 (1954); Crawford v. Pressley, 6 N.C. App. 641, 171 S.E.2d 197 (1969).

Stated in Worley v. Pipes, 229 N.C. 465, 50 S.E.2d 504 (1948).

Cited in Murphy v. American Enka Corp., 213 N.C. 218, 195 S.E. 536 (1938); Odum v. National Oil Co., 213 N.C. 478, 196 S.E. 823 (1938); McCune v. Rhodes-Rhyne Mfg. Co., 217 N.C. 351, 8 S.E.2d 219 (1940); Bame v. Palmer Stone Works, 232 N.C. 267, 59 S.E.2d 812 (1950); Vause v. Vause Farm Equip. Co., 233 N.C. 88, 63 S.E.2d 173 (1951); Laughridge v. South Mountain Pulpwood Co., 266 N.C. 769, 147 S.E.2d 213 (1966).

§ 97-4. Notice of nonacceptance and waiver of exemption.—Either an employer or an employee, who has exempted himself by proper notice from the operation of this Article, may at any time waive such exemption, and thereby accept the provisions of this Article by giving notice as herein provided.

The notice of nonacceptance of the provisions of this Article shall be given 30 days prior to any accident resulting in injury or death: Provided, that if any such accident occurred less than 30 days after the date of employment, notice of such exemption or acceptance given at the time of employment shall be sufficient notice thereof. An employee may waive notice of nonacceptance by giving five days' notice in the manner provided for nonacceptance. The notice shall be in writing or print, in substantially the form prescribed by the Industrial Commission, and shall be given by the employer by posting the same in a conspicuous place in the shop, plant, office, room, or place where the employee is employed, or by serving it personally upon him; and shall be given by the employee by sending the same in registered letter, addressed to the employer at his last known residence or place of business, or by giving it personally to the employer or any of his agents upon whom a summons in civil action may be served under the laws of the State. A copy of the notice in prescribed form shall also be filed with the Industrial Commission.

In any suit by an employer or an employee who has exempted himself by proper notice from the application of this Article, a copy of such notice duly certified by the Industrial Commission shall be admissible in evidence as proof of such exemption. (1929, c. 120, s. 5; 1945, c. 766.)

Compensation Policy Held to Cover Executives Not Filing Nonacceptance Notice. — Where a corporate employer with less than five employees procures a policy of compensation insurance, such employer is presumed to have accepted the provisions of the Workmen's Compensation Act, and such policy covers its executive officers notwithstanding the premium on the policy is based on the compensation of a single nonexecutive

employee and the parties intended to cover him only, unless notice of nonacceptance by the executive officers is duly filed with the Industrial Commission. Laughridge v. South Mountain Pulpwood Co., 266 N.C. 769, 147 S.E.2d 213 (1966).

Failure of Third-Party Insurance Agent to Fulfill Agreement Not Waiver. — By purchasing a workmen's compensation insurance policy, the employer and his employees become subject to the act and continue to be "so bound unless waived as provided in this Article." The failure of a third party, such as the insurance agent, to fulfill his agreement to see that other insurance was obtained upon the cancellation of the insurance policy, does not constitute a waiver "as provided in this Article." Crawford v. Pressley, 6 N.C. App. 641, 171 S.E.2d 197 (1969).

Where the parties are presumed to have accepted the provisions of the Workmen's Compensation Act, under the facts alleged, the further allegation that defendants were not operating under the act involved both law and fact and was sufficient to admit proof of nonacceptance of the provisions of the act; and it was error for the court to sustain defendants' demurrer on the ground that the Industrial Commission had exclusive jurisdiction, it being a question of law for the court, when the plaintiff introduced his evidence, to determine whether defendant employer was not operating under the act. Cooke v. Gillis, 218 N.C. 726, 12 S.E.2d 250 (1940).

Common-Law Liability for Occupational Disease. — An employer who has elected not to operate under the provisions of the Workmen's Compensation Act may be held liable by the employee in an action at common law for an occupational disease when such disease is contracted as the result of negligence of the employer in failing to exercise ordinary care to provide a reasonably safe place in which to work, which proximately causes such occupational disease. Evidence in the case of such negligence and proximate cause held sufficient to take the case to the jury. Bame v. Palmer Stone Works, 232 N.C. 267, 59 S.E.2d 812 (1950).

Minor employees are bound by the terms of this section notwithstanding their common-law disability. Lineberry v. Mebane, 219 N.C. 257, 13 S.E.2d 429 (1941).

Applied in Miller v. Roberts, 212 N.C. 126, 193 S.E. 286 (1937).

Cited in Calahan v. Roberts, 208 N.C. 768, 182 S.E. 657 (1935); Ward v. Bowles, 228 N.C. 273, 45 S.E.2d 354 (1947); Muldrow v. Weinstein, 234 N.C. 587, 68 S.E.2d 249 (1951); Ashe v. Barnes, 255 N.C. 310, 121 S.E.2d 549 (1961).

§ 97-5. Presumption as to contract of service.—Every contract of service between any employer and employee covered by this Article, written or implied, now in operation or made or implied prior to July 1, 1929, shall, after that date, be presumed to continue, subject to the provisions of this Article; and every such contract made subsequent to that date shall be presumed to have been made subject to the provisions of this Article, unless either party shall give notice, as provided in G.S. 97-4, to the other party to such contract that the provisions of this Article other than G.S. 97-14, 97-15, 97-16, and 97-92 are not intended to apply.

A like presumption shall exist equally in the case of all minors, unless notice of the same character be given by or to the parent or guardian of the minor. (1929, c. 120, s. 6.)

Applied in Miller v. Roberts, 212 N.C. 126, 193 S.E. 286 (1937).

§ 97-6. No special contract can relieve an employer of obligations.—No contract or agreement, written or implied, no rule, regulation, or other device shall in any manner operate to relieve an employer in whole or in part, of any obligation created by this Article, except as herein otherwise expressly provided. (1929, c. 120, s. 7.)

Cross Reference. — As to settlements between employee and employer, see § 97-17 and note thereto.

Contract between Two Employers That One Shall Carry Compensation Insurance. — Where two employers make a contract that one of them should carry compensation insurance on employees, the other is not relieved of liability under the act. Roth v. McCord, 232 N.C. 678, 62 S.E.2d 64 (1950).

Liability to Employee Suffering from Preexisting Infirmity. — An employee who becomes disabled as the result of an accident while at work is not to be deprived of benefits because of any preexisting infirmity. And this liability of the employer cannot be waived or released or diminished by any agreement of the employee. National Labor Relations Bd. v. Cranston Print Works Co., 258 F.2d 206 (4th Cir. 1958).

Delegation of Authority. — A corporation, having been given a franchise for the operation of motor trucks on the highway as a carrier of goods in interstate commerce, cannot evade its responsibility by delegating its authority to others. Watkins v. Murrow, 253 N.C. 652, 118 S.E.2d 5 (1961).

Leases. — An employer may not, by leasing the truck of one not authorized to transport goods in interstate commerce and causing its operation under its own franchise and license plates for interstate transportation, avoid legal responsibility therefor. Watkins v. Murrow, 253 N.C. 652, 118 S.E.2d 5 (1961).

Employer May Make Provisions for Injured Employee beyond Workmen's Compensation Benefits. — There is nothing in the Workmen's Compensation Act that prohibits an employer from making special provisions for an injured employee beyond those benefits which the employee is entitled to receive under the provisions of the act. Ashe v. Barnes, 255 N.C. 310, 121 S.E.2d 549 (1961).

But He May Not Substitute Accident Insurance Policy for Such Benefits. — There is no provision in the law which authorizes an employer subject to the Workmen's Compensation Act to substitute an accident policy in lieu of compensation and other benefits required by the act. Ashe v. Barnes, 255 N.C. 310, 121 S.E.2d 549 (1961).

Employee Accepting Policy Does Not Exempt Himself from Compensation Act. — Where an employee elected to accept the insurance policy provided for him by his employer, he did not elect thereby to exempt himself from the provisions of the Workmen's Compensation Act. Ashe v. Barnes, 255 N.C. 310, 121 S.E.2d 549 (1961).

Nor Is He Estopped to Claim Compensation by Accepting Benefits under Policy. — Where an employee accepted benefits under an insurance policy, he did not thereby estop himself from claiming under the provisions of the Workmen's Compensation Act. Ashe v. Barnes, 255 N.C. 310, 121 S.E.2d 549 (1961).

Applied in Brown v. Bottoms Truck Lines, 227 N.C. 299, 42 S.E.2d 71 (1947).

Quoted in Laughridge v. South Mountain Pulpwood Co., 266 N.C. 769, 147 S.E.2d 213 (1966).

Stated in Worley v. Pipes, 229 N.C. 465, 50 S.E.2d 504 (1948).

Cited in Jocie Motor Lines v. Johnson, 231 N.C. 367, 57 S.E.2d 388 (1950).

§ 97-7. State or subdivision and employees thereof.—Neither the State nor any municipal corporation within the State, nor any political subdivision thereof, nor any employee of the State or of any such corporation or subdivision, shall have the right to reject the provisions of this Article relative to payment and acceptance of compensation, and the provisions of G.S. 97-4, 97-5, 97-14, 97-15, 97-16, and 97-100(j) shall not apply to them: Provided, that all such corporations or subdivisions are hereby authorized to self-insure or purchase insurance to secure its liability under this Article and to include thereunder the liability of such subordinate governmental agencies as the county board of health, the school board, and other political and quasi-political subdivisions supported in whole or in part by the municipal corporation or political subdivision of the State, and to appropriate an amount sufficient for this purpose and levy a special tax if a special tax is necessary to pay the costs of same. (1929, c. 120, s. 8; 1931, c. 274, s. 1; 1945, c. 766; 1957, c. 1396, s. 1; 1961, c. 1200.)

Local Modification. — City of Raleigh: 1955, c. 1184.

The death of highway patrolmen in a plane crash while attempting to locate and arrest a person accused of a crime of violence was held compensable under the Workmen's Compensation Act, since the patrolmen had authority to make the arrest and did not exceed their authority in using an airplane in their attempted discharge of their duties. Galloway v. Department of Motor Vehicles, 231 N.C. 447, 57 S.E.2d 799 (1950).

Tort Claims against State Agencies. — See § 143-291 et seq.

Applied in Perdue v. State Bd. of Equalization, 205 N.C. 730, 172 S.E. 396 (1934); Barnhardt v. City of Concord, 213 N.C. 364, 196 S.E. 310 (1938); Rape v. Town of Huntersville, 214 N.C. 505, 199 S.E. 736 (1938); Stanley v. Brown, 261 N.C. 243, 134 S.E.2d 321 (1964).

Stated in Wilmington Shipyard, Inc. v. North Carolina State Highway Comm'n, 6 N.C. App. 649, 171 S.E.2d 222 (1969).

§ 97-8. Prior injuries and deaths unaffected.—The provisions of this Article shall not apply to injuries or deaths, nor to accidents which occurred prior to July 1, 1929. (1929, c. 120, s. 9.)

Applied in Hafleigh & Co. v. Crossingham, 206 N.C. 333, 173 S.E. 619 (1934).

§ 97-9. Employer to secure payment of compensation.—Every employer who accepts the compensation provisions of this Article shall secure the payment of compensation to his employees in the manner hereinafter provided; and while such security remains in force, he or those conducting his business shall only be liable to any employee who elects to come under this Article for personal injury or death by accident to the extent and in the manner herein specified. (1929, c. 120, s. 10.)

Cross Reference. — See note to § 97-10.1.

Section Limits Employer's Liability. — When certain specified conditions are complied with, this section limits the liability of an employer for personal injury or death by accident of his employees as provided in the Workmen's Compensation Act. Gibbs v. Carolina Power & Light Co., 265 N.C. 459, 144 S.E.2d 393 (1965).

Act Provides Sole Remedy against Employer and Those Conducting His Business. — Under the Workmen's Compensation Act, where an employee's injury or death is compensable, the sole remedy against the employer and "those conducting his business" is that provided by its terms. Weaver v. Bennett, 259 N.C. 16, 129 S.E.2d 610 (1963).

Section in Pari Materia with Former § 97-10; Liberal Construction. — This section has been held to be in pari materia with the provisions of § 97-10 (see now §§ 97-10.1 through 97-10.3), and the immunity given in this section to "those conducting the business" of the employer should be given a liberal construction and its definitions and intendments carried through the provisions of § 97-10. Essick v. City of Lexington, 232 N.C. 200, 60 S.E.2d 106 (1950).

This section manifests the legislative intent that the liability of the employer is to be limited to the compensation payable by him on account of the injury or death of his employee. Hunsucker v. High Point Bending & Chair Co., 237 N.C. 559, 75 S.E.2d 768 (1953).

Employee Is Deprived of Certain Common-Law Rights. — The Workmen's Compensation Act provides compensation for an employee who sustains an injury by accident arising out of and in the course of his employment without regard to whether his injury was caused by negligence attributable to the employer, but the act also deprives the employee of certain rights which he had at common law. Hicks v. Guilford County, 267 N.C. 364, 148 S.E.2d 240 (1966.)

Meaning of "Those Conducting His Business". — The phrase, "those conducting his [the employer's] business" which appears in this section, should be given a liberal construction. One must be deemed to be conducting his employer's business, within the meaning of this section, whenever he, himself, is acting within the course of his employment, as that term is used in the Workmen's Compensation Act. It is not necessary, in order to bring an employee within the protection of this statute, to show that his act was such as would have been imputed to the employer at common law. Altman v. Sanders, 267 N.C. 158, 148 S.E.2d 21 (1966).

Superiors of an injured employee are within the immunity of this section when their orders, upon which alleged liability is predicated, are given in the conduct of the employer's business, and such supervisory employees are improperly made additional parties defendant upon the motion of the original defendant in an action by the personal representative of a deceased employee against the third-person tort-feasor. Essick v. City of Lexington, 232 N.C. 200, 60 S.E.2d 106 (1950).

As Is Fellow Employee Driving Automobile in Employer's Business. — Two employees, traveling in an automobile in the discharge of the employer's business, had a collision with another vehicle. In an action by the employee passenger against the owner and driver of such other vehicle, the employee driver is improperly joined as an additional defendant on motion of the original defendant for the purpose of contribution as a joint tort-feasor, since the employee driver is immune from liability under the provisions of this section. Bass v. Ingold, 232 N.C. 295, 60 S.E.2d 114 (1950).

Employee Cannot Maintain Common-Law Action against Coemployee. — An employee, subject to the provisions of the Workmen's Compensation Act, whose injury arose out of and in the course of his employment, cannot maintain an action at common law against his coemployee whose negligence caused the injury. Warner v. Leder, 234 N.C. 727, 69 S.E.2d 6 (1951), commented on in 30 N.C.L. Rev. 474 (1952).

Two early cases, without mentioning this section, allowed recovery by an employee against a fellow employee. Tscheiller v. National Weaving Co., 214 N.C. 449, 199 S.E. 623 (1938) (negligence action against fellow employee who was not a superior); McCune v. Rhodes-Rhyne Mfg. Co., 217 N.C. 351, 8 S.E.2d 219 (1940) (action for "willful and wanton assault" by a foreman, who was a superior employee of plaintiff). These cases have been modified by subsequent cases on this point. The Tscheiller case is no longer a precedent on this point, and the McCune case has been limited to suits for willful injury. Essick v. City of Lexington, 232 N.C. 200, 60 S.E.2d 106 (1950); Warner v. Leder, 234 N.C. 727, 69 S.E.2d 6 (1951).

This exemption from suit applies if the suit is

against the fellow employee by the injured coemployee or if the negligent third party seeks to join the negligent fellow employee as a joint tort-feasor, liable for contribution. See 30 N.C.L. Rev. 474 (1952).

This section relieves an employee from liability for negligence resulting in injury to a fellow employee when the employees and employer are subject to the Workmen's Compensation Act and the injury arises out of and in the course of the employment. Stanley v. Brown, 261 N.C. 243, 134 S.E.2d 321 (1964).

Where the facts show that plaintiff was injured in the course and scope of his employment while riding in an automobile driven by defendant, a fellow employee of plaintiff, who at the time was carrying plaintiff to his home in the conduct of his employer's business and pursuant to authority and direction given him by his employer, plaintiff may not hold defendant liable in an action at law for negligence, since defendant was a person conducting the business of his employer within the purview of the immunity provision of this section. Burgess v. Gibbs, 262 N.C. 462, 137 S.E.2d 806 (1964).

Where the employer maintains insurance coverage, as specified in this section, an employee who is subject to the provisions of the Workmen's Compensation Act and who sustains an injury, arising out of and in the course of his or her own employment, cannot maintain an action at common law against another employee whose negligence, while conducting the employer's business, was the proximate cause of the injury. Altman v. Sanders, 267 N.C. 158, 148 S.E.2d 21 (1966).

Where the employer furnished a parking lot for his employees and plaintiff employee, after parking her car and while walking to the plant to report for work, was struck by a vehicle operated by another employee who was then backing into a parking space preparatory to reporting for work, the accident arose in the course of the employment, precluding an action at common law by either employee against the other. Altman v. Sanders, 267 N.C. 158, 148 S.E.2d 21 (1966).

An officer or agent of a corporation who is acting within the scope of his authority for and on behalf of the corporation, and whose acts are such as to render the corporation liable therefor, is among those conducting the business of the corporation, within the purview of this section, and entitled to the immunity it gives. Warner v. Leder, 234 N.C. 727, 69 S.E.2d 6 (1951), commented on in 30 N.C.L. Rev. 474 (1952).

The protection of this section against suit by an injured employee extends to officers of the corporate employer whose acts are such as to render the corporate employer liable therefor. Lewis v. Barnhill, 267 N.C. 457, 148 S.E.2d 536 (1966).

Protection Does Not Extend to Independent Contractors. — The protection of this section against suit by an injured employee does not extend to independent contractors performing work pursuant to their contracts with the employer of the injured person. Lewis v. Barnhill, 267 N.C. 457, 148 S.E.2d 536 (1966).

Nor to Physician Treating Employees Sent to Him by Plant Manager. — Where a physician is carrying on an independent practice of medicine or surgery, he is not "conducting the business" of an industrial corporation merely because the manager of the plant sends to him, for examination and treatment, those who, from time to time, sustain injuries in the plant. Under these circumstances, this section does not deprive the employee of his common-law right to sue a physician or surgeon who, in the course of such examination or treatment, is negligent and thereby aggravates the original injury. Bryant v. Dougherty, 267 N.C. 545, 148 S.E.2d 548 (1966).

Coemployee's Immunity Does Not Extend to Employer. — By reason of the fact that an employee was within the course of her employment at the time of the alleged injury to the plaintiff, this section throws about her a cloak of immunity from suit on account of such injury even if it was caused by her negligence in the operation of the automobile. This section does not, however, extend this immunity to her husband, if it is established that she was driving the automobile as his agent and within the course of such employment. Altman v. Sanders, 267 N.C. 158, 148 S.E.2d 21 (1966).

Where a judgment in favor of a defendant, the employee or agent of her husband, does not rest upon the ground that she was not negligent, but rests upon the ground that this section makes her personally immune from suit on account of her negligence because, at the time of her negligent act or omission, she was in the course of her employment by a company, it is error to dismiss the action as against her husband since this statutory immunity has no connection with her employment by her husband to drive his automobile. He was acting, through her, in the driving of the automobile, if she was operating it with his consent and pursuant to the family purpose for which he maintained the automobile. It is as if he were personally present driving the vehicle in the same manner. Obviously, if he had brought his wife to her work, and had driven as she is alleged to have done, the Workmen's Compensation Act would not have made him immune to suit by the plaintiff, for he was not conducting the company's business. He is equally subject to suit when, by the fiction of the law, he so drives by and through his wife as his agent. Though she, his agent or employee, is immune to suit by the plaintiff, he is not.

Altman v. Sanders, 267 N.C. 158, 148 S.E.2d 21 (1966).

Lending Employee May Relieve Employer of Liability for His Negligence. — An employer may lend or otherwise furnish his employee to another person so as to be relieved from liability for an injury caused by the negligence of the employee in performing work for the other person. It is equally true that an employer may, for a consideration or otherwise, direct his employee to go upon the premises of another and there perform work, to be designated by such other person, without severing the employment relation between the general employer and the employee. Lewis v. Barnhill, 267 N.C. 457, 148 S.E.2d 536 (1966).

Test Is Right to Control Manner of Doing Work. — The crucial test in determining whether a servant furnished by one person to another becomes the employee of the person to whom he is loaned is whether he passes under the latter's right of control with regard not only to the work to be done but also to the manner of performing it. Lewis v. Barnhill, 267 N.C. 457, 148 S.E.2d 536 (1966).

Original Employment Is Presumed to Continue. — Where one is engaged in the business of renting out trucks, automobiles, cranes, or any other machine, and furnishes a driver or operator as part of the hiring, there is a factual presumption that the operator remains in the employ of his original master, and unless that presumption is overcome by evidence that the borrowing employer in fact assumes control of the employee's manner of performing the work, the servant remains in the service of his original employer. Lewis v. Barnhill, 267 N.C. 457, 148 S.E.2d 536 (1966).

Joint employment occurs when a single employee, under contracts with two employers, simultaneously performs the work of both under the control of both. In such a case, both employers are liable for workmen's compensation. Leggette v. J.D. McCotter, Inc., 265 N.C. 617, 144 S.E.2d 849 (1965).

One may be the servant or agent of another and acting within the course of his employment so as to make such employer or principal liable, under the doctrine of respondeat superior, for injuries proximately caused by his negligence, and at the same time be also in the course of his employment by another employer within the meaning of the Workmen's Compensation Act. Altman v. Sanders, 267 N.C. 158, 148 S.E.2d 21 (1966).

The operator of equipment may be held the employee of both the general employer and the special employer with regard to liability under the Workmen's Compensation Act when the general employer leases the equipment to a special employer who directs the work being performed and who has the power of terminating the employment at the work site but no power to terminate the general overall employment. Leggette v. J.D. McCotter, Inc., 265 N.C. 617, 144 S.E.2d 849 (1965).

Third Person Aggravating Injury May Be Sued. — There is no basis in the Workmen's Compensation Act for making a distinction between the right to sue a third person who, by negligence, causes the original injury and the right to sue a third person who, by negligence, causes an aggravation of it. Bryant v. Dougherty, 267 N.C. 545, 148 S.E.2d 548 (1966).

Evidence Held Sufficient. — The evidence was sufficient to support the findings and conclusions of the Industrial Commission that at the time of the injury the operator was in the dual employment of both the general and special employers, and that the award for compensation should be split between them and their insurance carriers. Leggette v. J.D. McCotter, Inc., 265 N.C. 617, 144 S.E.2d 849 (1965).

Evidence was sufficient to be submitted to the jury and sustain its determination that the contractor was an independent contractor and that the crane operator was his employee and not an employee of the builder. Lewis v. Barnhill, 267 N.C. 457, 148 S.E.2d 536 (1966).

Applied in McNair v. Ward, 240 N.C. 330, 82 S.E.2d 85 (1954); Nance v. Parks, 266 N.C. 206, 146 S.E.2d 24 (1966); Fender v. General Elec. Co., 380 F.2d 150 (4th Cir. 1967).

Quoted in Ohlhaver v. Narron, 195 F.2d 676 (4th Cir. 1952); Johnson v. United States, 133 F. Supp. 613 (E.D.N.C. 1955); Morse v. Curtis, 276 N.C. 371, 172 S.E.2d 495 (1970).

Cited in Jones v. Douglas Aircraft Co., 253 N.C. 482, 117 S.E.2d 496 (1960).

§ 97-10: Repealed by Session Laws 1959, c. 1324.

Editor's Note. — Sections 97-10.1 through 97-10.3 were enacted in lieu of the repealed section.

§ 97-10.1. Other rights and remedies against employer excluded. — If the employee and the employer are subject to and have accepted and complied with the provisions of this Article, then the rights and remedies herein granted to the employee, his dependents, next of kin, or personal representative shall exclude all other rights and remedies of the employee, his dependents, next of kin, or representative as against the employer at common law or otherwise on

account of such injury or death. (1929, c. 120, s. 11; 1933, c. 449, s. 1; 1943, c. 622; 1959, c. 1324.)

Editor's Note. — Several of the cases cited in this note were decided under § 97-10, which was repealed by the act that added §§ 97-10.1 through 97-10.3.

This section is designed to carry out the purpose of the Workmen's Compensation Act, which is to provide limited benefits to an employee for an injury by accident arising out of and in the course of his employment, and for certain occupational diseases, regardless of negligence or other fault on the part of the employer, and, on the other hand, to limit the liability of the employer so as to protect him against the possibility of a much larger judgment, such as was possible at common law when negligence by the employer was found. Bryant v. Dougherty, 267 N.C. 545, 148 S.E.2d 548 (1966).

Section Not Applicable to Injury Occurring Prior to June 20, 1959. — This section and § 97-10.2 do not apply to an injury which occurred prior to June 20, 1959, the effective date of those statutes. Swaney v. George Newton Constr. Co., 5 N.C. App. 520, 169 S.E.2d 90 (1969).

This section applies only to proceedings against the employer, and so against his insurance carrier. Bryant v. Dougherty, 267 N.C. 545, 148 S.E.2d 548 (1966).

Act Is Inapplicable Where Employment Relation Does Not Exist. — The Workmen's Compensation Act relates to the rights and liabilities of employee and employer by reason of injuries and disabilities arising out of and in the course of the employment relation. Where that relation does not exist, the act has no application. Bryant v. Dougherty, 267 N.C. 545, 148 S.E.2d 548 (1966).

It Deprives Employee of Certain Common-Law Rights. — The Workmen's Compensation Act provides compensation for an employee who sustains an injury by accident arising out of and in the course of his employment without regard to whether his injury was caused by negligence attributable to the employer, but the act also deprives the employee of certain rights which he had at the common law. Hicks v. Guilford County, 267 N.C. 364, 148 S.E.2d 240 (1966).

But Not Rights Disconnected from Employment. — The Workmen's Compensation Act does not take away any common-law right of the employee, even as against the employer, provided the right be one which is disconnected with the employment and pertains to the employee, not as an employee but as a member of the public. Bryant v. Dougherty, 267 N.C. 545, 148 S.E.2d 548 (1966).

The Workmen's Compensation Act contemplates mutual concessions by employee and employer; for that reason, its validity has been upheld, and its policy approved. Horney v. Meredith Swimming Pool Co., 267 N.C. 521, 148 S.E.2d 554 (1966).

Under the Workmen's Compensation Act, the master in exchange for limited liability was willing to pay on some claims in the future where in the past there had been no liability at all. Horney v. Meredith Swimming Pool Co., 267 N.C. 521, 148 S.E.2d 554 (1966).

Liability based on negligence was eliminated by the Workmen's Compensation Act. Horney v. Meredith Swimming Pool Co., 267 N.C. 521, 148 S.E.2d 554 (1966).

Hence, Statutes Authorizing Recovery for Negligent Death Became Ineffective. — The philosophy of workmen's compensation is that when employer and employee accept the terms of the act their relations become contractual, and other statutes authorizing recovery for negligent death become ineffective. Horney v. Meredith Swimming Pool Co., 267 N.C. 521, 148 S.E.2d 554 (1966).

Since the Workmen's Compensation Act by its terms repeals all inconsistent legislation, the rights and remedies thereby given are substituted for those theretofore provided by the Death Act. The result is that where an employee contracts to work under the Workmen's Compensation Act, the damages to be paid by the employer in case of death are limited by that act, and an action cannot be maintained in disregard of that act. Horney v. Meredith Swimming Pool Co., 267 N.C. 521, 148 S.E.2d 554 (1966).

Remedy against Employer Is Exclusive. — Where the allegations and evidence in an action for damages at common law show that the injury in suit was caused by an accident arising out of and in the course of plaintiff's employment, defendant's motion of nonsuit will be granted, as plaintiff's remedy under this act is exclusive of all other remedies. McNeely v. Carolina Asbestos Co., 206 N.C. 568, 174 S.E. 509 (1934). See Miller v. Roberts, 212 N.C. 126, 193 S.E. 286 (1937); Lee v. American Enka Corp., 212 N.C. 455, 193 S.E. 809 (1937); Tscheiller v. National Weaving Co., 214 N.C. 449, 199 S.E. 623 (1938); Champion v. Vance County Bd. of Health, 221 N.C. 96, 19 S.E.2d 239 (1942).

Where the employer and the employee are subject to and have accepted and complied with the provisions of the Workmen's Compensation Act, the rights and remedies therein granted to the employee exclude all other rights and remedies in his favor against the employer. Bryant v. Dougherty, 267 N.C. 545, 148 S.E.2d 548 (1966).

Where both the plaintiff and the defendant are presumed to have accepted the provisions of the Workmen's Compensation Act they are

bound thereby, and the rights and remedies therein granted are exclusive, and the contention that since the act does not provide for the award of punitive damages, plaintiff has not waived his right to trial by jury for the ascertainment thereof, is untenable. McCune v. Rhodes-Rhyne Mfg. Co., 217 N.C. 351, 8 S.E.2d 219 (1940).

Where, in a suit by a student nurse to recover damages for injuries sustained while being transported by the hospital which employed her, the plaintiff judicially admitted that her employment was within the coverage of the Workmen's Compensation Act except as to number of employees regularly employed and the uncontradicted evidence showed that more than five employees were regularly employed, a nonsuit was properly granted. Powers v. Robeson County Mem. Hosp., Inc., 242 N.C. 290, 87 S.E.2d 510 (1955).

Where Employee's Claim for Compensation Is Denied. — Plaintiff and his employer were bound by the provisions of the Workmen's Compensation Act. Plaintiff's injury occurred while he was allowed by his employer to use certain machinery for his own personal ends. Compensation was denied since the accident did not arise out of and in the course of the employment. Thereafter plaintiff sued, alleging negligence on the part of the employer. But it was held that, conceding that the evidence established negligence of defendant employer, the act barred all other rights and remedies of employee except those provided in the act. Francis v. Carolina Wood Turning Co., 208 N.C. 517, 181 S.E. 628 (1935). See analysis and criticism of this case in 14 N.C.L. Rev. 199. In accord, see Tscheiller v. National Weaving Co., 214 N.C. 449, 199 S.E. 623 (1938).

In an action brought at common law, the complaint alleged that the Commission had held that the plaintiff's injury did not arise out of and in the course of his employment. The defendant demurred. It was held that the rights conferred under the act excluded the employee from bringing an action against his employer at common law. Pilley v. Greenville Cotton Mills, 201 N.C. 426, 160 S.E. 479 (1931).

In Conrad v. Cook-Lewis Foundry Co., 198 N.C. 723, 153 S.E. 266 (1930), the plaintiff had been denied an award by the Industrial Commission on the ground that he was not injured "by accident arising out of and in the course of his employment." He did not appeal but brought a new action against his employer in the superior court alleging that his injuries were due to the employer's negligence. No recovery. Rights of an employee against his employer under this section are exclusive and no distinction is recognized by the act between injuries arising from accident and those due to the employer's negligence.

Surrender of Right of Action Is Not Absolute. — Expressions in this section and in § 97-10.2 regarding the surrender of the right to maintain common-law or statutory actions against the employer are not absolute—not words of universal import, making no contact with time, place or circumstance. They must be construed within the framework of the act, and as qualified by its subject and purposes. Barber v. Minges, 223 N.C. 213, 25 S.E.2d 837 (1943).

And Does Not Extend to Claim against Employer Disconnected with Employment. — An employee was killed by an explosion on a motorboat on a Sunday fishing trip organized and conducted by the employer's agent. The employee was not required to go nor paid for the time spent but his expenses were paid. His widow and administratrix brought an action for wrongful death against the employer alleging negligence of the agent. Defendant moved to dismiss on the ground that the Industrial Commission had sole jurisdiction of an employee's claims against his employer under the exclusive remedy provision of this section. It was held, two justices dissenting, that the jurisdiction of the Commission does not extend to claims arising against an employer when "disconnected with the employment." Barber v. Minges, 223 N.C. 213, 25 S.E.2d 837 (1943).

Section Not Applicable to Action Brought by Independent Contractor. — When it appears in a common-law action to recover for injuries that the Commission has held that the plaintiff was an independent contractor and not an employee, an action will lie against the defendant for negligence, as this section has no application to actions instituted by independent contractors. Odum v. National Oil Co., 213 N.C. 478, 196 S.E. 823 (1938). See also Barnhardt v. City of Concord, 213 N.C. 364, 196 S.E. 310 (1938).

Where Employee Contracted Contagious Disease as Result of Improper Working Conditions. — Plaintiff contracted tuberculosis in working with chemicals in defendant's plant. In a common-law action it was alleged that the disease was caused by inherently dangerous working conditions. Both plaintiff and defendant had accepted the act. Judgment dismissing the action was held proper. Lee v. American Enka Corp., 212 N.C. 455, 193 S.E. 809 (1937). In accord, see Jenkins v. American Enka Corp., 95 F.2d 755 (4th Cir. 1938), where plaintiff instituted an action at common law alleging that he had contracted a disease as a result of improper working conditions negligently permitted by defendant. See also Murphy v. American Enka Corp., 213 N.C. 218, 195 S.E. 536 (1938), treated in note to § 97-52.

Section Not Applicable to Liability of Physician Treating Employee. — This section has no relation to the liability of an attending physician or surgeon for negligence in the treatment of an injured employee. Bryant v. Dougherty, 267 N.C. 545, 148 S.E.2d 548 (1966).

Or Patron of Employer's Business Such as Shareholder or Member. — The immunity granted by this section does not extend to an independent contractor, or to the employees of such independent contractor, engaged in work upon the premises of the employer of the injured plaintiff. It would surely follow that the immunity would not extend to a mere patron of the employer's business, even though such patron be also a stockholder, or otherwise a member, of the corporation which owns the business and employs the injured plaintiff. McWilliams v. Parham, 269 N.C. 162, 152 S.E.2d 117 (1967).

Allegations that defendant was enjoying the privileges of membership in playing on a golf course, even if such allegations be construed to mean that defendant was a member and stockholder of the club, do not show that defendant was an employer of a caddy of preceding players, and do not show that defendant was "conducting" the business of the club, and therefore such defendant is not entitled to allege the defense of immunity under the Workmen's Compensation Act in an action by the caddy to recover for injuries resulting when struck by a ball driven by defendant. McWilliams v. Parham, 269 N.C. 162, 152 S.E.2d 117 (1967).

Action for Wrongful Death against Employer. — In Bright v. N.B. & C. Motor Lines, Inc., 212 N.C. 384, 93 S.E. 391 (1937), it was held that an award by the Industrial Commission to the widow of an employee excludes all other rights and remedies, and the administrator of the employee may not maintain an action against the employer for wrongful death, and the fact that the injury resulted from negligence in the violation by the employer of a criminal statute does not alter this result.

The Workmen's Compensation Act deals expressly with cases where the compensable injury results in death. The remedies provided thereby exclude all other rights and remedies of the employee, his dependents, next of kin, or representative as against the employer at common law or otherwise on account of such injury or death. Horney v. Meredith Swimming Pool Co., 267 N.C. 521, 148 S.E.2d 554 (1966).

Under the Workmen's Compensation Act a certain liability is imposed for death, and that liability is exclusive. No other responsibility is left which springs from the occurrence upon which liability rests—death—and the effect of the compensation as a satisfaction of all other claims is in no way limited or impaired by the circumstances or the identity of the persons to whom it is paid or because in a given case no one survives to take advantage of the statute. Horney v. Meredith Swimming Pool Co., 267 N.C. 521, 148 S.E.2d 554 (1966).

Right under Death by Wrongful Act Statute of Another State Not Affected. — The acceptance of compensation under this act cannot affect the right to pursue a remedy against a third person under the wrongful death statute of another state, unless there is something in the law of the latter state which so provides. Betts v. Southern Ry., 71 F.2d 787 (4th Cir. 1934).

Assignment of Such Claim Is Governed by Law of This State. — The assignment of the right of recovery against a third person under the wrongful death statute of one state as the result of acceptance by the beneficiary of compensation from the employer under the Workmen's Compensation Act of this State, in the absence of any provision to the contrary in the law of the state of the injury, is governed by the law of this State. Betts v. Southern Ry., 71 F.2d 787 (4th Cir. 1934).

Applied in Burgess v. Gibbs, 262 N.C. 462, 137 S.E.2d 806 (1964); Fender v. General Elec. Co., 260 F. Supp. 75 (W.D.N.C. 1966); Fender v. General Elec. Co., 380 F.2d 150 (4th Cir. 1967).

Quoted in Morse v. Curtis, 276 N.C. 371, 172 S.E.2d 495 (1970).

§ 97-10.2. Rights under Article not affected by liability of third party; rights and remedies against third parties.—(a) The right to compensation and other benefits under this Article for disability, disfigurement, or death shall not be affected by the fact that the injury or death was caused under circumstances creating a liability in some person other than the employer to pay damages therefor, such person hereinafter being referred to as the "third party." The respective rights and interests of the employee-beneficiary under this Article, the employer, and the employer's insurance carrier, if any, in respect of the common-law cause of action against such third party and the damages recovered shall be as set forth in this section.

(b) The employee, or his personal representative if he be dead, shall have the exclusive right to proceed to enforce the liability of the third party by appropriate proceedings if such proceedings are instituted not later than 12 months after the date of injury or death, whichever is later. During said 12-month period, and at any time thereafter if summons is issued against the third party during said 12-month period, the employee or his personal representative shall have the right to settle with the third party and to give a

valid and complete release of all claims to the third party by reason of such injury or death, subject to the provisions of (h) below.

(c) If settlement is not made and summons is not issued within said 12-month period, and if employer shall have filed with the Industrial Commission a written admission of liability for the benefits provided by this Chapter, then either the employee or the employer shall have the right to proceed to enforce the liability of the third party by appropriate proceedings; either shall have the right to settle with the third party and to give a valid and complete release of all claims to the third party by reason of such injury or death, subject to the provisions of (h) below. Provided that 60 days before the expiration of the period fixed by the applicable statute of limitations if neither the employee nor the employer shall have settled with or instituted proceedings against the third party, all such rights shall revert to the employee or his personal representative.

(d) The person in whom the right to bring such proceeding or make settlement is vested shall, during the continuation thereof, also have the exclusive right to make settlement with the third party and the release of the person having the right shall fully acquit and discharge the third party except as provided by (h) below. A proceeding so instituted by the person having the right shall be brought in the name of the employee or his personal representative and the employer or the insurance carrier shall not be a necessary or proper party thereto. If the employee or his personal representative should refuse to cooperate with the employer by being the party plaintiff, then the action shall be brought in the name of the employer and the employee or his personal representative shall be made a party plaintiff or party defendant by order of court.

(e) The amount of compensation and other benefits paid or payable on account of such injury or death shall not be admissible in evidence in any proceeding against the third party. If the third party defending such proceeding, by answer duly served on the employer, sufficiently alleges that actionable negligence of the employer joined and concurred with the negligence of the third party in producing the injury or death, then an issue shall be submitted to the jury in such case as to whether actionable negligence of the employer joined and concurred with the negligence of the third party in producing the injury or death. The employer shall have the right to appear, to be represented, to introduce evidence, to cross-examine adverse witnesses, and to argue to the jury as to this issue as fully as though he were a party although not named or joined as a party to the proceeding. Such issue shall be the last of the issues submitted to the jury. If the verdict shall be that actionable negligence of the employer did join and concur with that of the third party in producing the injury or death, then the court shall reduce the damages awarded by the jury against the third party by the amount which the employer would otherwise be entitled to receive therefrom by way of subrogation hereunder and the entire amount recovered, after such reduction, shall belong to the employee or his personal representative free of any claim by the employer and the third party shall have no further right by way of contribution or otherwise against the employer, except any right which may exist by reason of an express contract of indemnity between the employer and the third party, which was entered into prior to the injury to the employee.

(f) (1) If the employer has filed a written admission of liability for benefits under this Chapter with, or if an award final in nature in favor of the employee has been entered by, the Industrial Commission, then any amount obtained by any person by settlement with, judgment against, or otherwise from the third party by reason of such injury or death shall be disbursed by order of the Industrial Commission for the following purposes and in the following order of priority:

a. First to the payment of actual court costs taxed by judgment.

b. Second to the payment of the fee of the attorney representing the person making settlement or obtaining judgment, and such fee shall not be subject to the provisions of § 90 of this Chapter [G.S. 97-90] but shall not exceed one third of the amount obtained or recovered of the third party.

c. Third to the reimbursement of the employer for all benefits by way of compensation or medical treatment expense paid or to be paid by the employer under award of the Industrial Commission.

d. Fourth to the payment of any amount remaining to the employee or his personal representative.

(2) The attorney fee paid under (f)(1) shall be paid by the employee and the employer in direct proportion to the amount each shall receive under (f)(1)c and (f)(1)d hereof and shall be deducted from such payments when distribution is made.

(g) The insurance carrier affording coverage to the employer under this Chapter shall be subrogated to all rights and liabilities of the employer hereunder but this shall not be construed as conferring any other or further rights upon such insurance carrier than those herein conferred upon the employer, anything in the policy of insurance to the contrary notwithstanding.

(h) In any proceeding against or settlement with the third party, every party to the claim for compensation shall have a lien to the extent of his interest under (f) hereof upon any payment made by the third party by reason of such injury or death, whether paid in settlement, in satisfaction of judgment, as consideration for covenant not to sue, or otherwise and such lien may be enforced against any person receiving such funds. Neither the employee or his personal representative nor the employer shall make any settlement with or accept any payment from the third party without the written consent of the other and no release to or agreement with the third party shall be valid or enforceable for any purpose unless both employer and employee or his personal representative join therein; provided, that this sentence shall not apply if the employer is made whole for all benefits paid or to be paid by him under this Chapter less attorney's fees as provided by (f)(1) and (2) hereof and the release to or agreement with the third party is executed by the employee.

(i) Institution of proceedings against or settlement with the third party, or acceptance of benefits under this Chapter, shall not in any way or manner affect any other remedy which any party to the claim for compensation may have except as otherwise specifically provided in this Chapter, and the exercise of one remedy shall not in any way or manner be held to constitute an election of remedies so as to bar the other. (1929, c. 120, s. 11; 1933, c. 449, s. 1; 1943, c. 622; 1959, c. 1324; 1963, c. 450, s. 1; 1971, c. 171, s. 1.)

Editor's Note. — The 1971 amendment rewrote subsection (c).

Session Laws 1971, c. 171, s. 2, provides: "This act shall become effective on July 1, 1971 and shall apply to claims arising on and after that date."

Several of the cases cited in this note were decided under § 97-10, which was repealed by the act that added §§ 97-10.1 through 97-10.3.

Purpose of Section. — Manifestly the statute was designed primarily to secure prompt and reasonable compensation for an employee, and at the same time to permit an employer or his insurance carrier, who has made a settlement with the employee, to recover the amount so paid from a third party causing the injury to such employee. The statute was not designed as a city of refuge for a negligent third party. Brown v. Southern Ry., 204 N.C. 668, 169 S.E. 419 (1933).

Section Does Not Apply to Injuries Occurring Prior to June 20, 1959. — This section and § 97-10.1 do not apply to an injury which occurred prior to June 20, 1959, the effective date of those statutes. Swaney v. George Newton Constr. Co., 5 N.C. App. 520, 169 S.E.2d 90 (1969).

Action against Those Conducting Business of Employer Not Authorized. — The provision of former § 97-10 giving the injured employee or his personal representative "a right to recover damages for such injury, loss of service, or death from any person other than the employer," meant any other person or party who was a stranger to the employment but whose negligence contributed to the injury.

Such provision did not authorize the injured employee to maintain an action at common law against those conducting the business of the employer whose negligence caused the injury. Jackson v. Bobbitt, 253 N.C. 670, 117 S.E.2d 806 (1961); Warner v. Leder, 234 N.C. 727, 69 S.E.2d 6 (1951), commented on in 30 N.C.L. Rev. 474 (1952).

As to action against fellow employee, see note to § 97-9.

No Conflict between Subsection (f)(1)c and § 28-173. — There is no conflict in the language in § 28-173, which prohibits use of the wrongful death recovery to pay a debt of the decedent, and the language in subsection (f)(1)c of this section, which directs that a portion of the recovery be applied to the reimbursement of the employer for benefits paid under award of the Industrial Commission. Byers v. North Carolina State Highway Comm'n, 3 N.C. App. 139, 164 S.E.2d 535 (1968).

The Workmen's Compensation Act does not create two causes of action one for the employee's estate and the other for the employer and insurance carrier. The right to bring action for damages for wrongful death is conferred by § 28-173. The Workmen's Compensation Act merely governs the respective rights of the employee's estate, the employer and the insurance carrier to maintain an action for damages against third parties. Groce v. Rapidair, Inc., 305 F. Supp. 1238 (W.D.N.C. 1969).

Section Governs Rights to Sue Third Persons. — This section governs the respective rights of the employee, the employer, and the employer's insurance carrier to maintain actions for damages against third parties; that is, persons other than the employer and those conducting his business. Bryant v. Dougherty, 267 N.C. 545, 148 S.E.2d 548 (1966).

Third Party Responsible for Total Pecuniary Loss. — The third party whose negligence caused the death may be held responsible for the total pecuniary loss to the estate. Byers v. North Carolina State Highway Comm'n, 275 N.C. 229, 166 S.E.2d 649 (1969).

Right of Subrogation Not Forfeited by Failure to Participate in Trial and Appeal of Wrongful Death Action. — Employer, by its failure to participate in the trial and appeal of a wrongful death action brought by the administratrix of the estate of the deceased employee, did not forfeit its subrogation right to be reimbursed out of the recovery from the third party whose negligence caused the death, since, the suit having been brought within one year from the employee's death, his personal representative had exclusive control of the proceedings against the negligent third party. Byers v. North Carolina State Highway Comm'n, 275 N.C. 229, 166 S.E.2d 649 (1969).

Employee of Subcontractor May Maintain Action against Main Contractor. — An employee of a subcontractor is not precluded by the Workmen's Compensation Act from maintaining an action at common law against the main contractor for injuries resulting from alleged negligence on the part of the main contractor, since the action is not against plaintiff's employer but against a third person. Cathey v. Southeastern Constr. Co., 218 N.C. 525, 11 S.E.2d 571 (1940); Tipton v. Barge, 243 F.2d 531 (4th Cir. 1957).

Sayles v. Loftis, 217 N.C. 674, 9 S.E.2d 393 (1940), likewise had held a principal contractor liable at common law as a third person for negligent injuries to employees of a subcontractor. See § 97-19, which enlarges the compensation responsibility of a principal contractor to the employees of subcontractors. See also Foster v. Denny Motor Transfer Co., 100 F.2d 658 (7th Cir. 1938), raising conflict of law problem.

Action against Third Party Does Not Abate upon Making of Award. — Where an award is made under the act after an action at law has been begun by the employee's representative against the third party, such an action does not abate. Phifer v. Berry, 202 N.C. 388, 163 S.E. 119 (1932).

The employer is not a joint tort-feasor, and an acceptance of an award against said employer for compensation would not discharge a third person whose negligence had contributed to the injury or death of the employee. Betts v. Southern Ry., 71 F.2d 787 (4th Cir. 1934).

Where deceased is killed as a result of the concurring negligence of his employer and a third party, the employer is not a joint tort-feasor who may be made a party defendant at the instance of the negligent third party. Essick v. City of Lexington, 232 N.C. 200, 60 S.E.2d 106 (1950); Brown v. Southern Ry., 202 N.C. 256, 162 S.E. 613 (1932).

Order Joining Employer and Insurance Carrier Is Appealable. — See Lovette v. Lloyd, 236 N.C. 663, 73 S.E.2d 886 (1953).

Third Person Cannot Hold Employer for Contribution or Indemnity. — Third party, who was sued for damages for negligently inflicting a compensable injury upon an employee, could not hold the employer liable for contribution under the statute embodied in former § 1-240 (see now § 1B-1) or for indemnity under the doctrine of primary and secondary liability even when the injury was the result of the joint or concurrent negligence of the employer and the third person. Lovette v. Lloyd, 236 N.C. 663, 73 S.E.2d 886 (1953); Johnson v. United States, 133 F. Supp. 613 (E.D.N.C. 1955).

Since it relieves the employer of liability to his injured employee as a tort-feasor, the Workmen's Compensation Act abrogates both the statutory right of a negligent third party to claim contribution from a negligent employer

in equal fault, and the common-law right of a passively negligent third party to demand indemnity from an actively negligent employer. And this construction of the Workmen's Compensation Act is not invalidated by the mere circumstances that such construction may occasion hardship or injustice to a passively negligent third party. Hunsucker v. High Point Bending & Chair Co., 237 N.C. 559, 75 S.E.2d 768 (1953).

Unless There Is Express Contract of Indemnity between Third Person and Employer. — If there is an express contract of indemnity between third party and employer providing against loss to third party arising from the negligence of the employer, the third party if sued for damages by the employee may bring in the employer for contribution or indemnity. Johnson v. United States, 133 F. Supp. 613 (E.D.N.C. 1955).

The Workmen's Compensation Act provides that a third party shall have no right (other than to assert the joint or concurring negligence of the employer) "by way of contribution or otherwise against the employer, except any right which may exist by reason of an express contract of indemnity between the employer and the third party, which was entered into prior to the injury to the employee." Gibbs v. Carolina Power & Light Co., 265 N.C. 459, 144 S.E.2d 393 (1965).

Reduction of Tort Liability of Passively Negligent Third Person. — There is no substance in the proposition that the North Carolina Workmen's Compensation Act confers no right whatever upon the passively negligent third party. It reduces his liability in tort for the injury to the employee by the amount of the workmen's compensation received by the employee from the actively negligent employer or his insurance carrier. Hunsucker v. High Point Bending & Chair Co., 237 N.C. 559, 75 S.E.2d 768 (1953).

Employee Filing Counterclaim in Action by Third Person. — See Rowe v. Rowe-Coward Co., 208 N.C. 484, 181 S.E. 254 (1935).

Action for Wrongful Death against Third Person. — See Betts v. Southern Ry., 71 F.2d 787 (4th Cir. 1934); Taylor v. Hunt, 245 N.C. 212, 95 S.E.2d 589 (1956); Mack v. Marshall Field & Co., 217 N.C. 55, 6 S.E.2d 889 (1940); Sayles v. Loftis, 217 N.C. 674, 9 S.E.2d 393 (1940).

Effect of Compromise and Settlement by Widow in Her Capacity as Administratrix. — The widow of a deceased employee, in her capacity as administratrix, executed a compromise and settlement with the employer on a common-law claim for wrongful death under the mistaken belief that the Workmen's Compensation Act was not applicable. It was held that the compromise and settlement barred the widow in her capacity as a dependent from recovery under the Workmen's Compensation Act. McGill v. Bison Fast Freight, Inc., 245 N.C. 469, 96 S.E.2d 438 (1957).

But the compromise and settlement did not bar claim under the Workmen's Compensation Act of the deceased's child under 18 years of age without guardian, since the administratrix had no authority to act for the dependent child except in respect of claims or causes of action vested in the administratrix as such. However, the child's recovery under the act should be diminished to the extent of the benefits ultimately received by the child from the compromise and settlement. McGill v. Bison Fast Freight, Inc., 245 N.C. 469, 96 S.E.2d 438 (1957).

Rights and Liabilities of Third Person Not Affected. — The insurance carrier who has paid compensation to an injured employee for which the employer was liable under this Chapter may maintain an action against a third person upon allegations that the negligence of such third person caused the injury, but the rights and liabilities of such third person are in nowise affected by the Chapter. Hinson v. Davis, 220 N.C. 380, 17 S.E.2d 348 (1941).

Action Prosecuted in Behalf of Any Person Entitled to Share in Recovery. — A necessary implication of the statutory requirement respecting the disbursement of the recovery is that the action against the third party is prosecuted in behalf of any person entitled to claim a share in the recovery, regardless of whether he is a party to the action. Lovette v. Lloyd, 236 N.C. 663, 73 S.E.2d 886 (1953).

Necessity for New Action against Third Person. — Whether the employer or insurance carrier who has paid compensation may proceed in the action which has been instituted against a third person by an injured employee or his personal representative, or must institute a new and independent action, is a question of procedure, and under the law of this State it is proper to proceed in the action which has been instituted. Betts v. Southern Ry., 71 F.2d 787 (4th Cir. 1934).

Action by Insurance Carrier Instituted after Action by Employee. — Where it appears that an injured employee's action against the third-person tort-feasor was instituted prior to the institution of an action by the compensation insurance carrier against the tort-feasor, defendant's plea in abatement in the employee's action on the ground of the pendency of a prior action cannot be sustained. Thompson v. Virginia & Carolina S.R.R., 216 N.C. 554, 6 S.E.2d 38 (1939). For comment on this case, see 18 N.C.L. Rev. 375.

Contracts for Indemnity are Recognized. — This section recognizes the right of third parties to provide by contract with employers for indemnity against liability to employees for the consequences of their negligence and to enforce the contracts. Gibbs v. Carolina Power & Light Co., 265 N.C. 459, 144 S.E.2d 393 (1965).

The Workmen's Compensation Act recognizes the right of third parties to enforce express contracts of indemnity against employers. Gibbs v. Carolina Power & Light Co., 265 N.C. 459, 144 S.E.2d 393 (1965).

Recovery by Employee's Administrator Bars Action by Employer or Carrier. — Where the employee's administrator has recovered and collected a judgment at law against third persons for the employee's death, the employer and carrier cannot, in their own name, sue the defendants under the subrogation provisions of this section. Suits for wrongful death must be brought in the name of the personal representative, and the employee's administrator having collected, there remains no cause to which the employer or carrier can be subrogated. Whitehead & Anderson, Inc. v. Branch, 220 N.C. 507, 17 S.E.2d 637 (1941).

Action Not Governed by Code of Civil Procedure. — An action in behalf of an injured employee against a third-person tort-feasor is governed by this section and not by the Code of Civil Procedure. Lovette v. Lloyd, 236 N.C. 663, 73 S.E.2d 886 (1953).

Insofar as the provisions of this section are in conflict with or supersede any of the rules of civil procedure, an action against a third party by an employee or employer to recover for injury to employee caused by the alleged negligence of the third party is governed by the provisions of the Workmen's Compensation Act and not by the Code of Civil Procedure. Gibbs v. Carolina Power & Light Co., 265 N.C. 459, 144 S.E.2d 393 (1965).

Industrial Commission Has Exclusive Original Jurisdiction to Determine Right to Subrogation. — The Declaratory Judgment Act may not be used to determine whether or not the employer's insurance carrier is entitled to the right of subrogation against the funds received from the third-party tort-feasor, under the provisions of this section, since the Industrial Commission has the exclusive original jurisdiction to determine the question. Cox v. Pitt County Transp. Co., 259 N.C. 38, 129 S.E.2d 589 (1963).

Employer Cannot Be Made Party Defendant. — The remedy under the Workmen's Compensation Act is exclusive and an employer is relieved of all further liability for injury to or death of an employee, and where the administrator of a deceased employee brings action against third persons for the employee's wrongful death, the motion of the defendants that the deceased's employer be made a party as a joint tort-feasor with them should be denied. Brown v. Southern Ry., 202 N.C. 256, 162 S.E. 613 (1932).

Court May Not Join Unnecessary Additional Parties. — Where the plaintiff is the party authorized by this section to maintain the action against the tort-feasor, he is entitled to prosecute same to final judgment, and the court may not interfere with this privilege by the joinder of wholly unnecessary additional parties. Lovette v. Lloyd, 236 N.C. 663, 73 S.E.2d 886 (1953).

Employee is to have the exclusive privilege to prosecute his action to a final conclusion without the presence of either the employer or the insurance carrier unless extraordinary circumstances require their joinder. Gibbs v. Carolina Power & Light Co., 265 N.C. 459, 144 S.E.2d 393 (1965).

An action by an employee against a third party shall not be encumbered by including as parties, plaintiff or defendant, the employer or insurance carrier, nor by bringing in irrelevant causes of action. Gibbs v. Carolina Power & Light Co., 265 N.C. 459, 144 S.E.2d 393 (1965).

Defendant Not Entitled to Joinder of Employer and Insurance Carrier. — In an action instituted by the employee against the third-person tort-feasor, defendant was not entitled to the joinder of the employer and the insurance carrier. Lovette v. Lloyd, 236 N.C. 663, 73 S.E.2d 886 (1953).

Contributory Negligence of Injured Employee. — The contributory negligence of the injured employee cannot be made the basis of an independent plea in bar of the right of the employer to recover over against the original and primary wrongdoer. Poindexter v. Johnson Motor Lines, 235 N.C. 286, 69 S.E.2d 495 (1952).

Any alleged negligence of such employee who has received, or whose estate has received, compensation from the employer under the Workmen's Compensation Act, must be pleaded, if at all, as a bar to the whole action without reference to any rights of the employer to share in the recovery. Poindexter v. Johnson Motor Lines, 235 N.C. 286, 69 S.E.2d 495 (1952).

Contributory negligence of the injured employee constitutes a complete defense to an action against a third-person tort-feasor, and may be pleaded and proved by such third person irrespective of whether the action is instituted by the employer, the insurance carrier, or the employee. Lovette v. Lloyd, 236 N.C. 663, 73 S.E.2d 886 (1953).

Proceeds of Settlement or Judgment to Be Disbursed According to Provisions of Act. — It is mandatory under the provisions of the Workmen's Compensation Act that any recovery against a third party by reason of an injury to or death of an employee subject to the act, the proceeds received from a settlement with a judgment against the third party, shall be disbursed according to the provisions of the Workmen's Compensation Act. Cox v. Pitt County Transp. Co., 259 N.C. 38, 129 S.E.2d 589 (1963); Byers v. North Carolina State Highway Comm'n, 3 N.C. App. 139, 164 S.E.2d 535 (1968).

Since the passage of the Workmen's Compensation Act, the Supreme Court has held recovery from a responsible third party must be distributed by the Industrial Commission

according to the order of priority set out in the act. Byers v. North Carolina State Highway Comm'n, 275 N.C. 229, 166 S.E.2d 649 (1969).

The distribution of any recovery is a matter for the Industrial Commission under subsection (f). Spivey v. Babcock & Wilcox Co., 264 N.C. 387, 141 S.E.2d 808 (1965); Byers v. North Carolina State Highway Comm'n, 275 N.C. 229, 166 S.E.2d 649 (1969).

The net recovery from the responsible third party (except that which must be returned to the subrogee for its outlay) goes to the personal representative under subsection (f)(1)d. Byers v. North Carolina State Highway Comm'n, 275 N.C. 229, 166 S.E.2d 649 (1969).

Subsection (f) provides adequate protection against double recovery by the injured employee on account of aggravation of his original injury through the physician's negligence. Bryant v. Dougherty, 267 N.C. 545, 148 S.E.2d 548 (1966).

Illegal Agreement between Employee's Dependents and Employer for Distribution of Recovery. — In an action by the administrator of a deceased employee against the third-party tort-feasor, allegations in defendant's answer of an illegal agreement between the dependents and the employer for the distribution of the fund, are properly stricken on motion, since the administrator is an official of the court under duty to make disbursement of any recovery in conformity with statute, and could not be bound by the terms of the agreement alleged. Penny v. Stone, 228 N.C. 295, 45 S.E.2d 362 (1947).

Allegations Failing to Show Contract by Employer and Carrier Not to Sue. — An action was instituted by the administrator of a deceased employee against a third-party tort-feasor. Compensation had been paid for the employee's death under the Workmen's Compensation Act. Defendant alleged in its answer that in the collision causing the death of plaintiff's intestate, other persons were killed or injured, that the other actions growing out of the collision were compromised, and that in the settlement defendant made a substantial contribution upon the assurance of the attorneys for the employer and insurance carrier that they would recommend that this action not be instituted. It was held that the allegations failed to show a contract by the employer or the insurance carrier not to sue, or that the attorneys did not make the promised recommendation in good faith; and the allegations were properly stricken upon motion in the administrator's action. Penny v. Stone, 228 N.C. 295, 45 S.E.2d 362 (1947).

Amount and Distribution of Recovery in Action by Insurance Carrier. — When an action is maintained by the insurance carrier against the third-person tort-feasor causing the injury, the tort-feasor is liable for the amount ascertained by the jury as sufficient to compensate the employee for the injuries sustained, which the statute prescribes shall be first applied to the actual court costs, then to the payment of attorneys' fees, then to the reimbursement of the insurance carrier for money paid by it under the award, and any amount remaining to the injured employee, and an instruction on the issue of damages that defendant would be liable for such sum as would reimburse the insurance carrier and would fairly compensate the injured employee is error. Rogers v. Southeastern Constr. Co., 214 N.C. 269, 199 S.E. 41 (1938).

Verdict to Be for Full Amount of Damages. — This section clearly contemplates that the action against the third party is to be tried on its merits as an action in tort, and that any verdict of the jury adverse to the third party is to declare the full amount of damages suffered by the employee on account of his injury, notwithstanding any award of payment of compensation to him under the provisions of the Workmen's Compensation Act. Lovette v. Lloyd, 236 N.C. 663, 73 S.E.2d 886 (1953).

Evidence of Compensation Payments Inadmissible in Action by Employee against Third Party. — Evidence of payments by an employer, as self-insurer under the Workmen's Compensation Act, to an injured employee was inadmissible in an action by the employee against a third party. Redding v. Braddy, 258 N.C. 154, 128 S.E.2d 147 (1962).

In an action by the administrator of an employee against the third-party tort-feasor, evidence concerning amount of compensation paid or payable by the employer is prohibited. Penny v. Stone, 228 N.C. 295, 45 S.E.2d 362 (1947). See Lovette v. Lloyd, 236 N.C. 663, 73 S.E.2d 886 (1953).

The amount of compensation and other benefits paid to or for the employee on account of the injury for which he is seeking damages, is not admissible in evidence in his suit against a third party. Spivey v. Babcock & Wilcox Co., 264 N.C. 387, 141 S.E.2d 808 (1965).

This section provides that the compensation paid under the Workmen's Compensation Act cannot properly be shown to the jury. Lewis v. Barnhill, 267 N.C. 457, 148 S.E.2d 536 (1966).

Trial Court to Enter Judgment Safeguarding Rights of Persons Entitled to Share in Recovery. — In the event of a verdict for the plaintiff in the action against the third party, the trial court, sitting without a jury, is to determine the amount of compensation paid or payable to the injured employee under the Workmen's Compensation Act on the basis either of a stipulation of the interested persons or of evidence submitted to it, and after so doing enter a judgment safeguarding the rights of any person entitled to share in the recovery, regardless of whether or not such person is a party to the action. Lovette v. Lloyd, 236 N.C. 663, 73 S.E.2d 886 (1953).

Double Recovery. — See article entitled, "Settlement with a Third Party," 8 N.C.L. Rev. 424.

Reimbursement of Employer and Insurer from Recovery in Action by Employee's Personal Representative. — Where the suit was instituted by the personal representative of the deceased, and the employer and its insurance carrier have taken no action except to file an affidavit of interest, this in itself would not have prevented them from being reimbursed from the recovery. Essick v. City of Lexington, 233 N.C. 600, 65 S.E.2d 220 (1951).

Employer Not Relieved of Liability by Insurer's Insolvency after Recovery against Third Person. — See Roberts v. City Ice & Coal Co., 210 N.C. 17, 185 S.E. 438 (1936).

Cited in Ray v. French Broad Elec. Membership Corp., 252 N.C. 380, 113 S.E.2d 806 (1960); Young v. Baltimore & O.R.R., 266 N.C. 458, 146 S.E.2d 441 (1966); Bowen v. Iowa Nat'l Mut. Ins. Co., 270 N.C. 486, 155 S.E.2d 238 (1967); Thrift v. Trethewey, 272 N.C. 692, 158 S.E.2d 777 (1968).

§ 97-10.3. Minors illegally employed.—In any case where an employer and employee are subject to the provisions of this Chapter, any injury to a minor while employed contrary to the laws of this State shall be compensable under this Chapter as if said minor were an adult, subject to the other provisions of this Chapter. (1929, c. 120, s. 11; 1933, c. 449, s. 1; 1943, c..622; 1959, c. 1324.)

Injury to Minor Employed Contrary to Law. — Where the evidence discloses that the infant plaintiff was one of five or more employees in a business owned by two of defendants and conducted by the third defendant as general manager, and that he was injured in the performance of the duties of his employment, nonsuit is proper, since the evidence discloses that the cause is within the exclusive jurisdiction of the Industrial Commission, notwithstanding the infant plaintiff may have been hired contrary to law. McNair v. Ward, 240 N.C. 330, 82 S.E.2d 85 (1954), decided under former § 97-10.

§ 97-11. Employer not relieved of statutory duty.—Nothing in this Article shall be construed to relieve any employer or employee from penalty for failure or neglect to perform any statutory duty. (1929, c. 120, s. 12.)

§ 97-12. Intoxication or willful neglect of employee; willful disobedience of statutory duty, safety regulation or rule.—No compensation shall be payable if the injury or death was occasioned by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another. When the injury or death is caused by the willful failure of the employer to comply with any statutory requirement or any lawful order of the Commission, compensation shall be increased ten percent (10%). When the injury or death is caused by the willful failure of the employee to use a safety appliance or perform a statutory duty or by the willful breach of any rule or regulation adopted by the employer and approved by the Commission and brought to the knowledge of the employee prior to the injury compensation shall be reduced ten percent (10%). The burden of proof shall be upon him who claims an exemption or forfeiture under this section. (1929, c. 120, s. 13.)

Cross Reference. — On willful injuries, see also note to § 97-2.

Editor's Note. — For note on the range of compensable consequences of a work-related injury, see 49 N.C.L. Rev. 583 (1971).

Act Eliminates Fault of Workmen as Basis for Denying Recovery. — Compensation acts were intended to eliminate the fault of the workman as a basis for denying recovery. Hartley v. North Carolina Prison Dep't, 258 N.C. 287, 128 S.E.2d 598 (1962).

The negligence of the employee does not disbar him from compensation, except only in cases where the injury is occasioned by his intoxication or willful intention to injure himself or another. Archie v. Greene Bros. Lumber Co., 222 N.C. 477, 23 S.E.2d 834 (1943).

An act of negligence by an employee while he was in the performance of his duty of waiting for his foreman did not bar the employee's right to compensation for the accident resulting from the negligence. Stubblefield v. Watson Elec. Constr. Co., 277 N.C. 444, 177 S.E.2d 882 (1970).

Not even gross negligence is a defense to a compensation claim. Hartley v. North Carolina Prison Dep't, 258 N.C. 287, 128 S.E.2d 598 (1962).

Only intoxication or injury intentionally inflicted will defeat a claim. Hartley v. North Carolina Prison Dep't, 258 N.C. 287, 128 S.E.2d 598 (1962).

Intervening Cause. — When suicide is the "end result" of an injury sustained in a compensable accident, it is an intervening act

but not an intervening cause. An intervening cause is one occurring entirely independent of a prior cause. When a first cause produces a second cause that produces a result, the first cause is a cause of that result. Petty v. Associated Transp., Inc., 276 N.C. 417, 173 S.E.2d 321 (1970).

Suicide Induced by Injury. — In those cases where the injuries suffered by the deceased result in his becoming devoid of normal judgment and dominated by a disturbance of mind directly caused by his injury and its consequences, his suicide cannot be considered "willful" within the meaning and intent of the act. Petty v. Associated Transp., Inc., 276 N.C. 417, 173 S.E.2d 321 (1970).

Suicide cannot be intentionally self-inflicted if, in spite of his act being one of conscious volition, the suicide, because of mental condition resulting from the injury, is unable to control the impluse to kill himself. Petty v. Associated Transp., Inc., 276 N.C. 417, 173 S.E.2d 321 (1970).

If the sole motivation controlling the will of the employee when he knowingly decides to kill himself is the pain and despair caused by the injury, and if the will itself is deranged and disordered by these consequences of the injury, then it seems wrong to say that this exercise of will is "independent," or that it breaks the chain of causation. Rather, it seems to be in the direct line of causation. Petty v. Associated Transp., Inc., 276 N.C. 417, 173 S.E.2d 321 (1970).

While suicide may be an independent intervening cause in some cases, it is certainly not so in those cases where the incontrovertible evidence shows that, without the injury, there would have been no suicide. Petty v. Associated Transp., Inc., 276 N.C. 417, 173 S.E.2d 321 (1970).

Compensation for Suicide. — Using the statute to deny compensation for suicides arising out of the employment is anomalous because to do so produces a narrower basis for recovery under the remedial workmen's compensation acts than would have been possible under common-law tort doctrine. Petty v. Associated Transp., Inc., 276 N.C. 417, 173 S.E.2d 321 (1970).

A ruling prohibiting compensation to the dependents of an employee who intentionally killed himself is not compatible with the objective of the Workmen's Compensation Act, which is to provide for the injured workman, or his dependents in the event of his death, at the cost of the industry which he was serving. To this end, the rule is that benefits under the act should not be denied by a technical, narrow, and strict construction. Petty v. Associated Transp., Inc., 276 N.C. 417, 173 S.E.2d 321 (1970).

Effect of Breach by Statute upon Willful Misconduct. — See 8 N.C.L. Rev. 326.

Failure to Use Safety Appliances or Observe Rules. — This section does not deny compensation when it appears that an injury was caused by the willful failure of an employee to use a safety appliance, or by the willful breach of a rule or regulation adopted by the employer and approved by the Industrial Commission, but only subjects the injured employee to the penalty of a reduction in the compensation to be awarded. Archie v. Greene Bros. Lumber Co., 222 N.C. 477, 23 S.E.2d 834 (1943).

An intentional violation of an approved safety rule of which he had prior notice will not defeat, but will only reduce the amount of an award. Hartley v. North Carolina Prison Dep't, 258 N.C. 287, 128 S.E.2d 598 (1962).

Death Occasioned by Violation of Safety Statute and Intoxication. — Findings, supported by evidence, that in overtaking a truck preceding him on the highway, employee's car left skid marks for 75 feet straight in a line forward and then skid marks sideways across the center of the highway to his left, and that his car was struck by a car approaching from the opposite direction, together with evidence that his blood contained .20 percent of alcohol, were held sufficient to show that the accident resulted from the employee's violation of a safety statute and to support the finding of the Industrial Commission that the employee's death was occasioned by his intoxication, and judgment denying compensation was affirmed. Osborne v. Colonial Ice Co., 249 N.C. 387, 106 S.E.2d 573 (1959).

Injury Held Not Result of Intoxication. — In Brooks v. Carolina Rim & Wheel Co., 213 N.C. 518, 196 S.E. 835 (1938), it was held that the evidence was sufficient to support finding of Industrial Commission that the accident causing injury was not the result of the employee's intoxication, although defendants introduced evidence in conflict therewith. See Gant v. Crouch, 243 N.C. 604, 91 S.E.2d 705 (1956).

Suicide Induced by Insanity. — Evidence was sufficient to support a finding that by reason of insanity a suicide was the result of an uncontrollable impulse, or in a delirium of frenzy without conscious volition to cause death. Painter v. Mead Corp., 258 N.C. 741, 129 S.E.2d 482 (1963).

Where it is shown that the employee's death resulted from a bullet wound, such showing raises a prima facie case only of death by accident, placing upon the employer the burden of going forward with evidence to show that the employee killed himself within the exemption or forfeiture under this section. McGill v. Town of Lumberton, 215 N.C. 752, 3 S.E.2d 324 (1939) (police chief found dead in town building, his gun by his side; compensation was denied by the Commission,

reversed and remanded by the Supreme Court, three justices dissenting). Subsequent award of compensation was affirmed in McGill v. Town of Lumberton, 218 N.C. 586, 11 S.E.2d 873 (1940) (two justices concurring only because of the former decision; one dissent).

In Bolling v. Belkwhite Co., 228 N.C. 749, 46 S.E.2d 838 (1948) a department store manager was found dead in his store early in the morning, a pistol by his side, with no other evidence of how he met his death. The court held that "while there may be a presumption of injury by accident" the award of compensation is defeated because there is no presumption or evidence to support a conclusion that the injury arose out of the employment. "The causal connection between the injury and the employment is not apparent as was the case in McGill v. Lumberton."

Illustrative Cases. — See Winberry v. Farley Stores, 2 I.C. 64 (1934), aff'd, 204 N.C. 79, 167 S.E. 475 (1933) (where defendant contended that deceased met his death in willfully attempting to injure a negro); Brooks v. Carolina Rim & Wheel Co., 6949 (June, 1937), aff'd, 213 N.C. 518, 196 S.E. 835 (1938) (where claimant had one drink four or five hours before the injury).

Applied in Yates v. Hajoca Corp., 1 N.C. App. 553, 162 S.E.2d 119 (1968); Petty v. Associated Transport, 4 N.C. App. 361, 167 S.E.2d 38 (1969).

Quoted in Brewer v. Powers Trucking Co., 256 N.C. 175, 123 S.E.2d 608 (1962).

Cited in Thomason v. Red Bird Cab Co., 235 N.C. 602, 70 S.E.2d 706 (1952).

§ 97-13. Exceptions from provisions of Article.—(a) Employees of Certain Railroads.—This Article shall not apply to railroads or railroad employees nor in any way repeal, amend, alter or affect Article 8 of Chapter 60 or any section thereof relating to the liability of railroads for injuries to employees, nor upon the trial of any action in tort for injuries not coming under the provisions of this Article, shall any provision herein be placed in evidence or be permitted to be argued to the jury. Provided, however, that the foregoing exemption to railroads and railroad employees shall not apply to electric street railroads or employees thereof; and this Article shall apply to electric street railroads and employees thereof and to this extent the provisions of Article 8 of Chapter 60 are hereby amended.

(b) Casual Employment, Domestic Servants, Farm Laborers, Federal Government, Employer of Less than Five Employees.—This Article shall not apply to casual employees, farm laborers, federal government employees in North Carolina, and domestic servants, nor to employees of such persons, nor to any person, firm or private corporation that has regularly in service less than five employees in the same business within this State, except that any employer without regard to number of employees, including an employer of domestic servants, farm laborers, or one who previously had exempted himself, who has purchased workmen's compensation insurance to cover his compensation liability shall be conclusively presumed during life of the policy to have accepted the provisions of this Article from the effective date of said policy and his employees shall be so bound unless waived as provided in this Article; provided however, that this Article shall apply to all employers of one or more employees who are employed in activities which involve the use or presence of ionizing radiation.

(c) Prisoners.—This Article shall not apply to prisoners being worked by the State or any subdivision thereof, except to the following extent: Whenever any prisoner assigned to the State Department of Correction shall suffer accidental injury or accidental death arising out of and in the course of the employment to which he had been assigned, if there be death or if the results of such injury continue until after the date of the lawful discharge of such prisoner to such an extent as to amount to a disability as defined in this Article, then such discharged prisoner or the dependents or next of kin of such discharged prisoner may have the benefit of this Article by applying to the Industrial Commission as any other employee; provided, such application is made within 12 months from the date of the discharge; and provided further that the maximum compensation to any prisoner or to the dependents or next of kin of any deceased prisoner shall not exceed twenty dollars ($20.00) per week and the

period of compensation shall relate to the date of his discharge rather than the date of the accident. If any person who has been awarded compensation under the provisions of this subsection shall be recommitted to prison upon conviction of an offense committed subsequent to the award, such compensation shall immediately cease. Any awards made under the terms of this subsection shall be paid by the State Department of Correction from the funds available for the operation of the Department of Corrections. The provisions of G.S. 97-10.1 and G.S. 97-10.2 shall apply to prisoners and discharged prisoners entitled to compensation under this subsection and to the State in the same manner as said section applies to employees and employers.

(d) Sellers of Agricultural Products.—This Article shall not apply to persons, firms or corporations engaged in selling agricultural products for the producers thereof on commission or for other compensation, paid by the producers, provided the product is prepared for sale by the producer. (1929, c. 120, s. 14; 1933, c. 401; 1935, c. 150; 1941, c. 295; 1943, c. 543; 1945, c. 766; 1957, c. 349, s. 10; c. 809; 1967, c. 996, s. 13; 1971, c. 284, s. 2; c. 1176.)

I. In General.
II. Casual Employees.
III. Farm Laborers.
IV. Domestic Servants.
V. Number of Employees.
VI. Prisoners.

I. IN GENERAL.

Local Modification. — Mecklenburg: 1933, c. 401.

Cross Reference. — As to cases arising in admiralty and as to logging railroads, see note to § 97-2.

Editor's Note. — The first 1971 amendment added the proviso at the end of subsection (b).

The second 1971 amendment, in the first sentence of subsection (c), inserted "or accidental death," inserted "if there be death or," inserted "or the dependents or next of kin of such discharged prisoner," inserted "the" following "the date of," inserted "or to the dependents or next of kin of any deceased prisoner," substituted "twenty dollars ($20.00)" for "ten dollars," and deleted the language following "date of the accident." In the second sentence of subsection (c), the amendment substituted "subsection" for "section," substituted "of" for "for" following "conviction," and deleted "and determine" following "cease." At the end of the third sentence of subsection (c), the amendment substituted "Department of Corrections" for "Department of Correction." The amendment also substituted "G.S. 97-10.1 and G.S. 97-10.2" for "G.S. 97-10" in the fourth sentence of subsection (c).

Session Laws 1971, c. 284, s. 4, provides: "This act shall be in full force and effect from and after July 1, 1971, and shall apply only to cases originating on and after July 1, 1971."

Article 8 of Chapter 60, referred to in subsection (a) of this section, was repealed by Session Laws 1963, c. 1165. For present provisions as to liability of railroads for injuries to employees, see § 62-242.

Prima Facie Evidence of Coverage by Act. — This section merely facilitates proof that the employer and its employees are subject to the terms of the Workmen's Compensation Act. Proof that the employer obtained insurance and a claim was filed is, under this section, prima facie evidence that the employer and the employee have elected to be bound by the act. Gassaway v. Gassaway, 220 N.C. 694, 18 S.E.2d 120 (1942), decided prior to the 1945 amendment which rewrote subsection (b).

The former provisions of this section that proof that the employer obtained insurance and filed claim should be prima facie evidence that the employer and employee have elected to be bound by the act did not have the effect of raising a presumption that an executive officer injured in the course of his duties was at the time engaged in the duties of an employee rather than those of an executive. Gassaway v. Gassaway, 220 N.C. 694, 18 S.E.2d 120 (1942).

Purchase of Insurance Subjects Employer and Employees to Act. — By purchasing a workmen's compensation insurance policy, the employer and his employees become subject to the act and continue to be "so bound unless waived as provided in this Article." Crawford v. Pressley, 6 N.C. App. 641, 171 S.E.2d 197 (1969).

And Failure of Third-Party Insurance Agent to Renew Policy Does Not Constitute Waiver. — By purchasing a workmen's compensation insurance policy, the employer and his employees become subject to the act and continue to be "so bound unless waived as provided in this Article." The failure of a third party, such as the insurance agent, to fulfill his agreement to see that other insurance was obtained upon the cancellation of the insurance

policy, does not constitute a waiver "as provided in this Article." Crawford v. Pressley, 6 N.C. App. 641, 171 S.E.2d 197 (1969).

Applied in Rape v. Town of Huntersville, 214 N.C. 505, 199 S.E. 736 (1938).

Quoted in Horney v. Meredith Swimming Pool Co., 267 N.C. 521, 148 S.E.2d 554 (1966); Patterson v. L.M. Parker & Co., 2 N.C. App. 43, 162 S.E.2d 571 (1968).

Cited in Borders v. Cline, 212 N.C. 472, 193 S.E. 826 (1937); Crawford v. General Ins. & Realty Co., 266 N.C. 615, 146 S.E.2d 651 (1966).

II. CASUAL EMPLOYEES.

Employment in Employer's Regular Course of Business Not Casual. — Two employees were hired by a fertilizer dealer "whenever a carload of fertilizer arrived, to unload and deliver the fertilizer." This was held not to be "casual" employment, but "work pertaining to the regular course of defendant's business." Hunter v. Peirson, 229 N.C. 356, 49 S.E.2d 653 (1948).

Where plaintiff was hired to paint the interior of defendant's mill, the employment was not casual since it was part of defendant's duties as a mill operator to keep its buildings in repair. Johnson v. Asheville Hosiery Co., 1 I.C. 41 (1929), aff'd, 199 N.C. 38, 153 S.E. 591 (1930).

Employment continuously for five or six weeks in construction of facilities for handling material in defendant's plant may not be held to be either casual or not in the course of defendant's business. Smith v. Southern Wastepaper Co., 226 N.C. 47, 36 S.E.2d 730 (1946).

Civilian Summoned by Forest Warden to Help Extinguish Fire. — A civilian who had been summoned by a forest warden to assist in extinguishing a fire was held to be not a casual employee. Moore v. State, 200 N.C. 300, 156 S.E. 806 (1930).

III. FARM LABORERS.

Employee of State Engaged in Farm Labor Is Covered by Act. — In Barbour v. State Hosp., 213 N.C. 515, 196 S.E. 812 (1938), the holding that an employee of the State engaged in farm labor was covered by the act was affirmed, the court stating that the exemption was intended for the protection of farmers as an occupational class and that § 97-2(2) includes all State "officers and employees" except those elected or appointed by the Governor or General Assembly.

For other cases involving public employees, see note to § 97-2, analysis line II, B, 4, "State and Municipal Employees."

IV. DOMESTIC SERVANTS.

Dual Employment — Domestic and Trade. — Plaintiff was employed for a single wage to do janitorial, window cleaning, and delivery work at defendant's paint store and also to do janitor and garden work at defendant's home. He was paid at the store. His injuries arose from an accident connected with lawn mowing at the employer's home. An award by the Commission was affirmed in the superior court but reversed on the insurance carrier's appeal. The personal work done for the employer was not within the coverage of the act. Burnett v. Palmer-Lipe Paint Co., 216 N.C. 204, 4 S.E.2d 507 (1939).

V. NUMBER OF EMPLOYEES.

Where a corporate employer with less than five employees procures a policy of compensation insurance, such employer is presumed to have accepted the provisions of the Workmen's Compensation Act, and such policy covers its executive officers notwithstanding the premium on the policy is based on the compensation of a single nonexecutive employee and the parties intended to cover him only, unless notice of nonacceptance by the executive officers is duly filed with the Industrial Commission. Laughridge v. South Mountain Pulpwood Co., 266 N.C. 769, 147 S.E.2d 213 (1966).

Ordinarily, an employer with less than five employees is exempt from the act. However, when such employer at his election voluntarily purchases workmen's compensation insurance, he accepts all provisions of the act. In such case, the policy he purchases both creates and protects his compensation liability; and thereafter such employer and his employees are bound by the provisions of the act unless, prior to any accident resulting in injury or death, notice to the contrary is given. Crawford v. Pressley, 6 N.C. App. 641, 171 S.E.2d 197 (1969).

Whether or not there are five persons regularly employed in one business is a jurisdictional matter that cannot be waived. Thompson v. Johnson Funeral Home, 205 N.C. 801, 172 S.E. 500 (1934) (where the jurisdiction of the Industrial Commission was first challenged in an appeal from the Commission to the superior court). See same case on rehearing, 208 N.C. 178, 179 S.E. 801 (1935), noted critically, 14 N.C.L. Rev. 76.

Employment of Five or More Must Affirmatively Appear. — It must appear affirmatively by evidence or by admission of record that a defendant sought to be held liable under this Chapter had in his employ five or more employees in order to sustain the jurisdiction of the Commission. Chadwick v. North Carolina Dep't of Conservation & Dev., 219 N.C. 766, 14 S.E.2d 842 (1941). See Hanks v. Southern Pub. Util. Co., 204 N.C. 155, 167 S.E. 560 (1933).

A demurrer to an action for death of an employee, on the ground that the action is

cognizable only by the Industrial Commission, is properly overruled when it does not appear on the face of the complaint that the defendant employed more than five men in this State. Hanks v. Southern Pub. Util. Co., 204 N.C. 155, 167 S.E. 560 (1933). See Southerland v. Harrell, 204 N.C. 675, 169 S.E. 423 (1933); Allen v. American Cotton Mills, 206 N.C. 704, 175 S.E. 98 (1934).

To sustain the jurisdiction of the Commission it must affirmatively appear that the employer, which it undertakes to bind by its award, had as many as five men in his or its employment. Letterlough v. Atkins, 258 N.C. 166, 128 S.E.2d 215 (1962).

Reversal of Commission's Award Where Number of Employees Not Affirmatively Shown. — When it is not made to affirmatively appear that the defendant sought to be held liable under this Chapter had in his employ five or more employees, the Commission's award of compensation against him must be reversed. Chadwick v. North Carolina Dep't of Conservation & Dev., 219 N.C. 766, 14 S.E.2d 842 (1941).

Where the findings of facts of the Industrial Commission that the deceased was an employee of the defendant and that the defendant employed more than five workers, are not supported by any evidence in the hearing before it, the findings are jurisdictional, and upon appeal to the superior court the award should be set aside and vacated. Poole v. Sigmon, 202 N.C. 172, 162 S.E. 198 (1932).

Remand to Determine Number of Employees. — It is not error for the superior court to remand a proceeding in order that the facts with respect to the number of employees in the employment of the defendant at the time the employee was injured might be ascertained by the Industrial Commission. Letterlough v. Atkins, 258 N.C. 166, 128 S.E.2d 215 (1962).

Less than Five Employees within This State. — See Chadwick v. North Carolina Dep't of Conservation & Dev., 219 N.C. 766, 14 S.E.2d 842 (1941), treated under § 97-86.

Where Number of Employees Varies. — Defendant employed three employees regularly. Two additional employees had been hired for at least a part of each week for two preceding months. It was held that the jurisdictional requirement of five regular employees was met. Hunter v. Peirson, 229 N.C. 356, 49 S.E.2d 653 (1948).

Where Employer Conducts Several Distinct Businesses. — Where the employer conducts several distinct businesses and in each employs less than the requisite number required to bring himself within the act, he is not subject to the act. This is true though the businesses are under the same roof. Aycock v. Cooper, 202 N.C. 500, 163 S.E. 569 (1932).

Evidence Tending to Show Less than Five Regular Employees. — Where, in a hearing before the Industrial Commission the employer testifies that he employed three men other than himself, and another witness testifies that at the time of the injury in suit there were two men working besides the employer and that the other employees were on vacation, the evidence is insufficient to support the finding that the parties were bound by the act, since the evidence tends to show that the employer regularly employed less than five employees. Thompson's Dependents v. Johnson Funeral Home, 205 N.C. 801, 172 S.E. 500 (1934).

Finding of Jury That Defendant Employed Less than Five. — In a common-law action where the jury found on conflicting evidence that defendant employed less than five employees, the trial court was held to have jurisdiction. Young v. Maryland Mica Co., 212 N.C. 243, 193 S.E. 285 (1937).

VI. PRISONERS.

Action for Wrongful Death under Tort Claims Act Not Barred. — Subsection (c) of this section was held not to be a bar in an action for wrongful death of a prisoner brought under the Tort Claims Act. Ivey v. North Carolina Prison Dep't, 252 N.C. 615, 114 S.E.2d 812 (1960).

The second 1957 amendment to this section which made former § 97-10 applicable to certain prisoners does not deny to prisoners on assigned tasks rights conferred by the Tort Claims Act. Ivey v. North Carolina Prison Dep't, 252 N.C. 615, 114 S.E.2d 812 (1960). See also note to § 143-291.

Burial Expenses. — It was assumed, for the purposes of the case, that this section permits the establishment of a claim for the burial expenses of a prisoner whose death occurred while a prisoner. Lawson v. North Carolina State Highway & Pub. Works Comm'n, 248 N.C. 276, 103 S.E.2d 366 (1958).

In Ivey v. North Carolina Prison Dep't, 252 N.C. 615, 114 S.E.2d 812 (1960), it was held that the payment of burial expenses is not payment of "compensation" under the Workmen's Compensation Act so as to make the remedy of the personal representative of such a prisoner under subsection (c) exclusive by virtue of former § 97-10.

§ 97-14. Employers not bound by Article may not use certain defenses in damage suit.—An employer who elects not to operate under this Article shall not, in any suit at law instituted by an employee subject to this Article to recover damages for personal injury or death by accident, be permitted to defend any such suit at law upon any or all of the following grounds:

(1) That the employee was negligent.
(2) That the injury was caused by the negligence of a fellow employee.
(3) That the employee has assumed the risk of the injury. (1929, c. 120, s. 15.)

Cross Reference. — See § 97-94(b), applying these rules to employers failing to insure.

Employer Is Not an Insurer. — This section, although abolishing an employer's most cherished defenses, does not make him an insurer, nor does it relieve the employee of establishing a breach of duty. It is elementary, however, that this section leaves the employer in a completely exposed position. Great Atl. & Pac. Tea Co. v. Robards, 161 F.2d 929 (4th Cir. 1947).

The defendants were not insurers of the safety of their employee, but were required only to exercise the degree of care which a man of ordinary prudence would have used under like circumstances and charged with like duty. Muldrow v. Weinstein, 234 N.C. 587, 68 S.E.2d 249 (1951).

The fact that plaintiff suffered an injury while at work for the defendants would not of itself impose liability therefor. In order to sustain recovery plaintiff must allege and offer evidence tending to show negligence on the part of his employers, and that such negligence was the proximate cause of his injury. Muldrow v. Weinstein, 234 N.C. 587, 68 S.E.2d 249 (1951).

This section cannot be held to have abolished the simple tool doctrine as a ground of defense. Newbern v. Great Atl. & Pac. Tea Co., 68 F.2d 523, 91 A.L.R. 781 (4th Cir. 1934).

In an action brought at common law on the grounds that defendant had rejected the act, plaintiff alleged that defendant negligently permitted the wheel of a moving floor scale to become defective and that in attempting to move the scale plaintiff suffered injury. It was held that in the use of simple tools, the employer can anticipate no danger which the employee could not guard against; thus, there was no negligence on defendant's part. Newbern v. Great Atl. & Pac. Tea Co., 68 F.2d 523, 91 A.L.R. 781 (4th Cir. 1934).

The same result obtained in Muldrow v. Weinstein, 234 N.C. 587, 68 S.E.2d 249 (1951), where the court, three justices dissenting, denied a common-law recovery to a 67-year-old employee who fell into a scrap metal compressing pit which had no guardrail.

Defenses Not Available. — Where an employer who regularly employs more than five employees in his business elects not to operate under the Workmen's Compensation Act, an injured employee may maintain an action against him at common law, in which action contributory negligence, negligence of a fellow employee, and assumption of risks are not available as defenses. Bame v. Palmer Stone Works, 232 N.C. 267, 59 S.E.2d 812 (1950).

Contributory Negligence. — Where it is admitted that defendant employer had a sufficient number of employees to bring him under this Chapter, but that he had elected not to do so, the defense of contributory negligence is properly excluded. Lee v. Roberson, 220 N.C. 61, 16 S.E.2d 459 (1941).

If an employee contracts an occupational disease while working for an employer who has rejected the act, recovery may be had in an action at common law upon a showing of negligence. Bame v. Palmer Stone Works, 232 N.C. 267, 59 S.E.2d 812 (1950).

Cited in Calahan v. Roberts, 208 N.C. 768, 182 S.E. 657 (1935); Dark v. Johnson, 225 N.C. 651, 36 S.E.2d 237 (1945).

§ 97-15. Electing employer may use such defenses against nonelecting employee.—Any employee who elects not to operate under this Article shall, in any action to recover damages for personal injury or death brought against an employer accepting the compensation provisions of this Article, proceed at common law, and the employer may avail himself of the defenses of contributory negligence, negligence of a fellow servant, and assumption of risk, as such defenses exist at common law. (1929, c. 120, s. 16.)

§ 97-16. Defenses denied to nonelecting employer as against nonelecting employee.—When both the employer and employee elect not to operate under this Article, the liability of the employer shall be the same as though he alone rejected the terms of this Article, and in any suit brought against him by such employee the employer shall not be permitted to avail himself of any of the common-law defenses cited in G.S. 97-14. Provided, however, that in Ashe, Avery, Bladen, Carteret, Caswell, Cherokee, Gates, Hyde, Macon, Pender, Perquimans, Watauga and Wilkes Counties any sheriff may exempt himself and any and all deputies appointed by him from the provisions of this Article by notice in writing to the Industrial Commission, such notice to be made on

forms prescribed by the Industrial Commission. (1929, c. 120, s. 17; 1931, c. 274, s. 2; 1939, c. 277, s. 2; 1943, c. 543; 1967, c. 182.)

The former provision permitting a sheriff to exempt himself from the operation of the act by giving the notice prescribed, did not have the effect of bringing deputy sheriffs within the intent and meaning of the act, nor did the fact that a sheriff purchased insurance to cover his compensation liability have the effect of enlarging or extending the language of the act. Borders v. Cline, 212 N.C. 472, 193 S.E. 826 (1937), decided prior to the 1943 amendment which added the present proviso. See also 16 N.C.L. Rev. 419.

Cited in Calahan v. Roberts, 208 N.C. 768, 182 S.E. 657 (1935).

§ 97-17. Settlements allowed in accordance with Article.—Nothing herein contained shall be construed so as to prevent settlements made by and between the employee and employer so long as the amount of compensation and the time and manner of payment are in accordance with the provisions of this Article. A copy of such settlement agreement shall be filed by employer with and approved by the Industrial Commission: Provided, however, that no party to any agreement for compensation approved by the Industrial Commission shall thereafter be heard to deny the truth of the matters therein set forth, unless it shall be made to appear to the satisfaction of the Commission that there has been error due to fraud, misrepresentation, undue influence or mutual mistake, in which event the Industrial Commission may set aside such agreement. (1929, c. 120, s. 18; 1963, c. 436.)

The law, by this section, undertakes to protect the rights of the employee in contracting with respect to his injuries. Caudill v. Chatham Mfg. Co., 258 N.C. 99, 128 S.E.2d 128 (1962).

Section Contemplates Only Settlement in Respect of Amount of Compensation. — The only "settlement" contemplated by this section is a settlement in respect of the amount of compensation to which claimants are entitled under the act. McGill v. Bison Fast Freight, Inc., 245 N.C. 469, 96 S.E.2d 438 (1957).

And Does Not Apply to Compromise and Settlement of Common-Law Claim. — Compromise and settlement of the common-law claim of the administratrix of a deceased employee for the wrongful death of the employee, executed under the mistaken belief that Workmen's Compensation Act was not applicable, will not be disturbed on the ground that the Industrial Commission did not approve such settlement as required by this section. McGill v. Bison Fast Freight, Inc., 245 N.C. 469, 96 S.E.2d 438 (1957).

Settlement for out-of-the-state injury may be beyond the jurisdiction of the Commission to approve and enforce. See Reaves v. Earle-Chesterfield Mill Co., 216 N.C. 462, 5 S.E.2d 305 (1939), treated under § 97-36.

The presumption is that the Industrial Commission approves compromises only after a full investigation and a determination that the settlement is fair and just. Caudill v. Chatham Mfg. Co., 258 N.C. 99, 128 S.E.2d 128 (1962); Hartsell v. Pickett Cotton Mills, Inc., 4 N.C. App. 67, 165 S.E.2d 792 (1969).

Agreement Nullifying Workmen's Compensation Act Not Permitted. — The Industrial Commission has the inherent power, upon application made in due time, to relieve a party from a judicial determination of his rights when the decision is a product of mistake, fraud, or excusable neglect, but this power to prevent injustice by fraud, mistake, or excusable neglect does not extend so far as to permit a nullification of the Workmen's Compensation Act by an agreement between a party entitled to receive and a party obligated to pay compensation that they will disregard its provisions. Stanley v. Brown, 261 N.C. 243, 134 S.E.2d 321 (1964).

Setting Aside Settlement. — Where the mistake relied on to set aside a release related only to the consequences of a known injury, and uncertainties in this regard were the subject matter of the compromise settlement, the mistake was not such as to warrant a court of equity in setting aside a release executed pursuant to a settlement approved by the Industrial Commission under this section. Caudill v. Chatham Mfg. Co., 258 N.C. 99, 128 S.E.2d 128 (1962).

The question whether the Industrial Commission has jurisdiction to rescind and set aside settlements and compromise settlements, approved by them, on the ground of mutual mistake of fact, was touched on, but not decided, in Caudill v. Chatham Mfg. Co., 258 N.C. 99, 128 S.E.2d 128 (1962).

Where an employee has received benefits from an agreement for compensation executed by himself, his employer, and the insurance carrier, which agreement was duly approved by the Industrial Commission, he may attack and have such agreement set aside only for fraud, misrepresentation, undue influence, or mutual mistake, and he may not attack it on the ground that the jurisdictional facts therein

alleged in regard to the relationship of employer and employee and that the accident arose out of and in the course of the employment were untrue. Tabron v. Gold Leaf Farms, Inc., 269 N.C. 393, 152 S.E.2d 533 (1967).

Setting Aside Award Without Setting Aside Agreement. — An agreement for the payment of compensation is binding on the parties when approved by the Industrial Commission, and therefore where such agreement has been signed and approved by the Commission and an award entered thereon, and the Commission has entered an order setting aside the award alone without disturbing the Commission's approval or the agreement of the parties, for fraud, mistake, or misunderstanding, such agreement precludes action at common law. Neal v. Clary, 259 N.C. 163, 130 S.E.2d 39 (1963).

Cited in Hedgecock v. Frye, 1 N.C. App. 369, 161 S.E.2d 647 (1968).

§ 97-18. Prompt payment of compensation required; installments; notice to Commission; penalties.—(a) Compensation under this Article shall be paid periodically, promptly and directly to the person entitled thereto unless otherwise specifically provided.

(b) The first installment of compensation payable under the terms of an agreement shall become due on the fourteenth day after the employer has knowledge of the injury or death, on which date all compensation then due shall be paid. Thereafter compensation shall be paid in installments weekly except where the Commission determines that payment in installments should be made monthly or at some other period.

(c) The first installment of compensation payable under the terms of an award by the Commission, or under the terms of a judgment of the court upon an appeal from such an award, shall become due seven days from the date of such an award or from the date of such a judgment of the court, on which date all compensation then due shall be paid. Thereafter compensation shall be paid in installments weekly, except where the Commission determines that payment in installments shall be made monthly or in some other manner.

(d) Upon making the first payment, and upon suspension of payment for any cause, the employer shall immediately notify the Commission, in accordance with the form prescribed by the Commission, that payment of compensation has begun or has been suspended, as the case may be.

(e) If any installment of compensation payable in accordance with the terms of an agreement approved by the Commission is not paid within 14 days after it becomes due, as provided in subsection (b) of this section, or if any installment of compensation payable in accordance with the terms of an award by the Commission is not paid within 14 days after it becomes due, as provided in subsection (c) of this section, there shall be added to such unpaid installment an amount equal to ten per centum (10%) thereof, which shall be paid at the same time as, but in addition to, such installment, unless such nonpayment is excused by the Commission after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

(f) Within 16 days after final payment of compensation has been made, the employer shall send to the Commission a notice, in accordance with a form prescribed by the Commission, stating that such final payment has been made, the total amount of compensation paid, the name of the employee and of any other person to whom compensation has been paid, the date of the injury or death, and the date to which compensation has been paid. If the employer fails to so notify the Commission within such time, the Commission shall assess against such employer a civil penalty in the amount of twenty-five dollars ($25.00). (1929, c. 120, s. 18½; 1967, c. 1229, s. 2.)

Cited in Watkins v. Central Motor Lines, 10 N.C. App. 486, 179 S.E.2d 130 (1971).

§ 97-19. Liability of principal contractors; certificate that subcontractor has complied with law; right to recover compensation of those who would

have been liable; order of liability.—Any principal contractor, intermediate contractor, or subcontractor who shall sublet any contract for the performance of any work without requiring from such subcontractor or obtaining from the Industrial Commission a certificate, issued by the Industrial Commission, stating that such subcontractor has complied with G.S. 97-93 hereof, shall be liable, irrespective of whether such subcontractor has regularly in service less than five employees in the same business within this State, to the same extent as such subcontractor would be if he had accepted the provisions of this Article for the payment of compensation and other benefits under this Article on account of the injury or death of any employee of such subcontractor due to an accident arising out of and in the course of the performance of the work covered by such subcontract. If the principal contractor, intermediate contractor or subcontractor shall obtain such certificate at the time of subletting such contract to subcontractor, he shall not thereafter be held liable to any employee of such subcontractor for compensation or other benefits under this Article. The Industrial Commission, upon demand shall furnish such certificate, and may charge therefor the cost thereof, not to exceed twenty-five cents (25¢).

Any principal contractor, intermediate contractor, or subcontractor paying compensation or other benefits under this Article, under the foregoing provisions of this section, may recover the amount so paid from any person, persons, or corporation who independently of such provision, would have been liable for the payment thereof.

Every claim filed with the Industrial Commission under this section shall be instituted against all parties liable for payment, and said Commission, in its award, shall fix the order in which said parties shall be exhausted, beginning with the immediate employer.

The principal or owner may insure any or all of his contractors and their employees in a blanket policy, and when so insured such contractor's employees will be entitled to compensation benefits regardless of whether the relationship of employer and employee exists between the principal and the contractor. (1929, c. 120, s. 19; 1941, c. 358, s. 1; 1945, c. 766.)

Editor's Note. — For note as to rights of employees of subcontractors against owners and principal contractors, see 35 N.C.L. Rev. 569 (1957).

The 1941 amendment, which inserted "irrespective of whether such subcontractor has regularly in service less than five employees in the same business within this State" in the first sentence, was not in reality an amendment in the sense that it changed an existing law, but really amounted to an amendment for the purpose of expressing the full legislative intent under the existing law. Graham v. Wall, 220 N.C. 84, 16 S.E.2d 691 (1941).

Purpose of Section. — The manifest purpose of this section, enacted as an amendment to the original Workmen's Compensation Act, is to protect employees of irresponsible and uninsured subcontractors by imposing ultimate liability on principal contractors, intermediate contractors, or subcontractors, who, presumably being financially responsible, have it within their power, in choosing subcontractors, to pass upon their financial responsibility and insist upon appropriate compensation protection for their workers. It is also the obvious aim of the statute to forestall evasion of the Workmen's Compensation Act by those who might be tempted to subdivide their regular operations with the workers, thus relating them for compensation protection to small subcontractors, who fail to carry, or if small enough may not even be required to carry, compensation insurance. Greene v. Spivey, 236 N.C. 435, 73 S.E.2d 488 (1952).

Section Not Applicable to Employers and Independent Contractors. — This section relates to contractors and subcontractors and not to employers and independent contractors. Beach v. McLean, 219 N.C. 521, 14 S.E.2d 515 (1941).

This section imposes liability, under certain specified circumstances, on the principal contractor or employer for injuries and death to employees of his independent contractor or of his subcontractor, but the provisions of this section do not extend to his independent contractor personally or to his subcontractor personally when he is an independent contractor. Richards v. Nationwide Homes, 263 N.C. 295, 139 S.E.2d 645 (1965).

This section is not applicable to an independent contractor as distinguished from a subcontractor of the class designated by the

statute. And all the more is it so that the statute does not apply to an independent employer who produces or gets out raw materials of his own, like logs, and sells them in the open market to a processor-purchaser who has no control whatsoever over the operations of the independent employer. Greene v. Spivey, 236 N.C. 435, 73 S.E.2d 488 (1952).

Principal Not Liable for Failure of Independent Contractor to Insure. — In McCraw v. Calvine Mills, 233 N.C. 524, 64 S.E.2d 658 (1951), a mill company contracted with one G to paint the mill. The company was to furnish all materials; G was to furnish brushes and skilled labor. G testified that he, and not the mill company, had complete control of the painters employed on the job. It was held that G was not an employee, but an independent contractor within the meaning of the act, and the mill company was not liable for G's failure to insure.

Main Contractor Held Agent of Insurer in Effecting Compensation Insurance for Independent Contractor. — See Greene v. Spivey, 236 N.C. 435, 73 S.E.2d 488 (1952).

This Section Modifies § 97-2(1). — As a general proposition, the only private employments covered by the Workmen's Compensation Act are those "in which five or more employees are regularly employed in the same business or establishment." See § 97-2(1). But this general rule is subject to the exception created by this section, which was manifestly enacted to protect the employees of financially irresponsible subcontractors who do not carry workmen's compensation insurance, and to prevent principal contractors, intermediate contractors, and subcontractors from relieving themselves of liability under the act by doing through subcontractors what they would otherwise do through the agency of direct employees. Withers v. Black, 230 N.C. 428, 53 S.E.2d 668 (1949).

Number of Persons Regularly Employed by Contractor Is Immaterial. — Where a contractor sublets a part of the contract to a subcontractor without requiring from the subcontractor a certificate that he had procured compensation insurance or had satisfied the Industrial Commission of his financial responsibility as a self-insurer under § 97-93, such contractor is properly held secondarily liable for compensation to an employee of the subcontractor, even though the contractor regularly employs less than five employees. Withers v. Black, 230 N.C. 428, 53 S.E.2d 668 (1949). See § 97-2.

Lumber Company Buying Timber Held Not Contractor. — A lumber company which purchases timber on the basis of a stipulated price per thousand feet when processed into lumber by it, and which is given the privilege of going upon the land and cutting and logging the timber to its site, cannot be held a contractor of the owners of the timber in the performance of the logging operations, and therefore a person employed by it to conduct logging operations cannot be a subcontractor within the meaning of this section, and the section has no application in determining the liability for injury to one of the workmen employed in the logging operations. Evans v. Tabor City Lumber Co., 232 N.C. 111, 59 S.E.2d 612 (1950).

On an almost identical set of facts, claimant brought an action against the lumber company, on the ground that his superior was not an independent contractor or a subcontractor, but was actually an employee of the lumber company. On the evidence there presented, the court held that an award of compensation based on the employee-employer relation should be affirmed. Scott v. Waccamaw Lumber Co., 232 N.C. 162, 59 S.E.2d 425 (1950).

Assistant Driver Employed by Owner-Lessor of Truck under Trip-Lease Agreement. — Where the owner of a truck drives same on a trip in interstate commerce for an interstate carrier under a trip-lease agreement providing that the carrier's I.C.C. license plates should be used and the carrier retain control and direction over the truck, an assistant driver employed by the owner-lessor is an employee of the carrier within the coverage of the North Carolina Workmen's Compensation Act. Further, if the owner-lessor be considered an independent contractor, but had less than five employees and no compensation insurance coverage, the carrier would still be liable under this section. McGill v. Bison Fast Freight, Inc., 245 N.C. 469, 96 S.E.2d 438 (1957).

Order of Liability. — See Roberts v. City Ice & Coal Co., 210 N.C. 17, 185 S.E. 438 (1936), where it is stated: "The liability of the employer under the award is primary. He, by contract, may secure liability insurance for his protection, but his obligation to the injured employee is unimpaired."

Cited in Sayles v. Loftis, 217 N.C. 674, 9 S.E.2d 393 (1940).

§ 97-20. Priority of compensation claims against assets of employer.—All rights of compensation granted by this Article shall have the same preference or priority for the whole thereof against the assets of the employer as is allowed by law for any unpaid wages for labor. (1929, c. 120, s. 20.)

§ 97-21. Claims unassignable and exempt from taxes and debts;

agreement of employee to contribute to premium or waive right to compensation void; unlawful deduction by employer.—No claim for compensation under this Article shall be assignable, and all compensation and claims therefor shall be exempt from all claims of creditors and from taxes.

No agreement by an employee to pay any portion of premium paid by his employer to a carrier or to contribute to a benefit fund or department maintained by such employer for the purpose of providing compensation or medical services and supplies as required by this Article shall be valid, and any employer who makes a deduction for such purpose from the pay of any employee entitled to the benefits of this Article shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than five hundred dollars ($500.00). No agreement by an employee to waive his right to compensation under this Chapter shall be valid. (1929, c. 120, s. 21.)

Editor's Note. — For a discussion of this section, see 8 N.C.L. Rev. 477. And see 15 N.C.L. Rev. 286.

Exemption Lost on Transfer to Another Fund. — See Merchants Bank v. Weaver, 213 N.C. 767, 197 S.E. 551 (1938).

Stated in Worley v. Pipes, 229 N.C. 465, 50 S.E.2d 504 (1948).

§ 97-22. Notice of accident to employer.—Every injured employee or his representative shall immediately on the occurrence of an accident, or as soon thereafter as practicable, give or cause to be given to the employer a written notice of the accident, and the employee shall not be entitled to physician's fees nor to any compensation which may have accrued under the terms of this Article prior to the giving of such notice, unless it can be shown that the employer, his agent or representative, had knowledge of the accident, or that the party required to give such notice had been prevented from doing so by reason of physical or mental incapacity, or the fraud or deceit of some third person; but no compensation shall be payable unless such written notice is given within 30 days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the Industrial Commission for not giving such notice and the Commission is satisfied that the employer has not been prejudiced thereby. (1929, c. 120, s. 22.)

Cross Reference. — As to minor dependent without guardian, etc., see note to § 97-50.

Necessity for Giving Notice. — In Singleton v. Durham Laundry Co., 213 N.C. 32, 195 S.E. 34 (1937), the court stated that an employee "is not entitled to recover unless he can show that he has complied with the provisions of the statute in respect to the giving of notice, or has shown reasonable excuse to the satisfaction of the Industrial Commission for not giving such notice and the Commission is satisfied that the employer has not been prejudiced thereby."

Notice Held Insufficient. — In Jacobs v. Safie Mfg. Co., 229 N.C. 660, 50 S.E.2d 738 (1948), claimant, after his injury, sent two or three messages to the superintendent, requesting him to come to see him, and the superintendent promised to do so but never did. Also, claimant's sister testified that she told the superintendent, (nearly four months after the injury) that claimant had been hurt in the mill. It was held that this did not constitute sufficient notice of injury, nor did it constitute a basis for estoppel against the defendant to plead the provisions of this section.

Finding That Employer Not Prejudiced by Lack of Notice. — A finding by the Commission that the employer has not been prejudiced by the failure of the plaintiff to give notice of the injury within 30 days after the accident, suffices to sustain the award from and after such notice; but not for benefits which may have accrued prior thereto. Eller v. Lawrence Leather Co., 222 N.C. 604, 24 S.E.2d 244 (1943).

Fact That Employer Continued to Pay Employee's Salary after Injury. — Where plaintiff suffered a disabling injury which he failed to report, the fact that defendant continued to pay his salary for a while does not constitute an estoppel in the absence of proof that defendant knew of the injury at the time the payments were made. Lilly v. Belk Bros., 210 N.C. 735, 188 S.E. 319 (1936).

A finding by the Commission that plaintiff was not capable of coherent, normal thought at the time of his examination by physicians falls short of a finding that he was prevented from giving written notice of his injury by reason of physical or mental incapacity so as to entitle him to the benefits which may have accrued prior to the giving of such notice. Eller v. Lawrence Leather Co., 222 N.C. 604, 24 S.E.2d 244 (1943).

Pleadings. — Unless the notice of accident required by this section and § 97-23 is so considered, the Workmen's Compensation Act makes no mention of pleadings. Clark v. Gastonia Ice Cream Co., 261 N.C. 234, 134 S.E.2d 354 (1964).

Cited in Wilson v. E.H. Clement Co., 207 N.C. 541, 177 S.E. 797 (1935); Hanks v. Southern Pub. Util. Co., 210 N.C. 312, 186 S.E. 252 (1936); Matros v. Owen, 229 N.C. 472, 50 S.E.2d 509 (1948); Duncan v. Carpenter, 233 N.C. 422, 64 S.E.2d 410 (1951); Biddix v. Rex Mills, Inc., 237 N.C. 660, 75 S.E.2d 777 (1953).

§ 97-23. What notice is to contain; defects no bar; notice personally or by registered letter or certified mail.—The notice provided in the foregoing section [G.S. 97-22] shall state in ordinary language the name and address of the employee, the time, place, nature, and cause of the accident, and of the resulting injury or death; and shall be signed by the employee or by a person on his behalf, or, in the event of his death, by any one or more of his dependents, or by a person in their behalf.

No defect or inaccuracy in the notice shall be a bar to compensation unless the employer shall prove that his interest was prejudiced thereby, and then only to such extent as the prejudice.

Said notice shall be given personally to the employer or any of his agents upon whom a summons in civil action may be served under the laws of the State, or may be sent by registered letter or certified mail addressed to the employer at his last known residence or place of business. (1929, c. 120, s. 23; 1959, c. 863, s. 1.)

Pleadings. — See same catchline in note to § 97-22.

Applied in Lilly v. Belk Bros., 210 N.C. 735, 188 S.E. 319 (1936).

Cited in Wilson v. E.H. Clement Co., 207 N.C. 541, 177 S.E. 797 (1935); Matros v. Owen, 229 N.C. 472, 50 S.E.2d 509 (1948); Biddix v. Rex Mills, Inc., 237 N.C. 660, 75 S.E.2d 777 (1953); McGill v. Bison Fast Freight, Inc., 245 N.C. 469, 96 S.E.2d 438 (1957).

§ 97-24. Right to compensation barred after two years; destruction of records.—(a) The right to compensation under this Article shall be forever barred unless a claim be filed with the Industrial Commission within two years after the accident, and if death results from the accident, unless a claim be filed with the Commission within one year thereafter.

(b) If any claim for compensation is hereafter made upon the theory that such claim or the injury upon which said claim is based is within the jurisdiction of the Industrial Commission under the provisions of this Article, and if the Commission, or the Supreme Court on appeal, shall adjudge that such claim is not within the Article, the claimant, or if he dies, his personal representative, shall have one year after the rendition of a final judgment in the case within which to commence an action at law.

(c) When all claims and reports required by this Article have been filed, and the cases and records of which they are a part have been closed by proper reports, receipts, awards or orders, these records, may after five years in the discretion of the Commission, with and by the authorization and approval of the North Carolina Department of Archives and History, be destroyed by burning or otherwise. (1929, c. 120, s. 24; 1933, c. 449, s. 2; 1945, c. 766; 1955, c. 1026, s. 12.)

Cross References. — As to corresponding limitations in cases of occupational diseases, see § 97-58. As to tolling of limitation period by the signing of a closing receipt, see § 97-47.

Editor's Note. — Several of the cases in the following note were decided under this section as it stood before the 1955 amendment, when the limitation upon the filing of claims was one year.

For note on the range of compensable consequences of a work-related injury, see 49 N.C.L. Rev. 583 (1971).

The requirement that claim be filed within a certain time is a condition precedent to the right to compensation, and not a statute of limitation. For this reason, where a claim for compensation under the provisions of the Workmen's Compensation Act has not been filed with the Industrial Commission within the statutory period after the date of the accident, which resulted in the injury for which compensation is claimed, or where the Industrial Commission has not acquired jurisdiction of such claim within the statutory

period, the right to compensation is barred. Winslow v. Carolina Conference Ass'n, 211 N.C. 571, 191 S.E. 403 (1937). See Whitted v. Palmer-Bee Co., 228 N.C. 447, 46 S.E.2d 109 (1948), noted in 58 Yale L.J. 495.

The requirement that a claim be filed in accord with the provisions of this section constitutes a condition precedent to the right to compensation, and is not a statute of limitations. Montgomery v. Horneytown Fire Dep't, 265 N.C. 553, 144 S.E.2d 586 (1965).

The requirement that an injured employee file notice of his claim within a certain period from the date of injury, is not a statute of limitations, but a condition precedent to the right to compensation. Lineberry v. Mebane, 218 N.C. 737, 12 S.E.2d 252 (1940).

The plaintiff's inchoate right to compensation arose by operation of law on the date of the accident. But his substantive right to compensation was not fixed by the simple fact of injury arising out of and in the course of his employment. The requirement of filing claim within the time limited by this section was a condition precedent to his right to compensation. Necessarily, then, the element of filing claim within the time limited was of the very essence of the plaintiff's right to recover compensation. McCrater v. Stone & Webster Eng'r Corp., 248 N.C. 707, 104 S.E.2d 858 (1958).

Time Limit in Effect on Date of Accident Controls. — The time limit fixed by this section as it existed on the date of the accident, being a part of the plaintiff's substantive right of recovery, could not be enlarged by subsequent statute, i.e., the 1955 amendment. To do so would be to deprive the defendants of vested right. McCrater v. Stone & Webster Eng'r Corp., 248 N.C. 707, 104 S.E.2d 858 (1958).

Report of Accident and Claim of Employee Filed by Employer. — When the employer has filed with the Commission a report of the accident and claim of the injured employee, the claim is filed with the Commission within the meaning of this section. Hardison v. W.H. Hampton & Son, 203 N.C. 187, 165 S.E. 355 (1932), distinguished in Whitted v. Palmer-Bee Co., 228 N.C. 447, 46 S.E.2d 109 (1948).

There is no provision in the North Carolina Workmen's Compensation Act requiring an injured employee to file a claim for compensation for his injury with the North Carolina Industrial Commission. When the employer has filed with the Commission a report of the accident and claim of the injured employee, the Commission has jurisdiction of the matter, and the claim is filed with the Commission within the meaning of this section. Smith v. Allied Exterminators, Inc., 11 N.C. App. 76, 180 S.E.2d 390 (1971); Hardison v. W.H. Hampton & Son, 203 N.C. 187, 165 S.E. 355 (1932).

Report Filed by Employer on Verbal Information Is Proper. — Where an employer files a report with the Commission within the prescribed time upon verbal information given by the representative of the employee, the representative not being able to read or write, and the employer admits liability, the report has been properly filed with the Industrial Commission as a claim and it acquires jurisdiction. Hanks v. Southern Pub. Util. Co., 210 N.C. 312, 186 S.E. 252 (1936), noted with proposal for amendment, 15 N.C.L. Rev. 85.

The Form No. 19 prescribed by the Industrial Commission has been amended and now contains on its face the statement that it is filed only in compliance with § 97-92 and is not employee's claim for compensation. See Whitted v. Palmer-Bee Co., 228 N.C. 447, 46 S.E.2d 109 (1948) (concurring opinion).

Claim Need Not Be Filed before Bringing Action. — Subsection (b) of this section does not require plaintiff to file a claim with the Industrial Commission, as a court of first instance, before bringing an action in the superior court. The subsection was intended to defer the time in which action in the proper court might be brought when mistaken resort to the Commission has been made. Barber v. Minges, 223 N.C. 213, 25 S.E.2d 837 (1943).

Payment of Medical Expenses by Employer Does Not Constitute Waiver of Limitation. — See note to § 97-25.

Report Filed by Employer and Award for Medical Expenses. — In Thompson v. Virginia & C.S.R.R., 216 N.C. 554, 6 S.E.2d 38 (1939), the employer gave notice to the Commission of an accident to its employee. Subsequently an award for medical expenses was made by the Commission on application of the doctor but no hearing before the Commission was ever asked by employer or employee. In a suit by the employee against the alleged negligent third party, the period of limitation prescribed in this section having passed, the court observed that the period for filing plaintiff's claim had elapsed and "no other right of action could now accrue for the benefit of the employer, or its insurance carrier."

Claims Not Filed within Time Prescribed. — Where an employee did not file a claim until more than the prescribed time after injury, and the employer did not file a report of the accident because it did not have knowledge thereof, although it delivered claimant's wages to him after the disability resulting from the injury, but thought the disability was due to a prior injury, had no knowledge of the subsequent injury, and made no representations that the wages delivered to the claimant were in lieu of compensation, the evidence supported a finding that the claim was not filed within the time prescribed by this section. Lilly v. Belk Bros., 210 N.C. 735, 188 S.E. 319 (1936).

Claimant was injured by accident arising out of and in the course of his employment. He

reported the accident to the employer, who, on the day of the accident, reported it to the Industrial Commission as required by § 97-92. Subsequently bills for medical services rendered claimant as a result of the injury were approved for payment by the Commission. No claim for compensation was filed by the employee, the employer or the insurance carrier. After the expiration of the period of limitation, the employee first discovered the serious effects of the accident and requested a hearing before the Industrial Commission. It was held that no claim for compensation having been filed within the statutory period from the date of the accident and no request for hearing having been made within that time, and no payment of bills for medical treatment having been made within the statutory period prior to the request for a hearing, the claim was barred by this section. Whitted v. Palmer-Bee Co., 228 N.C. 447, 46 S.E.2d 109 (1948), distinguishing Hardison v. W.H. Hampton & Son, 203 N.C. 187, 165 S.E. 355 (1932), and Hanks v. Southern Pub. Util. Co., 210 N.C. 312, 186 S.E. 252 (1936).

Commission's finding that the employee did not file his claim within the period of limitation, and that claim was therefore barred, was affirmed on appeal. Coats v. B. & R. Wilson, Inc., 244 N.C. 76, 92 S.E.2d 446 (1956).

Limitation Tolled as to Employee under 18 and without Guardian. — The limitation of time provided by this section as against an employee under 18 years of age, who is without guardian or other legal representative, is tolled until he arrives at the age of 18. Lineberry v. Mebane, 219 N.C. 257, 13 S.E.2d 429 (1941).

Prosecuting Common-Law Action and Failing to File Application for Hearing Is Not Abandonment of Filed Claim. — The prosecution of a suit at common law and the failure to file application for a hearing when requested did not amount to an abandonment of claim for compensation, and no final award having been made at the time of the filing of formal petition for an award, the matter was pending at that time before the Commission, and it was error to deny compensation on the ground that claimant was barred by failure to file claim within the time prescribed after the death of the deceased employee. Hanks v. Southern Pub. Util. Co., 210 N.C. 312, 186 S.E. 252 (1936), noted in 15 N.C.L. Rev. 85.

Implied Agreement Not to Plead Statute. — Where the injured party was led to believe that his wages were accruing to his benefit, and he delayed filing his claim for more than the time prescribed, it was held that the facts do not bring the case within the principle of equitable estoppel, there being no request by defendant that claimant delay the pursuit of his rights, nor as an express or implied agreement not to plead the statute. Wilson v. E.H. Clement Co., 207 N.C. 541, 177 S.E. 797 (1935).

Evidence held not to show any representation by the employer that the accident had been reported, or any agreement, express or implied, that the bar of the statute of limitations in this section would not be pleaded, and therefore the employer was not estopped from setting up the defense of the bar of the statute. Jacobs v. Safie Mfg. Co., 229 N.C. 660, 50 S.E.2d 738 (1948).

Effect of Dismissal on Rights of Dependents. — Where the claim of an employee under the Workmen's Compensation Act is dismissed because not filed within the period prescribed by this section, and pending appeal the employee dies as a result of the accidental injury, his dependents' claim for compensation for his death brought one month after his death is not barred, the dependents not being parties in interest in the prior proceeding, and their claim being an original right enforceable only after his death. Wray v. Carolina Cotton & Woolen Mills Co., 205 N.C. 782, 172 S.E. 487 (1934), decided prior to the 1933 amendment.

Award Protecting Employee against Possible Loss of Rights. — Where claimant suffered a general partial disability, but continued to receive the same wages, which amounted to more than the assessable amount of compensation for his injury, he could not receive additional compensation. To protect the employee against the possibility that the employer might, after the expiration of the period of limitation, discontinue the employment and thus defeat the rights of the employee, the Commission, after finding the existence of the disability, directed that an award issue subject to specified limitations. It directed compensation at the statutory rate "at any time it is shown that the claimant is earning less," etc., during the statutory period of 300 weeks. By this order the Commission, in effect, retained jurisdiction for future adjustments. In so doing it did not exceed its authority. Branham v. Denny Roll & Panel Co., 223 N.C. 233, 25 S.E.2d 865 (1943).

Cited in Matros v. Owen, 229 N.C. 472, 50 S.E.2d 509 (1948); Duncan v. Carpenter, 233 N.C. 422, 64 S.E.2d 410 (1951); Harris v. Asheville Contracting Co., 240 N.C. 715, 83 S.E.2d 802 (1954); McGill v. Bison Fast Freight, Inc., 245 N.C. 469, 96 S.E.2d 438 (1957); Shelton v. Spic & Span Dry Cleaners, 2 N.C. App. 528, 163 S.E.2d 288 (1968).

§ 97-25. Medical treatment and supplies.—Medical, surgical, hospital, nursing services, medicines, sick travel, and other treatment including medical and surgical supplies as may reasonably be required, for a period not exceeding

10 weeks from date of injury to effect a cure or give relief and for such additional time as in the judgment of the Commission will tend to lessen the period of disability, and in addition thereto such original artificial members as may be reasonably necessary at the end of the healing period shall be provided by the employer. In case of a controversy arising between the employer and employee relative to the continuance of medical, surgical, hospital, or other treatment, the Industrial Commission may order such further treatments as may in the discretion of the Commission be necessary.

The Commission may at any time upon the request of an employee order a change of treatment and designate other treatment suggested by the injured employee subject to the approval of the Commission, and in such a case the expense thereof shall be borne by the employer upon the same terms and conditions as hereinbefore provided in this section for medical and surgical treatment and attendance.

The refusal of the employee to accept any medical, hospital, surgical or other treatment when ordered by the Industrial Commission shall bar said employee from further compensation until such refusal ceases, and no compensation shall at any time be paid for the period of suspension unless in the opinion of the Industrial Commission the circumstances justified the refusal in which case, the Industrial Commission may order a change in the medical or hospital service.

If in an emergency on account of the employer's failure to provide the medical or other care as herein specified a physician other than provided by the employer is called to treat the injured employee, the reasonable cost of such service shall be paid by the employer if so ordered by the Industrial Commission: Provided, however, if he so desires, an injured employee may select a physician of his own choosing to attend, prescribe and assume the care and charge of his case, subject to the approval of the Industrial Commission. (1929, c. 120, s. 25; 1931, c. 274, s. 4; 1933, c. 506; 1955, c. 1026, s. 2.)

Editor's Note. — See 9 N.C.L. Rev. 405.

As to independent suit by physician against employee to recover for medical services, see note to § 97-90.

Insurer's Obligation to Furnish Medical Attention. — An employee brought action against the insurance carrier and its agent, alleging that after his injury the agent, on behalf of insurer, induced him to dispense with the services of his physician and consult physicians selected by insurer, and that insurer promised to provide hospitalization and surgical service recommended by insurer's physicians, but failed to do so to plaintiff's permanent injury. It was held that insurer's obligation to furnish medical attention necessary to plaintiff's complete recovery was founded on this section, and the Industrial Commission has exclusive jurisdiction of plaintiff's claim. Hedgepeth v. Lumbermen's Mut. Cas. Co., 209 N.C. 45, 182 S.E. 704 (1935).

Medical, etc., Expenses Not Included in Maximum Amount Recoverable for One Injury. — See Morris v. Laughlin Chevrolet Co., 217 N.C. 428, 8 S.E.2d 484, 128 A.L.R. 132 (1940).

Payment of Medical Expenses Does Not Constitute Admission or Waiver by Employer. — The Workmen's Compensation Act, by this section, requires or permits an employer to pay bills for medical and other treatment of an employee, and the payment of such bills, approved by the Commission, even without formal denial of liability, cannot have the effect of an admission of liability by the employer or constitute a waiver of the requirement of filing timely claim by the employee as provided in § 97-24. Such facts are insufficient to invoke the doctrine of estoppel. Biddix v. Rex Mills, Inc., 237 N.C. 660, 75 S.E.2d 777 (1953).

Payment of Full Wages Does Not Determine Liability for Treatment. — The act of an employer in paying an injured employee's wages in full from the date of the injury should not be determinative of the employee's disability and thereby relieve the employer or insurance carrier from liability for hospital and medical care designed to improve his capacity to earn wages. Ashley v. Rent-A-Car Co., 271 N.C. 76, 155 S.E.2d 755 (1967).

The rule that denies compensation to an injured employee who has lost no wages is necessarily applied in some cases growing out of § 97-30 in order to determine the amount of compensation due, but it is not applicable to medical, surgical, hospital, and nursing services under this section, as medical and hospital expenses are not a part of, and are not included in, determining recoverable compensation.

Ashley v. Rent-A-Car Co., 271 N.C. 76, 155 S.E.2d 755 (1967).

Plaintiff Permanently and Totally Disabled. — Plaintiff suffered a head injury and developed dementia praecox, which physicians pronounced incurable. She required constant medical attention. The order requiring defendant to continue treatment was reversed. While the plaintiff might be made more comfortable by further treatment, the evidence showed that the period of disability would not be lessened. Millwood v. Firestone Cotton Mills, 215 N.C. 519, 2 S.E.2d 560 (1939).

Additional Medical Treatment to Lessen Period of Disability. — The provision of this section that the employer should be liable for additional medical treatment to effect a cure or give relief is limited by the provision of this section to cases in which such additional medical treatment would tend to lessen the period of the employee's disability, and the discretionary power to award such additional medical treatment is also subject to this limitation; nor may liability for medical attention be extended upon the ground that public policy demands that the care of a permanently disabled employee should not be cast upon the State, the extent of liability under the act being definitely prescribed by its provisions. Millwood v. Firestone Cotton Mills, 215 N.C. 519, 2 S.E.2d 560 (1939).

The provision of this section that the employer should be liable for medical and nursing services for such time as such services will tend to lessen the period of disability does not preclude such payments when the disability is permanent, provided such services will tend to lessen the degree of disability. Ashley v. Rent-A-Car Co., 271 N.C. 76, 155 S.E.2d 755 (1967).

The legislature which enacted the Workmen's Compensation Act did not intend that there must be complete recovery within a stated time in order that an employee might continue to receive medical benefits under the statute beyond the 10-week period. Ashley v. Rent-A-Car Co., 271 N.C. 76, 155 S.E.2d 755 (1967).

Relaxation of Rule as to Fees for Practical Nursing. — Industrial Commission was not entitled to relax its rule that fees for practical nursing would not be allowed unless written authority was obtained from Commission in advance, so as to award mother of injured employee an amount for practical nursing services rendered to injured employee, where record showed that Commission never gave its written or oral permission for rendition of services. Hatchett v. Hitchcock Corp., 240 N.C. 591, 83 S.E.2d 539 (1954).

Cost of Treatment of Veteran May Be Recovered. — The Administrator of Veterans Affairs may recover from the employer and its insurance carrier the cost of treatment in a veterans hospital for compensable injuries received by an indigent ex-serviceman in the course of his employment. Marshall v. Rebert's Poultry Ranch & Egg Sales, 268 N.C. 223, 150 S.E.2d 423 (1966).

Appeal from Approval of Medical Bills. — When the Commission approves claimant's medical, etc., bills, defendant then has a right on appeal to challenge the action of the Commission in respect to the bills approved by it, in whole or in part, if it deems it advisable to do so. Bass v. Mecklenburg County, 258 N.C. 226, 128 S.E.2d 570 (1962).

Applied in Godwin v. Swift & Co., 270 N.C. 690, 155 S.E.2d 157 (1967).

Stated in Worley v. Pipes, 229 N.C. 465, 50 S.E.2d 504 (1948).

Cited in Matros v. Owen, 229 N.C. 472, 50 S.E.2d 509 (1948); Morgan v. Thomasville Furniture Indus., 2 N.C. App. 126, 162 S.E.2d 619 (1968); Gantt v. Hickory Motor Sales, Inc., 8 N.C. App. 559, 174 S.E.2d 624 (1970).

§ 97-26. Liability for medical treatment measured by average cost in community; malpractice of physician.—The pecuniary liability of the employer for medical, surgical, hospital service, nursing services, medicines, sick travel or other treatment required when ordered by the Commission, shall be limited to such charges as prevail in the same community for similar treatment of injured persons of a like standard of living when such treatment is paid for by the injured person, and the employer shall not be liable in damages for malpractice by a physician or surgeon furnished by him pursuant to the provisions of this section, but the consequences of any such malpractice shall be deemed part of the injury resulting from the accident, and shall be compensated for as such. (1929, c. 120, s. 26; 1955, c. 1026, s. 3.)

Liability of Physician or Surgeon Is Not Affected by This Section. — The purpose of this section is to treat the consequences of malpractice by a physician or surgeon as part of the consequences of the original injury as between the employee and the employer, and so, the employer's insurance carrier. Thus, the employee's right to benefit under the Workmen's Compensation Act on account of the consequences of such malpractice does not depend upon the employer's negligence. Conversely, the employer's liability for such consequences of malpractice by a physician or surgeon is limited to those benefits provided

under the act. It was not the purpose of this section to affect in any way the liability of the physician or surgeon. Bryant v. Dougherty, 267 N.C. 545, 148 S.E.2d 548 (1966).

This section relates to the right of the employee to recover damages or benefits under the Workmen's Compensation Act from the employer, and so from the insurance carrier of the employer. It does not impose liability upon the physician or surgeon or relieve him thereof. Bryant v. Dougherty, 267 N.C. 545, 148 S.E.2d 548 (1966); Bryant v. Dougherty, 270 N.C. 748, 155 S.E.2d 181 (1967).

Employee Is Not Deprived of Right of Action against Physician or Surgeon. — The Workmen's Compensation Act does not deprive an employee of a right to maintain an action at common law for malpractice against the physician or surgeon selected by the employer to treat his injuries received in the course of his employment, when the physician is not a full-time employee of the employer. Bryant v. Dougherty, 267 N.C. 545, 148 S.E.2d 548 (1966).

The Workmen's Compensation Act does not abrogate the employee's common-law right of action against the attending physician or surgeon, and does not confer upon the Industrial Commission jurisdiction to hear and determine such action. Bryant v. Dougherty, 270 N.C. 748, 155 S.E.2d 181 (1967).

Provided Physician Carries on Independent Practice. — Where a physician is carrying on an independent practice of medicine or surgery, he is not "conducting the business" of an industrial corporation merely because the manager of the plant sends to him, for examination and treatment, those who, from time to time, sustain injuries in the plant. Under these circumstances, § 97-9 does not deprive the employee of his common-law right to a physician or surgeon who, in the course of such examination or treatment, is negligent and thereby aggravates the original injury. Bryant v. Dougherty, 267 N.C. 545, 148 S.E.2d 548 (1966).

Approval of Bills Where Liability for Medical Care Voluntarily Incurred by Employer. — When liability for the medical care of an employee who has suffered an accident is voluntarily incurred by the employer, the bills therefor must be approved by the Commission before the employer can demand reimbursement from its insurance carrier. In this manner such expenditures are kept within the schedule of fees and charges adopted by the Commission. Biddix v. Rex Mills, Inc., 237 N.C. 660, 75 S.E.2d 777 (1953).

Injury or suffering sustained by employee in consequence of malpractice of a physician or surgeon furnished by the employer or carrier is not ground for an independent action; under this section it is a constituent element of the employee's injury for which he is entitled to compensation. In such event the employer and the carrier are primarily liable and the question of secondary liability is eliminated. Hoover v. Globe Indem. Co., 202 N.C. 655, 163 S.E. 758 (1932).

The physician and carrier are not joint tort-feasors within the meaning of former § 1-240. Hoover v. Globe Indem. Co., 202 N.C. 655, 163 S.E. 758 (1932), following Brown v. Southern Ry., 202 N.C. 256, 162 S.E. 613 (1932).

The malpractice of the physician or surgeon selected by the employer or carrier is not ground for an independent action against the employer or the carrier but is, as to them, one of the consequences of the original injury and is to be compensated as such in accordance with the provision of the Workmen's Compensation Act. Hence, a cross action for contribution on the theory that the carrier and the physician were joint tort-feasors did not lie. Bryant v. Dougherty, 267 N.C. 545, 148 S.E.2d 548 (1966).

Commission Does Not Have Jurisdiction of Malpractice Action. — The Workmen's Compensation Act does not confer upon the Industrial Commission jurisdiction to hear and determine an action brought by an injured employee against a physician or surgeon to recover damages for injury due to the negligence of the latter in the performance of his professional services to the employee. Bryant v. Dougherty, 267 N.C. 545, 148 S.E.2d 548 (1966); Bryant v. Dougherty, 270 N.C. 748, 155 S.E.2d 181 (1967).

Superior Court Has Jurisdiction of Such Action. — Since the Workmen's Compensation Act does not abrogate the employee's common-law right of action against the attending physician or surgeon and does not confer upon the Industrial Commission jurisdiction to hear and determine such action, the superior court has jurisdiction to do so. Bryant v. Dougherty, 267 N.C. 545, 148 S.E.2d 548 (1966).

As to independent suit by physician against employee to recover for medical services, see note to § 97-90.

Applied in Godwin v. Swift & Co., 270 N.C. 690, 155 S.E.2d 157 (1967).

Stated in Worley v. Pipes, 229 N.C. 465, 50 S.E.2d 504 (1948); Hatchett v. Hitchock Corp., 240 N.C. 591, 83 S.E.2d 539 (1954).

Cited in Matros v. Owen, 229 N.C. 472, 50 S.E.2d 509 (1948); Bass v. Mecklenburg County, 258 N.C. 226, 128 S.E.2d 570 (1962).

§ 97-27. Medical examination; facts not privileged; refusal to be examined suspends compensation; autopsy.—(a) After an injury, and so long as he claims compensation, the employee, if so requested by his employer or ordered

by the Industrial Commission, shall, subject to the provisions of subsection (b), submit himself to examination, at reasonable times and places, by a duly qualified physician or surgeon designated and paid by the employer or the Industrial Commission. The employee shall have the right to have present at such examination any duly qualified physician or surgeon provided and paid by him. No fact communicated to or otherwise learned by any physician or surgeon who may have attended or examined the employee, or who may have been present at any examination, shall be privileged, either in hearings provided for by this Article or any action at law brought to recover damages against any employer who may have accepted the compensation provisions of this Article. If the employee refuses to submit himself to or in any way obstructs such examination requested by and provided for by the employer, his right to compensation and his right to take or prosecute any proceedings under this Article shall be suspended until such refusal or objection ceases, and no compensation shall at any time be payable for the period of obstruction, unless in the opinion of the Industrial Commission the circumstances justify the refusal or obstruction. The employer, or the Industrial Commission, shall have the right in any case of death to require an autopsy at the expense of the party requesting the same.

(b) In those cases arising under this Article in which there is a question as to the percentage of permanent disability suffered by an employee, if any employee, required to submit to a physical examination under the provisions of subsection (a) is dissatisfied with such examination or the report thereof, he shall be entitled to have another examination by a duly qualified physician or surgeon licensed and practicing in North Carolina or by a duly qualified physician or surgeon licensed to practice in South Carolina, Georgia, Virginia and Tennessee provided said nonresident physician or surgeon shall have been approved by the North Carolina Industrial Commission and his name placed on the Commission's list of approved nonresident physicians and surgeons, designated by him and paid by the employer or the Industrial Commission in the same manner as physicians designated by the employer or the Industrial Commission are paid. Provided, however, that all travel expenses incurred in obtaining said examination shall be paid by said employee. The employer shall have the right to have present at such examination a duly qualified physician or surgeon provided and paid by him. No fact communicated to or otherwise learned by any physician or surgeon who may have attended or examined the employee, or who may have been present at any examination, shall be privileged, either in hearings provided for by this Article or any action at law. (1929, c. 120, s. 27; 1959, c. 732; 1969, c. 135.)

Editor's Note. — The 1969 amendment inserted the language between "practicing in North Carolina" and "designated by him" in the first sentence of subsection (b).

Analysis of Blood Taken from Body after Death. — The percentage of alcohol in the bloodstream of a deceased employee, determined by chemical analysis of a sample of blood taken from his body shortly after death, was competent evidence on the question of intoxication. Osborne v. Colonial Ice Co., 249 N.C. 387, 106 S.E.2d 573 (1959).

Autopsy after Burial. — One month after deceased's burial defendant requested that the body be disinterred and a postmortem examination be made to determine the cause of his death. It was held that plaintiff's consent was rightfully refused. There is a distinction between the right to have an autopsy before and after burial. The latter will not be granted except in cases of extreme emergency. Cabe v. Parker-Graham-Sexton, 202 N.C. 176, 162 S.E. 223 (1932).

§ 97-28. Seven-day waiting period; exceptions.—No compensation shall be allowed for the first seven calendar days of disability resulting from an injury, except the benefits provided for in G.S. 97-25. Provided however, that in the case the injury results in disability of more than 28 days, the compensation shall be allowed from the date of the disability. (1929, c. 120, s. 28.)

Cited in Branham v. Denny Roll & Panel Co., 223 N.C. 233, 25 S.E.2d 865 (1943); Tucker v. Lowdermilk, 233 N.C. 185, 63 S.E.2d 109 (1951).

§ 97-29. Compensation rates for total incapacity.—Except as hereinafter otherwise provided, where the incapacity for work resulting from the injury is total, the employer shall pay or cause to be paid, as hereinafter provided, to the injured employee during such total disability a weekly compensation equal to sixty percent (60%) of his average weekly wages, but not more than fifty-six dollars ($56.00), nor less than twenty dollars ($20.00) per week during not more than 400 weeks from the date of the injury, provided that the total amount of compensation paid shall not exceed twenty thousand dollars ($20,000).

In cases in which total and permanent disability results from paralysis resulting from an injury to the brain or spinal cord or from loss of mental capacity resulting from an injury to the brain, or in cases in which total and permanent disability results from the loss of both hands, or both arms, or both feet, or both legs, or both eyes, or any two thereof, compensation, including reasonable and necessary nursing services, medicines, sick travel, medical, hospital, and other treatment or care shall be paid during the life of the injured employee, without regard to the 400 weeks limited herein or to the twenty thousand dollars ($20,000) maximum compensation under this Article. In all such cases, however, if death results from the injury and within 350 weeks from the date of accident and before the compensation paid totals twenty thousand dollars ($20,000), then compensation shall be paid for the remainder of the 350 week period or until the full twenty thousand dollars ($20,000), including the five hundred dollar ($500.00) funeral benefit, shall have been paid, whichever is sooner, as in any other death case.

The weekly compensation payment for members of the North Carolina national guard and the North Carolina State guard shall be the maximum amount of fifty-six dollars ($56.00) per week as fixed herein. The weekly compensation payment for deputy sheriffs, or those acting in the capacity of deputy sheriffs, who serve upon a fee basis, shall be twenty dollars ($20.00) a week as fixed herein, provided that the last sentence herein shall not apply to Ashe, Avery, Bladen, Carteret, Caswell, Cherokee, Gates, Hyde, Macon, Pender, Perquimans, Union, Watauga, and Wilkes Counties.

An officer or member of the State Highway Patrol shall not be awarded any weekly compensation under the provisions of this section for the first two years of any incapacity resulting from an injury by accident arising out of and in the course of the performance by him of his official duties if, during such incapacity, he continues to be an officer or member of the State Highway Patrol, but he shall be awarded any other benefits to which he may be entitled under the provisions of this Article. (1929, c. 120, s. 29; 1939, c. 277, s. 1; 1943, c. 502, s. 3; c. 543; c. 672, s. 2; 1945, c. 766; 1947, c. 823; 1949, c. 1017; 1951, c. 70, s. 1; 1953, c. 1135, s. 1; c. 1195, s. 2; 1955, c. 1026, s. 5; 1957, c. 1217; 1963, c. 604, s. 1; 1967, c. 84, s. 1; 1969, c. 143, s. 1; 1971, c. 281, s. 1; c. 321, s. 1.)

Editor's Note. — The 1969 amendment increased the compensation rates in the first three paragraphs. Section 9 of the amendatory act provides that it shall apply only to cases originating on and after July 1, 1969.

The first 1971 amendment substituted "fifty-six dollars ($56.00)" for "fifty dollars ($50.00)" in the first paragraph, substituted "twenty dollars ($20.00)" for "ten dollars" in that paragraph, substituted "twenty thousand dollars ($20,000)" for "eighteen thousand dollars" therein, substituted "twenty thousand dollars ($20,000)" for "eighteen thousand dollars" in three places in the second paragraph, substituted "fifty-six dollars ($56.00)" for "fifty dollars ($50.00)" in the first sentence of the third paragraph, and substituted "twenty dollars ($20.00)" for "ten dollars" in the second sentence of that paragraph.

Session Laws 1971, c. 281, s. 7, provides: "This act shall be in full force from and after July 1, 1971, and shall apply only to cases originating on and after July 1, 1971."

The second 1971 amendment inserted, in the first sentence of the second paragraph, "or in cases in which total and permanent disability results from the loss of both hands, or both arms, or both feet, or both legs, or both eyes, or any two thereof."

Session Laws 1971, c. 321, s. 3, provides: "This act shall be in full force and effect from and after July 1, 1971, and shall apply only to cases originating on and after July 1, 1971."

For a discussion of this section, see 8 N.C.L. Rev. 427. For comment on the 1943

amendments, see 21 N.C.L. Rev. 384. As to the 1949 amendment, see 27 N.C.L. Rev. 495. For a discussion of the increase in allowable recovery by the 1951 amendment, see 29 N.C.L. Rev. 428. For note on average weekly wage and combination of wages, see 44 N.C.L. Rev. 1177 (1966).

This section should be construed in pari materia with § 97-31 allowing compensation for the loss of members, and so construed it is held that where an employee has suffered an injury to his hand arising out of and in the course of his employment, and the injury causes him total temporary disability in the course of its healing, and renders it necessary to amputate certain parts of certain fingers of the hand, he is entitled to receive compensation under this section for total temporary disability, and in addition thereto compensation for the loss of the parts of his fingers under § 97-31, there being no provision in the act that the latter should preclude the former, compensation for the latter to begin upon expiration of the compensation for the former. Rice v. Denny Roll & Panel Co., 199 N.C. 154, 154 S.E. 69 (1930).

This section is not subject to the limitation imposed by the proviso of § 97-37. Inman v. Meares, 247 N.C. 661, 101 S.E.2d 692 (1958).

Where an employee filed claim for total temporary disability under this section and thereafter recovered from his disabling injury and returned to his employment and was fatally injured in a compensable accident unconnected with the prior claim, the claim for disability did not come within the proviso of § 97-37 and the right to payments accrued at the time of the employee's death had vested and survived to his personal representative. Inman v. Meares, 247 N.C. 661, 101 S.E.2d 692 (1958).

"Mental Capacity". — The words "mental capacity" as used in this section and § 97-41 are properly defined as that quality of mind which enables a person to act with reasonable discretion in the ordinary affairs of life and to comprehend in a reasonable manner the nature, scope, and effect of his acts and conduct. Priddy v. Blue Bird Cab Co., 9 N.C. App. 291, 176 S.E.2d 26 (1970).

Disability as used in the Workmen's Compensation Act means impairment of wage earning capacity rather than physical impairment. Priddy v. Blue Bird Cab Co., 9 N.C. App. 291, 176 S.E.2d 26 (1970).

This section and § 97-41 do not require that there be a total loss of mental capacity. Priddy v. Blue Bird Cab Co., 9 N.C. App. 291, 176 S.E.2d 26 (1970).

But Do Require Total and Permanent Disability Resulting from Loss of Mental Capacity. — This section and § 97-41 do require in order to sustain an award for life thereunder, that there be a total and permanent disability resulting from a loss of mental capacity caused by an injury to the brain. Priddy v. Blue Bird Cab Co., 9 N.C. App. 291, 176 S.E.2d 26 (1970).

Whether Such Total and Permanent Disability Occurs Is Question of Fact. — The question of whether there has been a total and permanent disability resulting from a loss of mental capacity caused by or resulting from an injury to the brain is one of fact. Priddy v. Blue Bird Cab Co., 9 N.C. App. 291, 176 S.E.2d 26 (1970).

Control of Temper Is Mental Function. — When considered in the light of the definition of "mental capacity," the control of one's temper is a mental function for purposes of this section and § 97-41. Priddy v. Blue Bird Cab Co., 9 N.C. App. 291, 176 S.E.2d 26 (1970).

Accrued Unpaid Compensation Is Asset of Deceased Worker's Estate. — Compensation which accrues under this section during the lifetime of an injured worker, but is unpaid at his death, becomes an asset of his estate. McCulloh v. Catawba College, 266 N.C. 513, 146 S.E.2d 467 (1966).

Limitation on Total Compensation Applies to Compensation for Disfigurement. — Compensation which was awarded claimant for temporary total disability, loss of one eye and partial loss of another, and for serious facial disfigurement amounted to $5,441.71. He was also entitled to compensation for injury to his hand, but the Commission limited this to an amount small enough not to make the total amount payable exceed $6,000. Plaintiff appealed on the grounds that § 97-31 excluded compensation for facial disfigurement from the limitation referred to in this section. It was held that § 97-31 excluded the compensation for disfigurement from the weekly compensation payments but is subject to the limitation upon the total amount of compensation payable under the act. Arp v. Wood & Co., 207 N.C. 41, 175 S.E. 719 (1934), decided before the passage of the amendments to this section which increased the maximum total compensation from $6,000 to $20,000 and the 1943 amendment to § 97-31, which rewrote that section.

There is no maximum award where there is permanent disability due to injury to spinal cord. Baldwin v. Amazon Cotton Mills, 253 N.C. 740, 117 S.E.2d 718 (1961).

Spinal cord and brain injuries are placed in the same category by this section. Godwin v. Swift & Co., 270 N.C. 690, 155 S.E.2d 157 (1967).

And Limitations on Compensation Do Not Apply to Such Injuries. — The limitation of compensation payments for ordinary injuries to 400 weeks and a maximum of $12,000 (now $20,000) does not apply to compensation for spinal cord and brain injuries, which may be authorized for the life of the injured employee. Godwin v. Swift & Co., 270 N.C. 690, 155 S.E.2d 157 (1967).

Payment for care is proper in a case of brain or spinal cord injury causing paralysis and is

authorized for a blind paralytic, but not for an injured person who has only a broken leg. Godwin v. Swift & Co., 270 N.C. 690, 155 S.E.2d 157 (1967).

Other Treatment Provision Is in Addition to Named Items. — The provision for other treatment or care goes beyond and is in addition to the specific named essential items and services set out in this section. Godwin v. Swift & Co., 270 N.C. 690, 155 S.E.2d 157 (1967).

Presumption of Duration of Disability. — The Supreme Court has held that "if an award is made, payable during disability, and there is a presumption that disability lasts until the employee returns to work, there is likewise a presumption that disability ended when the employee returned to work." Tucker v. Lowdermilk, 233 N.C. 185, 63 S.E.2d 109 (1950).

Approval of Care Charges before Payment Substantially Complies with Rules. — While some of the charges for care of a blind paralytic did not have the prior approval of the Commission, but were so approved before payment or demand for payment was made, this was a substantial, if not a technical, compliance with the Commission's rules. Godwin v. Swift & Co., 270 N.C. 690, 155 S.E.2d 157 (1967).

Construction of Section Prior to Early Amendment. — See Smith v. Carolina Power & Light Co., 198 N.C. 614, 152 S.E. 805 (1930).

Applied in Aldridge v. Foil Motor Co., 262 N.C. 248, 136 S.E.2d 591 (1964); Anderson v. Lincoln Constr. Co., 265 N.C. 431, 144 S.E.2d 272 (1965); Bryan v. First Free Will Baptist Church, 267 N.C. 111, 147 S.E.2d 633 (1966); Swaney v. George Newton Constr. Co., 5 N.C. App. 520, 169 S.E.2d 90 (1969); Starr v. Charlotte Paper Co., 8 N.C. App. 604, 174 S.E.2d 342 (1970).

Quoted in Murray v. Nebel Knitting Co., 214 N.C. 437, 199 S.E. 609 (1938).

Cited in Stanley v. Hyman-Michaels Co., 222 N.C. 257, 22 S.E.2d 570 (1942); Branham v. Denny Roll & Panel Co., 223 N.C. 233, 25 S.E.2d 865 (1943); Duncan v. Carpenter, 233 N.C. 422, 64 S.E.2d 410 (1951); Brinkley v. United Feldspar & Minerals Corp., 246 N.C. 17, 97 S.E.2d 419 (1957); McDowell v. Town of Kure Beach, 251 N.C. 818, 112 S.E.2d 390 (1960); Brewer v. Powers Trucking Co., 256 N.C. 175, 123 S.E.2d 608 (1962); Morgan v. Thomasville Furniture Indus., 2 N.C. App. 126, 162 S.E.2d 619 (1968).

§ 97-30. Partial incapacity.—Except as otherwise provided in G.S. 97-31, where the incapacity for work resulting from the injury is partial, the employer shall pay, or cause to be paid, as hereinafter provided, to the injured employee during such disability, a weekly compensation equal to sixty per centum (60%) of the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter, but not more than fifty-six dollars ($56.00) a week, and in no case shall the period covered by such compensation be greater than 300 weeks from the date of injury. In case the partial disability begins after a period of total disability, the latter period shall be deducted from the maximum period herein allowed for partial disability. An officer or member of the State Highway Patrol shall not be awarded any weekly compensation under the provisions of this section for the first two years of any incapacity resulting from an injury by accident arising out of and in the course of the performance by him of his official duties if, during such incapacity, he continues to be an officer or member of the State Highway Patrol, but he shall be awarded any other benefits to which he may be entitled under the provisions of this Article. (1929, c. 120, s. 30; 1943, c. 502, s. 4; 1947, c. 823; 1951, c. 70, s. 2; 1953, c. 1195, s. 3; 1955, c. 1026, s. 6; 1957, c. 1217; 1963, c. 604, s. 2; 1967, c. 84, s. 2; 1969, c. 143, s. 2; 1971, c. 281, s. 2.)

Cross Reference. — As to credits, see § 97-42.

Editor's Note. — The 1969 amendment increased the maximum weekly compensation from forty-two dollars to fifty dollars. Section 9 of the amendatory act provides that it shall apply only to cases originating on and after July 1, 1969.

The 1971 amendment substituted "fifty-six dollars ($56.00)" for "fifty dollars ($50.00)" in the first sentence.

Session Laws 1971, c. 281, s. 7, provides: "This act shall be in full force from and after July 1, 1971, and shall apply only to cases originating on and after July 1, 1971."

For comment on the 1943 amendment, which increased the maximum weekly compensation, see 21 N.C.L. Rev. 384.

The Workmen's Compensation Act is only intended to furnish compensation for loss of earning capacity. Without such loss there is no provision for compensation in this section, although even permanent physical injury may have been suffered. Branham v. Denny Roll & Panel Co., 223 N.C. 233, 25 S.E.2d 865 (1943).

Test of Earning Capacity.— Under the act

wages earned, or the capacity to earn wages, is the test of earning capacity, or, to state it differently, the diminution of the power or capacity to earn is the measure of compensability. Branham v. Denny Roll & Panel Co., 223 N.C. 233, 25 S.E.2d 865 (1943), where claimant, who was found to have suffered one-third "general partial disability" due to back injury, returned to lighter work but was paid the same wage as before the injury, and the Supreme Court rejected his contention that he was unable to work as he had before the injury and was thus entitled to compensation although still receiving the same wage. (The 1955 amendment to § 97-31 made back injuries compensable as specific disabilities under that section. See § 97-31(23).—Ed. note.)

In Dail v. Kellex Corp., 233 N.C. 446, 64 S.E.2d 438 (1951), the court said, "The disability of an employee . . . is to be measured by his capacity or incapacity to earn the wages he was receiving at the time of the injury . . . . Loss of earning capacity is the criterion."

And in Hill v. DuBose, 234 N.C. 446, 67 S.E.2d 371 (1951), the court said, "Compensation must be based upon loss of wage-earning power rather than the amount actually received." See Evans v. Asheville Citizens Times Co., 246 N.C. 669, 100 S.E.2d 75 (1957).

Where Employee Loses No Wages.— The rule that denies compensation to an injured employee who has lost no wages is necessarily applied in some cases growing out of this section in order to determine the amount of compensation due, but it is not applicable to medical, surgical, hospital, and nursing services under § 97-25, as medical and hospital expenses are not a part of, and are not included in, determining recoverable compensation. Ashley v. Rent-A-Car Co., 271 N.C. 76, 155 S.E.2d 755 (1967).

Where Employee Returns to Work at Higher Wages. — Employee was receiving compensation under this section for permanent partial disability resulting from injury to his back. He obtained a new job in which he earned more than he was earning at the time of injury. His physical condition remained unchanged. The Supreme Court held that he had undergone a change of condition within the meaning of § 97-47 justifying a modification of the award and reduction of the compensation payable. Smith v. Swift & Co., 212 N.C. 608, 194 S.E. 106 (1937). (The 1955 amendment to § 97-31 made back injuries compensable as specific disabilities under that section. See § 97-31(23).—Ed. note.)

Rule XVI now expresses the policy of the Commission adopted and followed since the decision in the above case. In Tucker v. Lowdermilk, 233 N.C. 185, 63 S.E.2d 109 (1951), the Supreme Court said, ". . . if . . . there is a presumption that disability lasts until the employee returns to work, there is likewise a presumption that disability ended when the employee returned to work." The court did not deny the validity of the Commission's Rule XVI and the policy embodied therein, but it did not specifically rule upon this point.

Extent of Disability Must Be Known. — The Commission is not in a position to make a proper award until the extent of disability or permanent injury, if any, is determined. Hall v. Thomason Chevrolet, Inc., 263 N.C. 569, 139 S.E.2d 857 (1965).

Since Degree of Disability Is Measure for Compensation. — Under this section compensation for permanent partial disability is measured by the degree of disability, except in case of loss of a member as specified in § 97-31. Ashley v. Rent-A-Car Co., 271 N.C. 76, 155 S.E.2d 755 (1967).

Injuries Also Entitling to Compensation under § 97-31. — An employee sustained injuries resulting in disability of a general nature such as would entitle him to compensation under this section. In addition to such injuries, he had also sustained injuries of a specific nature such as to entitle him to compensation under § 97-31. He is entitled to compensation for the specific injuries under § 97-31, and then, if still disabled as a result of the other injuries, compensation will be paid under this section. Morgan v. Norwood, 211 N.C. 600, 191 S.E. 345 (1937).

Award for Partial Disability Not Increased to Compensation for Total Disability. — When an award has been entered for total disability for a certain length of time, and for partial disability thereafter for a total of 300 weeks under this section, the Industrial Commission may not increase the award of compensation to that allowed for total disability, upon its finding that at the time of the review of the award claimant's condition was unchanged and that he was at the time only 50 percent disabled. Murray v. Nebel Knitting Co., 214 N.C. 437, 199 S.E. 609 (1938), distinguishing Smith v. Swift & Co., 212 N.C. 608, 194 S.E. 106 (1937). See § 97-47 and note.

Burden is on claimant to show permanent partial disability. Hall v. Thomason Chevrolet, Inc., 263 N.C. 569, 139 S.E.2d 857 (1965).

And Also Its Degree. — See Hall v. Thomason Chevrolet, Inc., 263 N.C. 569, 139 S.E.2d 857 (1965).

Award for both partial incapacity under this section and for disfigurement under § 97-31(22) is now permissible for injuries occurring since July 1, 1963. Hall v. Thomason Chevrolet, Inc., 263 N.C. 569, 139 S.E.2d 857 (1965).

Retention of Jurisdiction by Commission. — Where an employee suffered a general partial disability, but continued to receive the same wages, which amounted to more than the

assessable compensation for his injury, he could not receive additional compensation. But to protect the employee against the possibility that the employer might, after the expiration of 12 months (§ 97-24), discontinue the employment and thus defeat the rights of the employee, the Commission, after finding the existence of the disability, directed that an award issue subject to specified limitations. It directed compensation at the statutory rate "at any time it is shown that the claimant is earning less," etc., during the statutory period of 300 weeks. By this order the Commission, in effect, retained jurisdiction for future adjustments. In so doing it did not exceed its authority. Branham v. Denny Roll & Panel Co., 223 N.C. 233, 25 S.E.2d 865 (1943).

An award also containing a provision by which the Commission sought to retain jurisdiction during 300 weeks so that claimant might be paid more compensation if he had a wage loss as a result of his injury within that time was held to be error by the Supreme Court, which said, "There is nothing in the statute, G.S. Chap. 97, that contemplates or authorizes an anticipatory finding by the Commission that a physical impairment may develop into a compensable disability. Neither does the statute vest in the Commission the power to retain jurisdiction of a claim, after compensation has been awarded, merely because some physical impairment suffered by the claimant may, at some time in the future, cause a loss of wages. The Commisssion is concerned with conditions existing prior to and at the time of the hearing. If such conditions change in the future, to the detriment of the claimant, the statute affords the claimant a remedy and fixes the time within which he must seek it. G.S. 97-47." Dail v. Kellex Corp., 233 N.C. 446, 64 S.E.2d 438 (1951).

In Harris v. Asheville Contracting Co., 240 N.C. 715, 83 S.E.2d 802 (1954), the court again stated that the Commission was without jurisdiction to retain jurisdiction for 300 weeks. Branham v. Denny Roll & Panel Co., 223 N.C. 233, 25 S.E.2d 865 (1943), was distinguished.

See also Hill v. DuBose, 234 N.C. 446, 67 S.E.2d 371 (1951); Hill v. DuBose, 237 N.C. 501, 75 S.E.2d 401 (1953).

Cited in Honeycutt v. Carolina Asbestos Co., 235 N.C. 471, 70 S.E.2d 426 (1952).

§ 97-31. Schedule of injuries; rate and period of compensation.—In cases included by the following schedule the compensation in each case shall be paid for disability during the healing period and in addition the disability shall be deemed to continue for the period specified, and shall be in lieu of all other compensation, including disfigurement, to wit:

(1) For the loss of a thumb, sixty per centum (60%) of the average weekly wages during 65 weeks.

(2) For the loss of a first finger, commonly called the index finger, sixty per centum (60%) of the average weekly wages during 40 weeks.

(3) For the loss of a second finger, sixty per centum (60%) of the average weekly wages during 35 weeks.

(4) For the loss of a third finger, sixty per centum (60%) of the average weekly wages during 22 weeks.

(5) For the loss of a fourth finger, commonly called the little finger, sixty per centum (60%) of the average weekly wages during 16 weeks.

(6) The loss of the first phalange of the thumb or any finger shall be considered to be equal to the loss of one half of such thumb or finger, and the compensation shall be for one half of the periods of time above specified.

(7) The loss of more than one phalange shall be considered the loss of the entire finger or thumb: Provided, however, that in no case shall the amount received for more than one finger exceed the amount provided in this schedule for the loss of a hand.

(8) For the loss of a great toe, sixty per centum (60%) of the average weekly wages during 35 weeks.

(9) For the loss of one of the toes other than a great toe, sixty per centum (60%) of the average weekly wages during 10 weeks.

(10) The loss of the first phalange of any toe shall be considered to be equal to the loss of one half of such toe, and the compensation shall be for one half of the periods of time above specified.

(11) The loss of more than one phalange shall be considered as the loss of the entire toe.

(12) For the loss of a hand, sixty per centum (60%) of the average weekly wages during 170 weeks.

(13) For the loss of an arm, sixty per centum (60%) of the average weekly wages during 220 weeks.

(14) For the loss of a foot, sixty per centum (60%) of the average weekly wages during 144 weeks.

(15) For the loss of a leg, sixty per centum (60%) of the average weekly wages during 200 weeks.

(16) For the loss of an eye, sixty per centum (60%) of the average weekly wages during 120 weeks.

(17) The loss of both hands, or both arms, or both feet, or both legs, or both eyes, or any two thereof, shall constitute total and permanent disability, to be compensated according to the provisions of G.S. 97-29.

(18) For the complete loss of hearing in one ear, sixty per centum (60%) of the average weekly wages during 70 weeks; for the complete loss of hearing in both ears, sixty per centum (60%) of the average weekly wages during 150 weeks.

(19) Total loss of use of a member or loss of vision of an eye shall be considered as equivalent to the loss of such member or eye. The compensation for partial loss of or for partial loss of use of a member or for partial loss of vision of an eye or for partial loss of hearing shall be such proportion of the periods of payment above provided for total loss as such partial loss bears to total loss, except that in cases where there is eighty-five per centum (85%), or more, loss of vision in any eye, this shall be deemed "industrial blindness" and compensated as for total loss of vision of such eye.

(20) The weekly compensation payments referred to in this section shall all be subject to the same limitations as to maximum and minimum as set out in G.S. 97-29.

(21) In case of serious facial or head disfigurement, the Industrial Commission shall award proper and equitable compensation not to exceed five thousand dollars ($5,000). In case of enucleation where an artificial eye cannot be fitted and used, the Industrial Commission may award compensation as for serious facial disfigurement.

(22) In case of serious bodily disfigurement for which no compensation is payable under any other subdivision of this section, but excluding the disfigurement resulting from permanent loss or permanent partial loss of use of any member of the body for which compensation is fixed in the schedule contained in this section, the Industrial Commission may award proper and equitable compensation not to exceed five thousand dollars ($5,000).

(23) For the total loss of use of the back, sixty per centum (60%) of the average weekly wages during 300 weeks. The compensation for partial loss of use of the back shall be such proportion of the periods of payment herein provided for total loss as such partial loss bears to total loss, except that in cases where there is seventy-five per centum (75%) or more loss of use of the back, in which event the injured employee shall be deemed to have suffered "total industrial disability" and compensated as for total loss of use of the back.

(24) In case of the loss of or permanent injury to any important external or internal organ or part of the body for which no compensation is payable under any other subdivision of this section, the Industrial Commission may award proper and equitable compensation not to exceed five thousand dollars ($5,000). (1929, c. 120, s. 31; 1931, c. 164; 1943, c. 502, s. 2; 1955, c. 1026, s. 7; 1957, c. 1221; c. 1396, ss. 2, 3; 1963, c. 424, ss. 1, 2; 1967, c. 84, s. 3; 1969, c. 143, s. 3.)

Cross Reference. — As to necessity of showing disability when injury is not within schedule of this section, see note to § 97-2.

Editor's Note. — The 1931 amendment added a proviso making the loss or serious or permanent injury to any member or organ of the body, not provided for, disfigurement, in an apparent effort to meet the decisions in the cases of Henninger v. Industrial Comm'n, 1 N.C.I.C. 3; Porter v. Jennings Cotton Mills, 1 N.C.I.C. 218. See 8 N.C.L. Rev. 423; 9 N.C.L. Rev. 405.

The 1969 amendment increased the maximum compensation in subdivisions (21), (22) and (24). Section 9 of the amendatory act provides that it shall apply only to cases originating on and after July 1, 1969.

For comment on the 1943 amendment, which rewrote this section, see 21 N.C.L. Rev. 384.

Many of the cases in this note construe the section as it read prior to the 1943 amendment.

The amending statute of 1963 is not retroactive. Arrington v. Stone & Webster Eng'r Corp., 264 N.C. 38, 140 S.E.2d 759 (1965).

The 1963 Amendment Separated Provisions for Disfigurement and Loss of Organ. — By Session Laws 1963, c. 424, the General Assembly rewrote subdivision (22) and added subdivision (24), separating the provisions for awards of compensation for disfigurement and for loss of an important organ of the body. Cates v. Hunt Constr. Co., 267 N.C. 560, 148 S.E.2d 604 (1966).

Which Are Not Covered by Subdivisions (1) to (20). — Subdivisons (1) to (20), inclusive, do not provide any compensation whatever for injuries on account of disfigurement. Neither do they provide compensation for loss of or injury to an organ or part of the body. Cates v. Hunt Constr. Co., 267 N.C. 560, 148 S.E.2d 604 (1966).

The philosophy which supports the Workmen's Compensation Act is that the wear and tear of the workman, as well as the machinery, shall be charged to the industry. Cates v. Hunt Constr. Co., 267 N.C. 560, 148 S.E.2d 604 (1966).

Liberal Construction. — The Workmen's Compensation Act should be liberally construed to the end that the benefits thereof shall not be denied upon technical, narrow, and strict interpretation. Cates v. Hunt Constr. Co., 267 N.C. 560, 148 S.E.2d 604 (1966).

The Workmen's Compensation Act requires the Industrial Commission and the courts to construe the compensation act liberally in favor of the injured workman. Cates v. Hunt Constr. Co., 267 N.C. 560, 148 S.E.2d 604 (1966).

This Section Is Exception to § 97-30. — Under § 97-30 compensation for permanent partial disability is measured by the degree of disability, except in case of loss of a member as specified in this section. Ashley v. Rent-A-Car Co., 271 N.C. 76, 155 S.E.2d 755 (1967).

Former Enumeration of Total Permanent Disabilities Was Not Exclusive. — The fact that subdivision (19) of this section formerly stated that certain injuries should be deemed permanent and total disabilities did not mean that permanent and total disabilities could be found only in those cases enumerated, but that such injuries were conclusively presumed to be permanent total disabilities, and the Commission should so find. Stanley v. Hyman-Michaels Co., 222 N.C. 257, 22 S.E.2d 570 (1942).

Provisions Are Mandatory. — The language of this section is clear, and its provisions are mandatory, and the Commission is without authority to deny the compensation for which it provides on the ground the employee is earning as much as he was earning before the injury. Watts v. Brewer, 243 N.C. 422, 90 S.E.2d 764 (1956).

Subdivision (21) is mandatory in providing that the Industrial Commission shall award proper and equitable compensation, not to exceed $3,500 (now $5,000), for serious facial or head disfigurement. Cates v. Hunt Constr. Co., 267 N.C. 560, 148 S.E.2d 604 (1966).

Meaning of "Shall Be Deemed". — The words "shall be deemed," as used in the opening paragraph of this section, mean "shall be held," "shall be adjudged," "shall be determined," "shall be treated as if," "shall be construed." Watts v. Brewer, 243 N.C. 422, 90 S.E.2d 764 (1956).

Specific Disability Following Temporary Total Disability. — Where claimant suffers an injury that results in temporary total disability followed by a specific disability compensable under this section, compensation for specific disability is payable in addition to that awarded for temporary total disability. Rice v. Denny Roll & Panel Co., 199 N.C. 154, 154 S.E. 69 (1930); Watkins v. Central Motor Lines, 279 N.C. 132, 181 S.E.2d 588 (1971).

Amount Awarded for Loss of Vision. — Under this section a workman who suffers a total loss of an eye is entitled to 60% of his average weekly wages during 120 weeks in addition to the compensation paid during the healing period. If, however, the injury produces only a partial loss of vision, he is entitled to receive that portion of the compensation provided in subdivision (16) that the percentage of loss of vision bears to a total loss. Watts v. Brewer, 243 N.C. 422, 90 S.E.2d 764 (1956).

In case of the loss of an eye the Commission must conclusively presume and adjudge that the disability resulting therefrom continued or will continue for 120 weeks beyond the healing period. Watts v. Brewer, 243 N.C. 422, 90 S.E.2d 764 (1956).

For note as to eye injuries and loss of vision, see 35 N.C.L. Rev. 443 (1957).

Compensation for partial loss of vision by a claimant should be awarded on the basis of the vision remaining without the use of corrective lenses. Hollman v. City of Raleigh, 273 N.C. 240, 159 S.E.2d 874 (1968).

"Total Loss" of Vision. — Prior to 1943, "total loss" of vision was taken in its ordinary meaning, that being "total destruction" of vision. Logan v. Johnson, 218 N.C. 200, 10 S.E.2d 653 (1940). By the 1943 amendment to this section "total loss" was enlarged to include "industrial blindness," which is 85% or more loss of vision in one eye. See Withers v. Black, 230 N.C. 428, 53 S.E.2d 668 (1949).

Loss of 95% of Vision of Each Eye. — Upon evidence showing that claimant had suffered permanent loss of 95% of the vision of each eye, it was held that, under the 1943 amendment to this section, an award for permanent and total loss of vision of each eye was proper. Withers v. Black, 230 N.C. 428, 53 S.E.2d 668 (1949).

Prior to the 1943 amendment it was held that the phrase "total . . . loss of vision of an eye" in prescribing the amount of compensation to be allowed therefor, meant the total destruction of the vision of the eye as distinguished from the partial loss of such vision. Logan v. Johnson, 218 N.C. 200, 10 S.E.2d 653 (1940).

Prior Astigmatism Not Barring Recovery. — In Schrum v. Catawba Upholstering Co., 214 N.C. 353, 199 S.E. 385 (1938), claimant was held entitled to full compensation for total loss of vision of an eye by this section. It was held error to first deduct 40% loss due to astigmatism and award claimant only 60% of the amount recoverable for total loss of vision, and this result was not altered by § 97-33.

Effect of 1957 Amendment to Subdivision (19). — Before the 1957 amendment to subdivision (19) of this section an award for partial disability was to be based on a percentage of the weekly wage for the entire period rather than a percentage of the number of weekly payments. Kellams v. Carolina Metal Prods., Inc., 248 N.C. 199, 102 S.E.2d 841 (1958).

Award for Partial Disability under Subdivision (19) Is Subject to Minimum Provided in § 97-29. — Under the provisions of subdivision (20) of this section, awards for partial loss or partial loss of use of a member under subdivision (19) were subject to the minimum fixed in § 97-29 in like manner as awards for total disability, and therefore the weekly payments of an award for partial disability should not have been less than the minimum fixed by § 97-29. Kellams v. Carolina Metal Prods., Inc., 248 N.C. 199, 102 S.E.2d 841 (1958).

Award for 75% Impairment of Use of Left Hand Upheld. — See Pridmore v. McCrary, 245 N.C. 544, 96 S.E.2d 843 (1957).

Provision as to Bodily Disfigurement Is Constitutional. — This section, authorizing the Industrial Commission to award compensation for bodily disfigurement, is sufficiently certain and prescribes the standard for the computation of an award thereunder with sufficient definiteness, and the provision is valid and constitutional and not void as a delegation of legislative power in contravention of N.C. Const., Art. I, § 8 [now § 6]. Baxter v. W.H. Arthur Co., 216 N.C. 276, 4 S.E.2d 621 (1939).

"Disfigurement" Construed. — A disfigurement is a blemish, a blot, a scar or a mutilation that is external and observable, marring the appearance. Arrington v. Stone & Webster Eng'r Corp., 264 N.C. 38, 140 S.E.2d 759 (1965).

Discretion of Commission in Awarding Compensation for Disfigurement. — Compensation for "serious bodily disfigurement" is not required by the act. Its allowance or disallowance is within the legal discretion of the Industrial Commission. Branham v. Denny Roll & Panel Co., 223 N.C. 233, 25 S.E.2d 865 (1943); Davis v. Sanford Constr., Co., 247 N.C. 332, 101 S.E.2d 40 (1957).

The General Assembly made provision for compensation for disfigurement of the head and body in separate subdivisions, and made compensation for head disfigurement mandatory and compensation for bodily disfigurement discretionary. Arrington v. Stone & Webster Eng'r Corp., 264 N.C. 38, 140 S.E.2d 759 (1965).

The statute makes it mandatory on the Commission to award proper and equitable compensation in case of serious facial or head disfigurement. This is not the case in regard to disfigurement of other parts of the body. Stanley v. Hyman-Michaels Co., 222 N.C. 257, 22 S.E.2d 570 (1942); Davis v. Sanford Constr. Co., 247 N.C. 332, 101 S.E.2d 40 (1957).

Provisions as to Disfigurement Are Not Invalid for Failure to Provide Guide or Standard. — The fact that there exists a broad area in which the judgment of the Commission with reference to the particular factual situation is determinative does not invalidate the statutory provision on the ground of failure to provide an intelligible guide or standard for the award of compensation for serious disfigurement causing impairment of future earning power. Davis v. Sanford Constr. Co., 247 N.C. 332, 101 S.E.2d 40 (1957).

There is a serious disfigurement in law only when there is a serious disfigurement in fact. A serious disfigurement in fact is a disfigurement that mars and hence adversely affects the appearance of the injured employee to such extent that it may be reasonably

presumed to lessen his opportunities for remunerative employment and so reduces his future earning power. True, no present loss of wages need be established; but to be serious, the disfigurement must be of such nature that it may be fairly presumed that the injured employee has suffered a diminution of his future earning power. Davis v. Sanford Constr. Co., 247 N.C. 332, 101 S.E.2d 40 (1957); Arrington v. Stone & Webster Eng'r Corp., 264 N.C. 38, 140 S.E.2d 759 (1965).

Disfigurement must be evidenced by an outward observable blemish, scar or mutilation, under the Workmen's Compensation Act, and it must be so permanent and serious as to hamper or handicap the person in his earnings or in securing employment. Branham v. Denny Roll & Panel Co., 223 N.C. 233, 25 S.E.2d 865 (1943).

Determining Award for Serious Disfigurement. — In awarding compensation for serious disfigurement the Commission, in arriving at the consequent diminution of earning power, should consider the natural physical handicap resulting, the age, training, experience, education, occupation and adaptability of the employee to obtain and retain employment. Stanley v. Hyman-Michaels Co., 222 N.C. 257, 22 S.E.2d 570 (1942); Davis v. Sanford Constr. Co., 247 N.C. 332, 101 S.E.2d 40 (1957).

Limitation on Amount of Award for Serious Disfigurement. — The provision of this section relating to serious disfigurement, as it stood before the 1943 amendment, excluded the compensation for facial and head disfigurement from the "weekly compensation payments" contained in the "foregoing schedule of compensation," but not from the limitation upon total compensation under the act. Arp v. E.A. Wood & Co., 207 N.C. 41, 175 S.E. 719 (1934).

Such Award Is Separate. — Weekly compensation under the schedules cannot be increased by the inclusion of compensation for disfigurement. Compensation for disfigurement, if allowed, must be a separate award and the aggregate awards in no case may exceed the total compensation fixed in the act. Stanley v. Hyman-Michaels Co., 222 N.C. 257, 22 S.E.2d 570 (1942).

No Award for Disfigurement if One Made for Total Permanent Disability. — No award can be made for disfigurement where an award has been made for total permanent disability. Likewise, disfigurement must be serious in order that compensation may be allowed therefor. Stanley v. Hyman-Michaels Co., 222 N.C. 257, 22 S.E.2d 570 (1942).

Disfigurement and Partial Loss of Arm. — Under this section the Industrial Commission had authority to award compensation for facial and bodily disfigurement, in this case resulting from scar tissue from burns, and to award compensation for partial loss of the use of the arm resulting from such scar tissue, when such awards were supported by competent evidence, provided the award for the disfigurement did not exceed the maximum provided by the act, and provided that the aggregate of all awards did not exceed the maximum total compensation prescribed by § 97-29. Baxter v. W.H. Arthur Co., 216 N.C. 276, 4 S.E.2d 621 (1939). See Stanley v. Hyman-Michaels Co., 222 N.C. 257, 22 S.E.2d 570 (1942), and note the effect of the 1943 amendment.

Loss of or Permanent Injury to Important Organ of Body. — Under subdivision (22) of this section as it stood before the 1957 amendment, "the loss or permanent injury to any important organ of the body for which no compensation is payable under the preceding subsections" would be the basis for a separate award only if it resulted in "serious bodily disfigurement." Such loss or permanent injury to an important organ of the body was not something different from or in addition to "serious bodily disfigurement" but rather, as indicated by the word "including," an instance of what might constitute "serious bodily disfigurement." Davis v. Sanford Constr. Co., 247 N.C. 332, 101 S.E.2d 40 (1957); Arrington v. Stone & Webster Eng'r Corp., 264 N.C. 38, 140 S.E.2d 759 (1965).

Loss of or Permanent Injury to Important Organ of Face or Head. — While subdivision (21) does not refer in express terms to the loss of or permanent injury to any important organ of the face or head, such loss, if in fact a "serious facial or head disfigurement," is compensable thereunder. Davis v. Sanford Constr. Co., 247 N.C. 332, 101 S.E.2d 40 (1957); Arrington v. Stone & Webster Eng'r Corp., 264 N.C. 38, 140 S.E.2d 759 (1965).

Award for both partial incapacity under § 97-30 and for disfigurement under subdivision (22) of this section is now permissible for injuries occurring since July 1, 1963. Hall v. Thomason Chevrolet, Inc., 263 N.C. 569, 139 S.E.2d 857 (1965).

Loss of Senses of Taste and Smell Compensable under Subdivision (24). — Under the present law, subdivision (24), an award of compensation for loss of sense of taste or smell would unquestionably be sustained, where from the circumstances it could be reasonably presumed that the workman suffered diminution of his future earning power by reason of such loss. Arrington v. Stone & Webster Eng'r Corp., 264 N.C. 38, 140 S.E.2d 759 (1965).

But Not under Subdivision (21). — Loss of the senses of taste and smell is not compensable under subdivision (21), which is applicable to head disfigurement. Arrington v. Stone &

Webster Eng'r Corp., 264 N.C. 38, 140 S.E.2d 759 (1965).

Loss of Front Teeth. — If the loss of two upper front teeth constitutes serious disfigurement within the meaning of this section, it would be a "serious facial or head disfigurement" compensable under subdivision (21) rather than a "serious bodily disfigurement" compensable under subdivision (22). In such case, plaintiff would be entitled under subdivision (21) to an award as a matter of right. Davis v. Sanford Constr. Co., 247 N.C. 332, 101 S.E.2d 40 (1957), construing the former statute.

Whether an injured employee has suffered a "serious facial or head disfigurement" in the loss of two upper front teeth is a question of fact to be determined by the Commission, after taking into consideration the factors involved, in relation to whether it may be fairly presumed to cause a diminution of his future earning power. Davis v. Sanford Constr. Co., 247 N.C. 332, 101 S.E.2d 40 (1957).

Applied in Moore v. State, 1 I.C. 405 (1930), aff'd, 200 N.C. 300, 156 S.E. 806 (1931); Williams v. Thompson, 3 I.C. 46, aff'd, 200 N.C. 463, 157 S.E. 430 (1931) (complete loss of vision in one eye); Oaks v. Cone Mills Corp., 249 N.C. 285, 106 S.E.2d 202 (1958); Pratt v. Central Upholstery Co., 252 N.C. 716, 115 S.E.2d 27 (1960).

Quoted in Maley v. Thomasville Furniture Co., 214 N.C. 589, 200 S.E. 438 (1939).

Cited in Smith v. Swift & Co., 212 N.C. 608, 194 S.E. 106 (1937); Anderson v. Northwestern Motor Co., 233 N.C. 372, 64 S.E.2d 265 (1951); Marshburn v. Patterson, 241 N.C. 441, 85 S.E.2d 683 (1955); Smith v. Mecklenburg County Chapter Am. Red Cross, 245 N.C. 116, 95 S.E.2d 559 (1956); Evans v. Asheville Citizens Times Co., 246 N.C. 669, 100 S.E.2d 75 (1957); Inman v. Meares, 247 N.C. 661, 101 S.E.2d 692 (1958); McDowell v. Town of Kure Beach, 251 N.C. 818, 112 S.E.2d 390 (1960); Brewer v. Powers Trucking Co., 256 N.C. 175, 123 S.E.2d 608 (1962); Bryan v. First Free Will Baptist Church, 267 N.C. 111, 147 S.E.2d 633 (1966); Morgan v. Thomasville Furniture Indus., 2 N.C. App. 126, 162 S.E.2d 619 (1968).

§ 97-32. Refusal of injured employee to accept suitable employment as suspending compensation.—If an injured employee refuses employment procured for him suitable to his capacity he shall not be entitled to any compensation at any time during the continuance of such refusal, unless in the opinion of the Industrial Commission such refusal was justified. (1929, c. 120, s. 32.)

The purpose of this section is to guard against the possibility that an injured employee may refuse to work, when, in fact, he is able to work and earn wages, and thus increase or attempt to increase the amount of his compensation. Branham v. Denny Roll & Panel Co., 223 N.C. 233, 25 S.E.2d 865 (1943).

Cited in Honeycutt v. Carolina Asbestos Co., 235 N.C. 471, 70 S.E.2d 426 (1952).

§ 97-33. Prorating permanent disability received in other employment.—If any employee has a permanent disability or has sustained a permanent injury in service in the army or navy of the United States, or in another employment other than that in which he received a subsequent permanent injury by accident, such as specified in G.S. 97-31, he shall be entitled to compensation only for the degree of disability which would have resulted from the later accident if the earlier disability or injury had not existed. (1929, c. 120, s. 33.)

Loss of Eye That Was Already Damaged. — It has been held in Schrum v. Catawba Upholstering Co., 214 N.C. 353, 199 S.E. 385 (1938), that when prior damage to an eye was not due to an accident, recovery should be allowed for the complete loss of sight. The court stated that this section was not applicable in instances of this sort.

§ 97-34. Employee receiving an injury when being compensated for former injury.—If an employee receives an injury for which compensation is payable, while he is still receiving or entitled to compensation for a previous injury in the same employment, he shall not at the same time be entitled to compensation for both injuries, unless the later injury be a permanent injury such as specified in G.S. 97-31; but he shall be entitled to compensation for that injury and from the time of that injury which will cover the longest period and the largest amount payable under this Article. (1929, c. 120, s. 34.)

§ 97-35. How compensation paid for two injuries; employer liable only for subsequent injury.—If any employee receives a permanent injury as

specified in G.S. 97-31 after having sustained another permanent injury in the same employment, he shall be entitled to compensation for both injuries, but the total compensation shall be paid by extending the period and not by increasing the amount of weekly compensation, and in no case exceeding 500 weeks.

If an employee has previously incurred permanent partial disability through the loss of a hand, arm, foot, leg, or eye, and by subsequent accident incurs total permanent disability through the loss of another member, the employer's liability is for the subsequent injury only. (1929, c. 120, s. 35.)

Cross Reference. — As to additional payments to be made out of the Second Injury Fund in certain hardship cases, see § 97-40.1.

§ 97-36. Accidents taking place outside State; employee receiving compensation from another state. — Where an accident happens while the employee is employed elsewhere than in this State which would entitle him or his dependents or next of kin to compensation if it had happened in this State, the employee or his dependents shall be entitled to compensation, if the contract of employment was made in this State, if the employer's place of business is in this State; provided his contract of employment was not expressly for service exclusively outside of the State; provided, however, if an employee shall receive compensation or damages under the laws of any other state nothing herein contained shall be construed so as to permit a total compensation for the same injury greater than is provided for in this Article. (1929, c. 120, s. 36; 1963, c. 450, s. 2; 1967, c. 1229, s. 3.)

Editor's Note. — For a discussion of this section, see 8 N.C.L. Rev. 427. For note on the application of full faith and credit to workmen's compensation statutes and awards, see 34 N.C.L. Rev. 501 (1956). For case law survey on conflict of laws, see 43 N.C.L. Rev. 895 (1965).

Requisites for Coverage. — This section provides coverage for accidents happening outside this State under the same rules as if the accident happened in this State, provided: (1) The contract of employment was made in this State; (2) the employer's business is in this State; (3) the contract of employment did not expressly provide for services exclusively outside this State. Rice v. Uwharrie Council Boy Scouts of America, 263 N.C. 204, 139 S.E.2d 223 (1964).

Employee No Longer Required to Be Resident of State. — The 1963 amendment struck out the requirement that the employee should be a resident of this State. Rice v. Uwharrie Council Boy Scouts of America, 263 N.C. 204, 139 S.E.2d 223 (1964). For case holding section to be constitutional prior to the 1963 amendment, see Reaves v. Earle-Chesterfield Mill Co., 216 N.C. 462, 5 S.E.2d 305 (1939).

Concurrence of Three Factors Formerly Requisite for Jurisdiction. — Prior to the 1963 amendment, in order to give the Industrial Commission jurisdiction of the rights of the parties arising out of an injury received by the employee while out of the State, it must appear that the contract of employment was made in this State, that the employer's place of business was in this State, and that the residence of the employee was in this State, and the concurrence of all three facts was prerequisite to its jurisdiction of such injury. Reaves v. Earle-Chesterfield Mill Co., 216 N.C. 462, 5 S.E.2d 305 (1939); Mallard v. Bohannon, 220 N.C. 536, 18 S.E.2d 189 (1942); Mallard v. Bohannon, 221 N.C. 227, 19 S.E.2d 880 (1942); Aylor v. Barnes, 242 N.C. 223, 87 S.E.2d 269 (1955); Suggs v. Williamson Truck Lines, 253 N.C. 148, 116 S.E.2d 359 (1960).

Where the accident, resulting in an employee's death, occurs in another state, but the contract of employment was made in this State between the resident employee and the resident employer, and the contract of employment is not expressly for services exclusively outside of the State, the North Carolina Industrial Commission has jurisdiction. McGill v. Bison Fast Freight, Inc., 245 N.C. 469, 96 S.E.2d 438 (1957).

Jurisdiction Cannot Be Conferred by Consent or Waiver. — In view of the three concurrent requirements of this section prior to the 1963 amendment, an injury outside the State to an employee resident without the State was not then compensable under the act and the North Carolina Industrial Commission had no jurisdiction to make an award or approve or enforce a settlement in such case. Jurisdiction cannot be conferred by consent or waiver, as by making payments under the supposed award. (It is intimated that the terms of the award pursuant to agreement might be the basis of a suit in contract, and one judge thought the rights thus created should be enforceable in this action.) Reaves v. Earle-Chesterfield Mill Co., 216 N.C. 462, 5 S.E.2d 305 (1939).

Whether a contract is expressly for service exclusively outside the State is a question of fact for the determination of the Industrial Commission. Mallard v. Bohannon, 220 N.C. 536, 18 S.E.2d 189 (1942); Mallard v. Bohannon, 221 N.C. 227, 19 S.E.2d 880 (1942).

When the contract of employment is for services to be rendered exclusively outside the State and such services in fact are performed in their entirety elsewhere than in this State this Chapter has no application. Mallard v. Bohannon, 221 N.C. 227, 19 S.E.2d 880 (1942).

Deceased employee, a resident of North Carolina, was hired as a salesman for Georgia and Florida territory under an oral contract with defendant's assistant sales manager but the latter had given the employee to understand that he would be transferred to North Carolina in accordance with his wish when a vacancy occurred there. The employee was killed in the scope of his employment in Georgia. On the first hearing the Supreme Court held, three justices dissenting, that the Commission was justified in finding that the contract contemplated service within the State under some circumstances, i.e., that the company could have transferred him to North Carolina under the contract and not in modification of it, therefore the North Carolina act was applicable. Mallard v. Bohannon, 220 N.C. 536, 18 S.E.2d 189 (1942). On rehearing after a change in the membership of the court, it was held, in accord with the previous dissent, that the evidence showed employment limited to Georgia and Florida, where and only where he could represent his employer, and that mere expectancy of a change in the contract by subsequent transfer to North Carolina did not bring the employment under the act. Mallard v. Bohannon, 221 N.C. 227, 19 S.E.2d 880 (1942).

Burden of Proof. — Where claimant establishes the jurisdictional facts, the burden is upon the employer and the insurance carrier to show that the contract of employment was expressly for service exclusively outside the State and thus bring themselves within the first proviso of this section. Mallard v. Bohannon, 220 N.C. 536, 18 S.E.2d 189 (1942); Mallard v. Bohannon, 221 N.C. 227, 19 S.E.2d 880 (1942).

Compensation Award as Barring Recovery in Another State. — Where a Louisiana employee was injured in the course of his employment in Texas, he was free to pursue his remedy in either state, but, having chosen to seek it in Texas, where compensation award was res judicata, the "full faith and credit" clause precluded him from again seeking a remedy in Louisiana upon the same grounds. The fact that a suitor has been denied a remedy by one state because it does not afford a remedy for the particular wrong alleged may not bar recovery in another state which does provide a remedy, but a recovery cannot be had in every state which affords a remedy. Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 64 S. Ct. 208, 88 L. Ed. 149, 150 A.L.R. 413 (1943). In 28 N.C.L. Rev. 68, it is suggested that Williams v. North Carolina, 325 U.S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577 (1945), might have the effect of modifying this decision.

Cited in Pearson v. Peerless Flooring Co., 247 N.C. 434, 101 S.E.2d 301 (1958); Warren v. Dixon & Christopher Co., 252 N.C. 534, 114 S.E.2d 250 (1960).

§ 97-37. Where injured employee dies before total compensation is paid.—When an employee receives or is entitled to compensation under this Article for an injury covered by G.S. 97-31 and dies from any other cause than the injury for which he was entitled to compensation, payment of the unpaid balance of compensation shall be made: First, to the surviving whole dependents; second, to partial dependents, and, if no dependents, to the next of kin as defined in the Article; if there are no whole or partial dependents or next of kin as defined in the Article, then to the personal representative, in lieu of the compensation the employee would have been entitled to had he lived.

Provided, however, that if the death is due to a cause that is compensable under this Article, and the dependents of such employee are awarded compensation therefor, all right to unpaid compensation provided by this section shall cease and determine. (1929, c. 120, s. 37; 1947, c. 823; 1971, c. 322.)

Cross Reference. — See note to § 97-29.

Editor's Note. — The 1971 amendment deleted "and Second Injury Fund as provided in the article" following "personal representative" near the end of the first paragraph.

An award inadvertently entered by the Industrial Commission after the death of the claimant on appeal from the award is irregular, but not void, and the proceedings do not abate. Butts v. Montague, 204 N.C. 389, 168 S.E. 215 (1933).

Stated in McCulloh v. Catawba College, 266 N.C. 513, 146 S.E.2d 467 (1966).

Cited in Davis v. North Carolina Granite Corp., 259 N.C. 672, 131 S.E.2d 335 (1963).

§ 97-38. Where death results proximately from the accident; dependents; burial expenses; compensation to aliens; election by partial dependents. —If death results approximately from the accident and within two years thereafter, or while total disability still continues and within six years after the accident, the employer shall pay or cause to be paid, subject to the provisions of other sections of this Article, weekly payments of compensation equal to sixty percent (60%) of the average weekly wages of the deceased employee at the time of the accident, but not more than fifty-six dollars ($56.00), nor less than twenty dollars ($20.00), per week for a period of 350 weeks from the date of the accident, and burial expenses not exceeding five hundred dollars ($500.00), to the person or persons entitled thereto as follows:

(1) Persons wholly dependent for support upon the earnings of the deceased employee at the time of the accident shall be entitled to receive the entire compensation payable share and share alike to the exclusion of all other persons. If there be only one person wholly dependent, then that person shall receive the entire compensation payable.

(2) If there is no person wholly dependent, then any person partially dependent for support upon the earnings of the deceased employee at the time of the accident shall be entitled to receive a weekly payment of compensation computed as hereinabove provided, but such weekly payment shall be the same proportion of the weekly compensation provided for a whole dependent as the amount annually contributed by the deceased employee to the support of such partial dependent bears to the annual earnings of the deceased at the time of the accident.

(3) If there is no person wholly dependent, and the person or all persons partially dependent is or are within the classes of persons defined as "next of kin" in G.S. 97-40, whether or not such persons or such classes of persons are of kin to the deceased employee in equal degree, and all so elect, he or they may take, share and share alike, the commuted value of the amount provided for whole dependents in (1) above instead of the proportional payment provided for partial dependents in (2) above; provided, that the election herein provided may be exercised on behalf of any infant partial dependent by a duly qualified guardian; provided, further, that the Industrial Commission may, in its discretion, permit a parent or person standing in loco parentis to such infant to exercise such option in its behalf, the award to be payable only to a duly qualified guardian except as in this Article otherwise provided; and provided, further, that if such election is exercised by or on behalf of more than one person, then they shall take the commuted amount in equal shares.

When weekly payments have been made to an injured employee before his death, the compensation to dependents shall begin from the date of the last of such payments, but shall not continue more than 350 weeks from the date of the injury.

Compensation payable under this Article to aliens not residents (or about to become nonresidents) of the United States or Canada, shall be the same in amount as provided for residents, except that dependents in any foreign country except Canada shall be limited to surviving wife and child or children, or if there be no surviving wife or child or children, to the surviving father or mother whom the employee has supported, either in whole or in part for a period of one year prior to the date of the injury; provided, that the Commission may, in its discretion, or, upon application of the employer or insurance carrier shall commute all future installments of compensation to be paid to such aliens to their present value and payment of one half of such

commuted amount to such aliens shall fully acquit the employer and the insurance carrier. (1929, c. 120, s. 38; 1943, c. 163; c. 502, s. 5; 1947, c. 823; 1951, c. 70, s. 3; 1953, c. 53, s. 1; 1955, c. 1026, s. 8; 1957, c. 1217; 1963, c. 604, s. 3; 1967, c. 84, s. 4; 1969, c. 143, s. 4; 1971, c. 281, s. 3.)

Cross References. — For definitions of terms, see § 97-2. For further cases on dependency, see note to § 97-39.

Editor's Note. — The 1969 amendment increased the maximum weekly benefits from $42.00 to $50.00. Section 9 of the amendatory act provides that it shall apply only to cases originating on and after July 1, 1969.

The 1971 amendment substituted "fifty-six dollars ($56.00)" for "fifty dollars ($50.00)" and "twenty dollars ($20.00)" for "ten dollars" in the introductory paragraph.

Session Laws 1971, c. 281, s. 7, provides: "This act shall be in full force from and after July 1, 1971, and shall apply only to cases originating on and after July 1, 1971."

For discussion of section, see 8 N.C.L. Rev. 427. And for comment on the 1943 amendment, see 21 N.C.L. Rev. 384. For brief comment on the 1953 amendment, which rewrote this section, see 31 N.C.L. Rev. 451 (1953).

Constitutionality. — In McPherson v. Henry Motor Sales Corp., 201 N.C. 303, 160 S.E. 283 (1931), appeal dismissed, 286 U.S. 527, 52 S. Ct. 499, 76 L.Ed. 1269 (1932), the constitutionality of this section was raised. The court refused to consider the point, however, because it was not presented at the hearing before the full Commission.

"Disability". — The definition of the word "disability" as it is defined in subdivision (9) of § 97-2 must be read into this section in lieu of the word "disability" therein. Burton v. Peter W. Blum & Son, 270 N.C. 695, 155 S.E.2d 71 (1967).

Under the Workmen's Compensation Act "disability" refers not to physical infirmity but to a diminished capacity to earn money. Burton v. Peter W. Blum & Son, 270 N.C. 695, 155 S.E.2d 71 (1967).

Proximate Cause. — The employer is required to pay compensation for death of employee only when the death results proximately from injury by accident arising out of and in the course of employment. Gilmore v. Hoke County Bd. of Educ., 222 N.C. 358, 23 S.E.2d 292 (1942).

When Compensation for Death Authorized. — The Workmen's Compensation Act authorizes the Industrial Commission to make an award of compensation on account of the death of an employee only in the event that death results proximately from the accident and within two years thereafter, or while total disability still continues and within six years after the accident. Burton v. Peter W. Blum & Son, 270 N.C. 695, 155 S.E.2d 71 (1967).

Continuing Total Disability Is Condition Precedent to Award for Death after Two Years. — A continuing total disability from the time of the accident to the time of the death is a condition precedent to the making of an award of death benefits where the death occurred more than two years after the accident. Burton v. Peter W. Blum & Son, 270 N.C. 695, 155 S.E.2d 71 (1967).

An award of compensation, on account of a death occurring more than two years after the accident, is authorized only if there is evidence to support a finding that, from the accident to the death, the employee had a continuing incapacity, because of the injury, to earn the wages which he was receiving at the time of his accident. Burton v. Peter W. Blum & Son, 270 N.C. 695, 155 S.E.2d 71 (1967).

Death from Preexisting Heart Condition Aggravated by Injury. — Findings to the effect that the employee suffered an injury arising out of and in the course of the employment, which injury aggravated a preexisting heart condition and caused death, will support an award for compensation and burial expenses. Wyatt v. Sharp, 239 N.C. 655, 80 S.E.2d 762 (1954).

Instance of Total Dependency. — Where the evidence tended to show that the mother of the deceased employee lived with him, that he had paid the rent, bought groceries and supported her for a period of years, but that for two months prior to his death she did washing and nominal services for, and stayed with, an aged bedridden person and earned $5.75 per week thereby, which she deposited in a bank or used to buy small luxuries, the fact that the mother earned small amounts of money in temporary and casual employment did not indicate any dependable source of income other than that she received from her son and the conclusion of the Industrial Commission that she was totally dependent upon her son within the meaning of the Workmen's Compensation Act was sustained. Thomas v. Raleigh Gas Co., 218 N.C. 429, 11 S.E.2d 297 (1940).

Finding as to Dependency Binding on Appeal. — While it may be admitted that in some instances the question of dependency may be a mixed question of fact and law, where the facts admitted or found by the Commission upon competent evidence support the conclusion of the Commission in regard thereto, its award is binding on the court. Thomas v. Raleigh Gas Co., 218 N.C. 429, 11 S.E.2d 297 (1940).

Election by Partial Dependents to Receive Benefits under § 97-40 — Former Law. — Before the passage of the 1953 amendments to

this section and § 97-40, it was held that the right given to partial dependents who were also next of kin to elect to take as next of kin under § 97-40 applied only if the partial dependents were of equal degree. Thus it was held that the partially dependent widowed mother of a deceased employee and his partially dependent brother could not elect to take as next of kin, under § 97-40, rather than as partial dependents under this section. Parsons v. Swift & Co., 234 N.C. 580, 68 S.E.2d 296 (1951).

Death or Remarriage of Widow Before All Installments Paid. — This section places no limitation by way of forfeiture on compensation receivable where a widow, who has been awarded workmen's compensation for her husband's death, dies or remarries before all installments have been paid. Hill v. Cahoon, 252 N.C. 295, 113 S.E.2d 569 (1960).

Where a widow properly awarded compensation as the sole dependent of her deceased husband dies before all the installments of compensation have been paid, the commuted value of such future installments is properly paid to her personal representative, and the next of kin of the deceased employee, who are not dependents, are not entitled thereto. Hill v. Cahoon, 252 N.C. 295, 113 S.E.2d 569 (1960).

Where an employee has lost his life in the course of his employment and thereafter an award has been made by the Industrial Commission to his widow, as his sole dependent, and within a few months after the award is made his widow dies intestate, her administrator is entitled to the benefits of the award as made to her. Queen v. Champion Fibre Co., 203 N.C. 94, 164 S.E.2d 752 (1932).

Proper Plaintiffs in Action for Failure to Procure Compensation Insurance. — An action against insurance agents for breach of their agreement with an employer to procure compensation coverage for an employee may be maintained only by those who would have been entitled to payments had the policy been issued, and when it appears that the employee died as the result of injury received during the employment, and that the employee left a widow him surviving, such action may be maintained only by the widow, and an action instituted by the employee's administrator and the employer, who advanced the insurance premium, must be dismissed. Crawford v. General Ins. & Realty Co., 266 N.C. 615, 146 S.E.2d 651 (1966).

Applied in Willingham v. Bryan Rock & Sand Co., 240 N.C. 281, 82 S.E.2d 68 (1954); Painter v. Mead Corp., 258 N.C. 741, 129 S.E.2d 482 (1963); Lovette v. Reliable Mfg. Co., 262 N.C. 288, 136 S.E.2d 685 (1964).

Quoted in Wilson v. Utah Constr. Co., 243 N.C. 96, 89 S.E.2d 864 (1955); Shealy v. Associated Transp., Inc., 252 N.C. 738, 114 S.E.2d 702 (1960); Petty v. Associated Transp., Inc., 4 N.C. App. 361, 167 S.E.2d 38 (1969).

Cited in Smith v. Collins-Aikman Corp., 198 N.C. 621, 152 S.E. 809 (1930); Early v. W.H. Basnight & Co., 214 N.C. 103, 198 S.E. 577 (1938); Roth v. McCord, 232 N.C. 678, 62 S.E.2d 64 (1950); McGill v. Bison Fast Freight, Inc., 245 N.C. 469, 96 S.E.2d 438 (1957); Inman v. Meares, 247 N.C. 661, 101 S.E.2d 692 (1958); Fetner v. Rocky Mount Marble & Granite Works, 251 N.C. 296, 111 S.E.2d 324 (1959); Davis v. North Carolina Granite Corp., 259 N.C. 672, 131 S.E.2d 335 (1963); Horney v. Meredith Swimming Pool Co., 267 N.C. 521, 148 S.E.2d 554 (1966).

§ 97-39. Widow, widower, or child to be conclusively presumed to be dependent; other cases determined upon facts; division of death benefits among those wholly dependent; when division among partially dependent.—A widow, a widower and/or a child shall be conclusively presumed to be wholly dependent for support upon the deceased employee. In all other cases questions of dependency, in whole or in part shall be determined in accordance with the facts as the facts may be at the time of the accident, but no allowance shall be made for any payment made in lieu of board and lodging or services, and no compensation shall be allowed unless the dependency existed for a period of three months or more prior to the accident. If there is more than one person wholly dependent, the death benefit shall be divided among them, the persons partly dependent, if any, shall receive no part thereof. If there is no one wholly dependent, and more than one person partially dependent, the death benefit shall be divided among them according to the relative extent of their dependency.

The widow, or widower and all children of deceased employees shall be conclusively presumed to be dependents of deceased and shall be entitled to receive the benefits of this Article for the full periods specified herein. (1929, c. 120, s. 39.)

Cross Reference. — For definition of terms "widow," "widower," and "child," see § 97-2.

Editor's Note. — As to determination of the extent of the dependency of partial dependents, see 8 N.C.L. Rev. 426.

Widow or Widower Conclusively Presumed

to Be Wholly Dependent. — Where deceased employee left a widower who had been living with her but was not dependent upon her for support, he is conclusively presumed to be wholly dependent. Section 97-2(15), which provides that a widower is dependent only if he lived with his wife and was dependent upon her for support at her death, is void insofar as it conflicts with this section. Martin v. Glenwood Park Sanatorium, 200 N.C. 221, 156 S.E. 849 (1930).

The common-law wife of a deceased employee is not entitled to compensation under the provisions of this act. Reeves v. Parker-Graham-Sexton, Inc., 199 N.C. 236, 154 S.E. 66 (1930).

A woman who was living with an employee as his common-law wife at the time of his death and who was actually wholly dependent upon him for support for some years prior to his death by accident arising out of and in the course of his employment is not a dependent of the deceased employee within the purview of this section, and is not entitled to any part of the compensation payable under the provisions of the Workmen's Compensation Act. Fields v. Hollowell, 238 N.C. 614, 78 S.E.2d 740 (1953).

The term "in all other cases" in the connection in which it appears in this section means, in all cases other than those of widows, widowers, and children, claiming to be dependents of the deceased employee,— dependency shall be determined in accordance with the facts as the facts may be at the time of the accident. Manifestly, a woman living in cohabitation with a man, to whom she is not married, is not within the purview of the term "in all other cases." Fields v. Hollowell, 238 N.C. 614, 78 S.E.2d 740 (1953).

Proper Plaintiffs in Action for Failure to Procure Compensation Insurance. — See same catchline in note to § 97-38.

Divorce and Remarriage in Another State. — On the conflict of laws question raised where there has been a divorce and remarriage in another state, and a subsequent controversy develops as to which is the "widow," see Rice v. Rice, 336 U.S. 674, 69 S. Ct. 751, 93 L. Ed. 957 (1949); 28 N.C.L. Rev. 265, 286.

A second or subsequent marriage is presumed legal until the contrary is proved, and the burden of the issue is upon a plaintiff who attempts to establish a property right which is dependent upon the invalidity of such a marriage. The plaintiff cannot recover because of the failure of defendant to carry the burden. Kearney v. Thomas, 225 N.C. 156, 33 S.E.2d 871 (1945).

Illegitimate Child Acknowledged by Father. — An illegitimate child, born after the death of its father, who before his death had acknowledged his paternity of the child, is a dependent of its deceased father within the meaning of this section, and such child is entitled to share with children of its deceased father who were born of his marriage to their mother, from whom their father had been divorced prior to his death, in compensation awarded under this act to his dependents. Lippard v. Southeastern Express Co., 207 N.C. 507, 177 S.E. 801 (1935).

Children of employee's common-law wife who were not the children of the employee were not entitled to share compensation with employee's legal widow and their children, even though supported by the employee, since act of maintenance was voluntary and was not a legal obligation. Wilson v. Utah Constr. Co., 243 N.C. 96, 89 S.E.2d 864 (1955).

A child born to employee's common-law wife shortly after death of employee was not entitled to compensation where there was no evidence that employee had acknowledged the child. Wilson v. Utah Constr. Co., 243 N.C. 96, 89 S.E.2d 864 (1955).

Father Held Not a Dependent. — Deceased had lived at his father's home, buying food and other supplies for the house from time to time. When he was away from home, he made no contribution. The Commission's finding that the father of deceased was not a dependent was affirmed. Scott v. Auman, 209 N.C. 853, 184 S.E. 830 (1936).

Applied in Wyatt v. Sharp, 239 N.C. 655, 80 S.E.2d 762 (1954).

Quoted in Hewett v. Garrett, 274 N.C. 356, 163 S.E.2d 372 (1968); Hewett v. Garrett, 1 N.C. App. 234, 161 S.E.2d 157 (1968); Cobb v. Eastern Clearing & Grading, Inc., 1 N.C. App. 327, 161 S.E.2d 612 (1968).

Cited in Smith v. Collins-Aikman Corp., 198 N.C. 621, 152 S.E. 809 (1930); McGill v. Bison Fast Freight, Inc., 245 N.C. 469, 96 S.E.2d 438 (1957).

§ 97-40. Commutation and payment of compensation in absence of dependents; "next of kin" defined; commutation and distribution of compensation to partially dependent next of kin; payment in absence of both dependents and next of kin.—Subject to the provisions of G.S. 97-38, if the deceased employee leaves neither whole nor partial dependents, then the compensation which would be payable under G.S. 97-38 to whole dependents shall be commuted to its present value and paid in a lump sum to the next of kin as herein defined. For purposes of this section and G.S. 97-38, "next of kin" shall include only child, father, mother, brother or sister of the deceased

employee, including adult children or adult brothers or adult sisters of the deceased, but excluding a parent who has wilfully abandoned the care and maintenance of his or her child and who has not resumed its care and maintenance at least one year prior to the first occurring of the majority or death of the child and continued its care and maintenance until its death or majority. For all such next of kin who are neither wholly nor partially dependent upon the deceased employee and who take under this section, the order of priority among them shall be governed by the general law applicable to the distribution of the personal estate of persons dying intestate. In the event of exclusion of a parent based on abandonment, the claim for compensation benefits shall be treated as though the abandoning parent had predeceased the employee. For all such next of kin who were also partially dependent on the deceased employee but who exercise the election provided for partial dependents by G.S. 97-38, the general law applicable to the distribution of the personal estate of persons dying intestate shall not apply and such person or persons upon the exercise of such election, shall be entitled, share and share alike, to the compensation provided in G.S. 97-38 for whole dependents commuted to its present value and paid in a lump sum.

If the deceased employee leaves neither whole dependents, partial dependents, nor next of kin as hereinabove defined, then no compensation shall be due or payable on account of the death of the deceased employee, except that the employer shall pay or cause to be paid the burial expenses of the deceased employee not exceeding five hundred dollars ($500.00) to the person or persons entitled thereto. (1929, c. 120, s. 40; 1931, c. 274, s. 5; c. 319; 1945, c. 766; 1953, c. 53, s. 2; c. 1135, s. 2; 1963, c. 604, s. 4; 1965, c. 419; 1967, c. 84, s. 5; 1971, c. 1179.)

Editor's Note. — The 1971 amendment, in the first paragraph, added the language beginning "including" in the second sentence, and added the fourth sentence.

For a discussion of the original section, see 8 N.C.L. Rev. 427. As to the 1931 amendments, see 9 N.C.L. Rev. 406.

For cases decided prior to 1963 amendment, which rewrote this section, see Brooks v. E.H. Clement Co., 201 N.C. 768, 161 S.E. 403 (1931); Hunt v. State, 201 N.C. 37, 158 S.E. 703 (1931), followed in Slade v. Willis Hosiery Mills, 209 N.C. 823, 184 S.E. 844 (1936); Hamby v. Cobb, 214 N.C. 813, 1 S.E.2d 101 (1939); Parsons v. Swift & Co., 234 N.C. 580, 68 S.E.2d 296 (1951); Green v. Briley, 242 N.C. 196, 87 S.E.2d 213 (1955); Fields v. Hollowell, 238 N.C. 614, 78 S.E.2d 740 (1953).

This section does not change the nature of the proceeds so as to convert them into assets of the estate and the designated beneficiaries do not take any right of intestate succession. Smith v. Allied Exterminators, Inc., 11 N.C. App. 76, 180 S.E.2d 390 (1971).

Nor does this section make the "general law" applicable to determine eligibility; it makes the "general law" applicable only to determine the order of priority among those who by the statute are specified as eligible for participation in the proceeds. Smith v. Allied Exterminators, Inc., 11 N.C. App. 76, 180 S.E.2d 390 (1971).

Applied in Horney v. Meredith Swimming Pool Co., 267 N.C. 521, 148 S.E.2d 554 (1966).

§ 97-40.1. Second Injury Fund.—(a) There is hereby created a fund to be known as the "Second Injury Fund," to be held and disbursed by the Industrial Commission as hereinafter provided.

For the purpose of providing money for said fund the Industrial Commission may assess against the employer or its insurance carrier the payment of not to exceed twenty-five dollars ($25.00) for the loss, or loss of use, of each minor member in every case of a permanent partial disability where there is such loss, and shall assess not to exceed one hundred dollars ($100.00) for fifty percent (50%) or more loss or loss of use of each major member, defined as back, foot, leg, hand, arm, eye, or hearing.

In addition to the assessments hereinabove provided for, the Commission shall also deposit in said fund all moneys received by it for the Second Injury Fund under the provisions of G.S. 97-40.

(b) The Industrial Commission shall disburse moneys from the Second Injury Fund in unusual cases of second injuries as follows:

(1) To pay additional compensation in cases of second injuries referred to in G.S. 97-33; provided, however, that the original injury and the subsequent injury were each at least twenty percent (20%) of the entire member; and, provided further, that such additional compensation, when added to the compensation awarded under said section, shall not exceed the amount which would have been payable for both injuries had both been sustained in the subsequent accident.

(2) To pay additional compensation to an injured employee who has sustained permanent total disability in the manner referred to in the second paragraph of G.S. 97-35, which shall be in addition to the compensation awarded under said section; provided, however, that such additional compensation, when added to the compensation awarded under said section, shall not exceed the compensation for permanent total disability as provided for in G.S. 97-29.

(3) To pay compensation and medical expense in cases of permanent and total disability resulting from an injury to the brain or spinal cord in the manner and to the extent hereinafter provided.

The additional compensation and treatment expenses herein provided for shall be paid out of the Second Injury Fund exclusively and only to the extent to which the assets of such fund shall permit.

(c) In addition to payments for the purposes hereinabove set forth, the Industrial Commission may, in its discretion, make payments from said fund for the following purposes and under the following conditions:

(1) In any case in which total and permanent disability due to paralysis or loss of mental capacity has resulted from an injury to the brain or spinal cord, the Industrial Commission may, in its discretion enter an award and pay compensation and reasonable and necessary medical, nursing, hospital, institutional, equipment, and other treatment expenses from the Second Injury Fund during the life of the injured employee in cases where the injury giving rise to such disability occurred prior to July 1, 1953, and the last payment of compensation has been made subsequent to January 1, 1941. Such compensation and medical expense shall be paid only from April 4, 1947, and after the employer's liability for compensation and treatment expense has ended, and in every case in which the injury resulting in paralysis due to injury to the spinal cord occurred subsequent to April 4, 1947, and prior to July 1, 1953, the liability of the employer and his insurance carrier to pay compensation and medical expense during the life of the injured employee shall not be affected by this section.

(2) When compensation is allowed from the fund in any case under subdivision (1) of subsection (c), the Commission may in its discretion authorize payment of medical, nursing, hospital, equipment, and other treatment expenses incurred prior to the date compensation is allowed and after the employer's liability has ended if funds are reasonably available in the Second Injury Fund for such purpose after paying claims in cases of second injuries as specified in G.S. 97-33 and 97-35. Should the fund be insufficient to pay both compensation and treatment expenses, then the said expenses may, in the discretion of the Commission, be paid first and compensation thereafter according to the reasonable availability of funds in the fund. (1953, c. 1135, s. 2; 1957, c. 1396, s. 4; 1963, c. 450, s. 3.)

Editor's Note. — The word "section" at the end of subdivision (1) of subsection (c) appears in the printed act as "amendment."

§ 97-41. Total compensation not to exceed $20,000.—In cases where permanent total disability results from paralysis or loss of mental capacity

caused by an injury to the brain or spinal cord, or in cases in which total and permanent disability results from the loss of both hands, or both arms, or both feet, or both legs, or both eyes, or any two thereof, compensation shall be payable for the life of the injured employee as provided by G.S. 97-29. In all other cases, the total compensation paid, including the funeral benefit, shall not exceed twenty thousand dollars ($20,000). (1929, c. 120, s. 41; 1947, c. 823; 1951, c. 70, s. 4; 1953, c. 1135, s. 3; 1955, c. 1026, s. 9; 1963, c. 604, s. 5; 1967, c. 84, s. 6; 1969, c. 143, s. 5; 1971, c. 281, s. 4; c. 1182, s. 1.)

Editor's Note. — The 1969 amendment increased the maximum compensation from fifteen thousand dollars to eighteen thousand dollars. Section 9 of the amendatory act provides that it shall apply only to cases originating on and after July 1, 1969.

The first 1971 amendment substituted "twenty thousand dollars ($20,000)" for "eighteen thousand dollars" in the last sentence.

The second 1971 amendment inserted "or in cases in which total and permanent disability results from the loss of both hands, or both arms, or both feet, or both legs, or both eyes, or any two thereof" in the first sentence.

Session Laws 1971, c. 281, s. 7, and c. 1182, s. 3, provide: "This act shall be in full force from and after July 1, 1971, and shall apply only to cases originating on and after July 1, 1971."

"Mental Capacity". — The words "mental capacity" as used in § 97-29 and this section are properly defined as that quality of mind which enables a person to act with reasonable discretion in the ordinary affairs of life and to comprehend in a reasonable manner the nature, scope and effect of his acts and conduct. Priddy v. Blue Bird Cab Co., 9 N.C. App. 291, 176 S.E.2d 26 (1970).

Disability as used in the Workmen's Compensation Act means impairment of wage earning capacity rather than physical impairment. Priddy v. Blue Bird Cab Co., 9 N.C. App. 291, 176 S.E.2d 26 (1970).

This section and § 97-29 do not require that there be a total loss of mental capacity. Priddy v. Blue Bird Cab Co., 9 N.C. App. 291, 176 S.E.2d 26 (1970).

But Do Require Total and Permanent Disability Resulting from Loss of Mental Capacity. — This section and § 97-29 do require in order to sustain an award for life thereunder, that there be a total and permanent disability resulting from a loss of mental capacity caused by an injury to the brain. Priddy v. Blue Bird Cab Co., 9 N.C. App. 291, 176 S.E.2d 26 (1970).

Whether Such Total and Permanent Disability Occurs Is Question of Fact. — The question of whether there has been a total and permanent disability resulting from a loss of mental capacity caused by or resulting from an injury to the brain is one of fact. Priddy v. Blue Bird Cab Co., 9 N.C. App. 291, 176 S.E.2d 26 (1970).

The amount allowed for serious facial or head disfigurement is to be included with other amounts allowed an injured employee in determining the total compensation allowed such employee, which in no case may exceed the maximum amount stated in this section. Arp v. E.A. Wood & Co., 207 N.C. 41, 175 S.E. 719 (1934).

There is no maximum award where there is permanent disability due to injury to spinal cord. Baldwin v. Amazon Cotton Mills, 253 N.C. 740, 117 S.E.2d 718 (1961).

Control of Temper Is Mental Function. — When considered in the light of the definition of "mental capacity," the control of one's temper is a mental function for purposes of § 97-29 and this section. Priddy v. Blue Bird Cab Co., 9 N.C. App. 291, 176 S.E.2d 26 (1970).

Reading Section in Argument to Jury. — See McCombs v. McLean Trucking Co., 252 N.C. 699, 114 S.E.2d 683 (1960).

Applied in Willingham v. Bryan Rock & Sand Co., 240 N.C. 281, 82 S.E.2d 68 (1954); Starr v. Charlotte Paper Co., 8 N.C. App. 604, 174 S.E.2d 342 (1970).

§ 97-42. Deduction of payments. — Any payments made by the employer to the injured employee during the period of his disability, or to his dependents, which by the terms of this Article were not due and payable when made, may, subject to the approval of the Industrial Commission be deducted from the amount to be paid as compensation. Provided, that in the case of disability such deductions shall be made by shortening the period during which compensation must be paid, and not by reducing the amount of the weekly payment. (1929, c. 120, s. 42.)

Cross Reference. — As to effect of accident insurance policy procured by employer, see note to § 97-6.

§ 97-43. Commission may prescribe monthly or quarterly payments.—The Industrial Commission, upon application of either party, may, in its discretion, having regard to the welfare of the employee and the convenience of the employer, authorize compensation to be paid monthly or quarterly instead of weekly. (1929, c. 120, s. 43.)

§ 97-44. Lump sums.—Whenever any weekly payment has been continued for not less than six weeks, the liability therefor may, in unusual cases, where the parties agree and the Industrial Commission deems it to be to the best interest of the employee or his dependents, or where it will prevent undue hardships on the employer or his insurance carrier, without prejudicing the interests of the employee or his dependents, be redeemed, in whole or in part by the payment by the employer of a lump sum which shall be fixed by the Commission, but in no case to exceed the uncommuted value of the future installments which may be due under this Article. The Commission, however, in its discretion, may at any time in the case of a minor who has received permanently disabling injuries either partial or total provide that he be compensated, in whole or in part, by the payment of a lump sum, the amount of which shall be fixed by the Commission, but in no case to exceed the uncommuted value of the future installments which may be due under this Article. (1929, c. 120, s. 44; 1963, c. 450, s. 4.)

Editor's Note. — For a discussion of this section, see 8 N.C.L. Rev. 427.

§ 97-45. Reducing to judgment outstanding liability of insurance carriers withdrawing from State.—Upon the withdrawal of any insurance carrier from doing business in the State that has any outstanding liability under the Workmen's Compensation Act, the Insurance Commissioner shall immediately notify the North Carolina Industrial Commission, and thereupon the said North Carolina Industrial Commission shall issue an award against said insurance carrier and commute the installments due the injured employee or employees, and immediately have said award docketed in the superior court of the county in which the claimant resides, and the said North Carolina Industrial Commission shall then cause suit to be brought on said judgment in the state of the residence of any such insurance carrier, and the proceeds from said judgment after deducting the cost, if any, of the proceeding, shall be turned over to the injured employee, or employees, taking from such employee, or employees, the proper receipt in satisfaction of his claim. (1933, c. 474.)

§ 97-46. Lump sum payments to trustee; receipt to discharge employer.—Whenever the Industrial Commission deems it expedient any lump sum, subject to the provisions of G.S. 97-44, shall be paid by the employer to some suitable person or corporation appointed by the superior court in the county wherein the accident occurred, as trustee, to administer the same for the benefit of the person entitled thereto, in the manner provided by the Commission. The receipt of such trustee for the amount as paid shall discharge the employer or anyone else who is liable therefor. (1929, c. 120, s. 45.)

§ 97-47. Change of condition; modification of award.—Upon its own motion or upon the application of any party in interest on the grounds of a change in condition, the Industrial Commission may review any award, and on such review may make an award ending, diminishing, or increasing the compensation previously awarded, subject to the maximum or minimum provided in this Article, and shall immediately send to the parties a copy of the award. No such review shall affect such award as regards any moneys paid but no such review shall be made after 12 months from the date of the last payment of compensation pursuant to an award under this Article, except that in cases in which only medical or other treatment bills are paid, no such review shall be made after 12 months from the date of the last payment of bills for

medical or other treatment, paid pursuant to this Article. (1929, c. 120, s. 46; 1931, c. 274, s. 6; 1947, c. 823.)

Editor's Note. — For note on the range of compensable consequences of a work-related injury, see 49 N.C.L. Rev. 583 (1971).

The language of this section is clear. White v. Shoup Boat Corp., 261 N.C. 495, 135 S.E.2d 216 (1964).

Basis for Altering Final Award. — There is no basis for altering a final award of compensation, other than that provided by this section. Watkins v. Central Motor Lines, 10 N.C. App. 486, 179 S.E.2d 130 (1971).

Commission May Alter Compensation Only upon a "Change in Condition". — The Industrial Commission is given authority to review an award and end, diminish or increase the compensation previously awarded only when there has been a "change in condition" of the claimant, as provided in this section. And when an award has been entered for total disability for a certain length of time, and for partial disability thereafter for a total of 300 weeks under § 97-30, the Industrial Commission may not, upon a review of the award on claimant's application prior to the payment of the last installment of the award, increase the award of compensation to that allowed for total disability under § 97-29, upon its finding that claimant was unable to earn any appreciable sum by his labor, when the Commission also finds that at the time of the review of the award claimant's condition was unchanged and that he was at that time only 50 percent disabled. Murray v. Nebel Knitting Co., 214 N.C. 437, 199 S.E. 609 (1938).

Where there is ample evidence to support a finding of a change in claimant's condition as contemplated by this section, and evidence which would support a contrary finding, the finding of the Industrial Commission from the conflicting evidence is conclusive. Knight v. Ford Body Co., 214 N.C. 7, 197 S.E. 563 (1938).

By this section the Industrial Commission is given authority to review an award and increase the compensation theretofore awarded when there has been a change of condition of the claimant, and when the evidence supports a finding of change of claimant's condition, the finding of the Commission is conclusive. Baldwin v. Amazon Cotton Mills, 253 N.C. 740, 117 S.E.2d 718 (1961).

Award Retaining Jurisdiction in Commission for Future Adjustments. — Claimant, following a back injury, returned to the same employer and was paid same wages as before injury although doing lighter work. The award of the Commission found as a fact that claimant was being paid wages "in lieu of compensation" and retained jurisdiction for 300 weeks from the date of injury so that future adjustments might be made in compensation payable should employee suffer any wage loss due to his injury within that period. The Supreme Court affirmed this action, saying that the Commission did not exceed its authority in thus retaining jurisdiction to protect the employee against imposition by the employer. Branham v. Denny Roll & Panel Co., 223 N.C. 233, 25 S.E.2d 865 (1943).

There is nothing in the Workmen's Compensation Act that contemplates or authorizes an anticipatory finding by the Commission that a physical impairment may develop into a compensable disability. Neither does the act vest in the Commission the power to retain jurisdiction of a claim, after compensation has been awarded, merely because some physical impairment suffered by the claimant may, at some time in the future, cause a loss of wages. The Commission is concerned with conditions existing prior to and at the time of the hearing. If such conditions change in the future, to the detriment of the claimant, this section affords the claimant a remedy and fixes the time within which he must seek it. Dail v. Kellex Corp., 233 N.C. 446, 64 S.E.2d 438 (1951).

Claimant suffered multiple injuries in a wreck. After hearing the Commission found as a fact that he had suffered 20 percent permanent partial disability. However, it also found that he was suffering no wage loss as a result of injury at the time of hearing. It did not appear that he was being paid wages in lieu of compensation. On the further finding that the physical impairment might cause loss of wages in the future, the Commission attempted to retain jurisdiction during 300 weeks from the date of injury. This was held to be error by the Supreme Court. Dail v. Kellex Corp., 233 N.C. 446, 64 S.E.2d 438 (1951).

As to the power of the Commission to retain jurisdiction during 300 weeks from the date of injury, see also note to § 97-30.

Power to Grant Rehearing on Ground of Newly Discovered Evidence. — The North Carolina Industrial Commission has the power, in a proper case, and in accordance with its rules and regulations, to grant a rehearing of a proceeding pending before it, and in which it has made an award, on the ground of newly discovered evidence. Owens v. Standard Mineral Co., 10 N.C. App. 84, 177 S.E.2d 775 (1970).

Fact Evidence Is Not Newly Discovered and Inadvertence of Counsel Do Not Prevent Granting Motion to Open Award. — The facts that evidence claimed as a basis of a motion to open a compensation award is not newly discovered and might have been offered at the original hearing in the exercise of due diligence and that counsel, through inadvertence, has failed to present a ground upon which

compensation might be allowed, do not in themselves prevent the North Carolina Industrial Commission from granting such a motion. Owens v. Standard Mineral Co., 10 N.C. App. 84, 177 S.E.2d 775 (1970).

"Change of condition" refers to a substantial change, after a final award of compensation, of the injured employee's physical capacity to earn and in some cases, of his earnings. Swaney v. George Newton Constr. Co., 5 N.C. App. 520, 169 S.E.2d 90 (1969).

Awareness of Continuing Medical Attention Not Inconsistent with Change of Condition. — A claim for permanent partial disability may involve a "change in condition" within the purview of this section, notwithstanding that the North Carolina Industrial Commission and the defendants were aware, at the time when the closing receipt was signed, that plaintiff was still undergoing treatment for his injury, because none of the parties realize that plaintiff's injury might result in permanent disability. Mere awareness of continuing medical attention is not inconsistent with the eventual prospect of complete recovery. Watkins v. Central Motor Lines, 10 N.C. App. 486, 179 S.E.2d 130 (1971).

Agreement to pay compensation when approved by Commission, is equivalent of award. White v. Shoup Boat Corp., 261 N.C. 495, 135 S.E.2d 216 (1964); Gantt v. Hickory Motor Sales, Inc., 8 N.C. App. 559, 174 S.E.2d 624 (1970); Watkins v. Central Motor Lines, 10 N.C. App. 486, 179 S.E.2d 130 (1971).

A closing receipt purports to be a final settlement and indicates that no further compensation will be paid unless request for hearing for change of condition is made within a year from date of the receipt. Watkins v. Central Motor Lines, 279 N.C. 132, 181 S.E.2d 588 (1971).

Motion for Rehearing Declined While under Misapprehension of Law. — Ordinarily, a motion for further hearing on the grounds of introducing additional or newly discovered evidence rests in the sound discretion of the North Carolina Industrial Commission, but this principle is not applicable where the Commission declines to consider such a motion under a misapprehension of applicable principles of law. Owens v. Standard Mineral Co., 10 N.C. App. 84, 177 S.E.2d 775 (1970).

If Timely Made. — An employee's application for a rehearing on the ground that he has additional evidence to establish his claim of disability by silicosis, is improperly dismissed by the North Carolina Industrial Commission, where (1) the employee's application is timely made and (2) the Commission acted under a misapprehension of the law in denying the application. Owens v. Standard Mineral Co., 10 N.C. App. 84, 177 S.E.2d 775 (1970).

Application Seeking Modification of Settlement Agreement. — See Morgan v. Norwood, 211 N.C. 600, 191 S.E. 345 (1937).

Changes of condition occurring during the healing period, and prior to the time of maximum recovery and the permanent disability, if any, found to exist at the end of the period of healing, are not changes of condition within the meaning of this section. Pratt v. Central Upholstery Co., 252 N.C. 716, 115 S.E.2d 27 (1960).

Increase in Earning Power as Change of Condition. — Claimant had been awarded compensation for general partial disability and thereafter had obtained a job paying practically as much as he made at the time of the accident. It was held that the claimant had undergone a change of condition, as the basis of disability under the act is loss of earning power. Smith v. Swift & Co., 212 N.C. 608, 194 S.E. 106 (1937).

Where Claimant Has Same Disability He Had at Time of First Rating. — Where plaintiff had been receiving compensation for over 275 weeks for permanent partial disability and then offered, as a basis for claiming total disability, proof that he had not been able to do any work, it was held that there had been no change of condition, since the claimant had the same disability he had at the time of his first rating. Murray v. Nebel Knitting Co., 214 N.C. 437, 199 S.E. 609 (1938).

Serious Bodily Disfigurement. — See Tucker v. Lowdermilk, 233 N.C. 185, 63 S.E.2d 109 (1951).

Facts Showing Change of Condition. — After payments for a time under an approved agreement, claimant applied on January 6, 1936, for compensation payable in a lump sum. Granted, and paid February 24, 1936. On January 5, 1937, he applied for a reopening of the case on the ground that blood poisoning had spread and created a change of condition and that he was then suffering from Buerger's disease due to the injury. The hearing commissioner's finding that there had been a change of condition and that the application was in time was affirmed. Knight v. Ford Body Co., 214 N.C. 7, 197 S.E. 563 (1938).

The review of an award for change of condition must be made within 12 months from the date of the last payment of compensation pursuant to an award, and, while the right to review is enlarged by the 1947 amendment to include instances in which only medical or other treatment bills are paid, the amendment provides for review in such cases only within 12 months of the date of last payment of such bills. Whitted v. Palmer-Bee Co., 228 N.C. 447, 46 S.E.2d 109 (1948), commented on in 58 Yale L.J. 495.

A claim is barred if the request for compensation is not made within 12 months from the date of the last payment, unless perhaps the carrier is estopped to plead the

lapse of time. White v. Shoup Boat Corp., 261 N.C. 495, 135 S.E.2d 216 (1964).

An injured employee is not entitled to a review of an agreement to pay compensation where his application for review is made more than 12 months after the last payment of compensation under the agreement. Gantt v. Hickory Motor Sales, Inc., 8 N.C. App. 559, 174 S.E.2d 624 (1970).

Where the findings of the Industrial Commission, supported by evidence, are to the effect that a review of the award of compensation is sought by an employee more than 12 months from the date of the last payment, the order of the Commission denying further compensation will be upheld by the courts in view of this section. Lee v. Rose's 5-10-25¢ Stores, 205 N.C. 310, 171 S.E. 87 (1933); Paris v. Carolina Builders Corp., 244 N.C. 35, 92 S.E.2d 405 (1956).

The agreement for compensation for disability approved by the Commission and the payment made by the carrier followed by the execution of the closing receipt by plaintiff employee more than one year prior to the filing of application with the Commission for an additional award put the case beyond the time given by this section in which to claim additional compensation. Smith v. Mecklenburg County Chapter Am. Red Cross, 245 N.C. 116, 95 S.E.2d 559 (1956).

The parties entered into an agreement for payment of compensation, approved by the Industrial Commission, which provided for payment of compensation "for necessary weeks" and stipulated that the employee had theretofore returned to work. The employer notified the Commission of final payment under such agreement. It was held that a request for review of the award for changed condition made some 16 months thereafter is barred since the disability for which compensation was agreed to be paid presumably terminated when the employee returned to work prior to the execution of the agreement, and therefore the phrase of the agreement "for necessary weeks" cannot be enlarged to include the subsequent disability. Tucker v. Lowdermilk, 233 N.C. 185, 63 S.E.2d 109 (1951).

Date of Last Payment. — The last payment of compensation within the meaning of this section is the date the last check was delivered to and accepted by the employee, and not the date the check was paid by the drawee bank. Paris v. Carolina Builders Corp., 244 N.C. 35, 92 S.E.2d 405 (1956); Baldwin v. Amazon Cotton Mills, 253 N.C. 740, 117 S.E.2d 718 (1961).

An employee cannot be allowed 12 months in which to request a review from the last date on which the compensation would have been due had he not elected to accept payment of the award in a lump sum. Paris v. Carolina Builders Corp., 244 N.C. 35, 92 S.E.2d 405 (1956).

This section merely fixes a date after which the claim is barred. Ammons v. Z.A. Sneeden's Sons, 257 N.C. 785, 127 S.E.2d 575 (1962).

Failure to assert a change in condition within 12 months is not jurisdictional. Ammons v. Z.A. Sneeden's Sons, 257 N.C. 785, 127 S.E.2d 575 (1962).

And Party May Be Estopped to Rely on It. — Delay for more than one year may be asserted as a plea in bar, but the party interposing and relying on it may be estopped to assert it by inequitable conduct. Ammons v. Z.A. Sneeden's Sons, 257 N.C. 785, 127 S.E.2d 575 (1962).

Limitation as to Minor Employees. — See Lineberry v. Mebane, 219 N.C. 257, 13 S.E.2d 429 (1941).

Running of Time Limitation. — The one-year limitation of this section begins to run when the employee is notified and the last payment of compensation pursuant to an agreement is made, and after one year forecloses plaintiff's claim, if there was a "change in condition" as contemplated by this section, and if defendants are not estopped to invoke the limitation. Watkins v. Central Motor Lines, 10 N.C. App. 486, 179 S.E.2d 130 (1971).

Without Regard to Plaintiff's Signature. — The limitation would have begun to run when notice of the last payment of compensation under an agreement was given plaintiff, with or without plaintiff's signature on a closing receipt. Watkins v. Central Motor Lines, 10 N.C. App. 486, 179 S.E.2d 130 (1971).

The one-year limitation is not jurisdictional; this section merely providing a plea in bar which may be asserted by the employer. Watkins v. Central Motor Lines, 10 N.C. App. 486, 179 S.E.2d 130 (1971).

But Is Technical Legal Defense. — The lapse of time, when properly pleaded, is a technical legal defense. Watkins v. Central Motor Lines, 279 N.C. 132, 181 S.E.2d 588 (1971).

Redetermination of Compensation Award Allowed During Period for Reopening. — Where the harmful consequences of an injury are unknown when the amount of compensation to be paid has been determined by agreement but subsequently develops, the amount of compensation to which the employee is entitled can be redetermined within the statutory period for reopening. It is a "change in condition" as the term is used in this section. Watkins v. Central Motor Lines, 279 N.C. 132, 181 S.E.2d 588 (1971).

Even If Change Necessitates Award in Different Category. — The fact that the change necessitates making an award in an entirely different category, as when an original award was one of temporary benefits for time

loss and the award on reopening would be for total permanent disability, is no obstacle to reopening. Watkins v. Central Motor Lines, 279 N.C. 132, 181 S.E.2d 588 (1971).

This section cannot apply unless there has been a previous award of the Commission. If that award directed the payment of both compensation and medical expense, then the injured employee would have one year from the last payment of compensation pursuant to the award in which to file claim for further compensation upon an alleged change of condition. If the award directed the payment of medical bills only, then the injured employee would have one year from the date on which the last payment for medical treatment is made in which to file a claim for further compensation upon an alleged change of condition. Biddix v. Rex Mills, Inc., 237 N.C. 660, 75 S.E.2d 777 (1953). See also Whitted v. Palmer-Bee Co., 228 N.C. 447, 46 S.E.2d 109 (1948).

The North Carolina Industrial Commission's authority under this statute is limited to review of prior awards, and the statute is inapplicable in instances where there has been no previous final award. Watkins v. Central Motor Lines, 279 N.C. 132, 181 S.E.2d 588 (1971).

This section has no application except where it is made to appear that previous award has been made by the Industrial Commission. Where the record on appeal to the superior court from an award of the Industrial Commission does not disclose a previous award made to claimant, defendant's contention that the award appealed from cannot be sustained in the absence of a finding of change of condition is untenable. Penland v. Bird Coal Co., 246 N.C. 26, 97 S.E.2d 432 (1957).

This section is not applicable unless a final award has been made. Pratt v. Central Upholstery Co., 252 N.C. 716, 115 S.E.2d 27 (1960).

And it does not apply if the Commission has no jurisdiction of the claim. Hart v. Thomasville Motors, Inc., 244 N.C. 84, 92 S.E.2d 673 (1956).

Proceeding Is Pending Until All Disabilities Considered.—Until all of an injured employee's compensable injuries and disabilities have been considered and adjudicated by the Commission, the proceeding pends for the purpose of evaluation, absent laches or some statutory time limitation. Hall v. Thomason Chevrolet, Inc., 263 N.C. 569, 139 S.E.2d 857 (1965).

Where No Previous Award, Jurisdiction Is Retained by Commission.—In cases where there has been no previous final award, jurisdiction is retained by and remains in the North Carolina Industrial Commission pending a termination of the case by final award, and no statute runs against a litigant while his case is pending in court. Watkins v. Central Motor Lines, 279 N.C. 132, 181 S.E.2d 588 (1971).

Notice to Employee and to Commission.—The law requires only that the injured employee be given notice of the one-year limitation, and that the North Carolina Industrial Commission be given notice that the final payment of compensation has been made. Watkins v. Central Motor Lines, 10 N.C. App. 486, 179 S.E.2d 130 (1971).

Law of Estoppel Applicable.—The law of estoppel appliés in compensation proceedings as in all other cases. Watkins v. Central Motor Lines, 279 N.C. 132, 181 S.E.2d 588 (1971).

And May Be Applied Where Employee Has No Notice of Time Limitation.—The employer and its insurance carrier may be estopped from asserting the one-year limitation where the employee is not given notice, as required by the rules of the North Carolina Industrial Commission, that a claim for a change of condition would have to be filed or the Commission notified within one year of the last payment, or where the employee's delay has been induced by acts, representations, or conduct on the part of the employer. Watkins v. Central Motor Lines, 10 N.C. App. 486, 179 S.E.2d 130 (1971).

But Lapse of 17 Months before Filing Exceeds Time Limitation.—Where 17 months elapsed before plaintiff filed Form 33 with the North Carolina Industrial Commission requesting a hearing and further award of compensation on account of his permanent partial disability, this came too late unless defendants were estopped to plead the lapse of time. Watkins v. Central Motor Lines, 279 N.C. 132, 181 S.E.2d 588 (1971).

Misrepresentation of Law Will Not Ordinarily Constitute Estoppel. — A misrepresentation as to a matter of law will not ordinarily constitute an estoppel to rely upon the statute of limitations. Watkins v. Central Motor Lines, 10 N.C. App. 486, 179 S.E.2d 130 (1971).

Denial of Right to Assert Defense of Lapse of Time.—Equity will deny the right to assert the defense of lapse of time when delay has been induced by acts, representations, or conduct, the repudiation of which would amount to a breach of good faith. Watkins v. Central Motor Lines, 279 N.C. 132, 181 S.E.2d 588 (1971).

Tolling of the statute may result from the honest but entirely erroneous expression of opinion as to some significant legal fact. Watkins v. Central Motor Lines, 279 N.C. 132, 181 S.E.2d 588 (1971).

The exception clause added at the end of this section by the 1947 amendment has no relation to the filing of original claims for compensation or the time within which such claims are to be filed. It relates exclusively to the time within which an employee may file a petition for a review of an award theretofore made, and the time limit within which the

review may be had is tolled by the payment of medical bills, if at all, only when such payments are made under the mandate of an award duly entered by the Commission. Biddix v. Rex Mills, Inc., 237 N.C. 660, 75 S.E.2d 777 (1953).

Notice to Employer of Recurrence of Disability within Year.—Where plaintiff contended that she notified defendant of a recurrence of disability within a year after receipt of the last payment of compensation, but she filed no claim with the Commission until after a year had elapsed, her rights were barred. Lee v. Rose's 5-10-25¢ Stores, 205 N.C. 310, 171 S.E. 87 (1933).

A change of theory in the application for review in the superior court from that pursued before the hearing commissioner and the full commission is not permissible. McGinnis v. Old Fort Finishing Plant, 253 N.C. 493, 117 S.E.2d 490 (1960).

Applied in Harris v. Asheville Contracting Co., 240 N.C. 715, 83 S.E.2d 802 (1954); Campbell v. Superior Yarn Mills, Inc., 265 N.C. 384, 144 S.E.2d 149 (1965); Anderson v. Lincoln Constr. Co., 265 N.C. 431, 144 S.E.2d 272 (1965); Hedgecock v. Frye, 1 N.C. App. 369, 161 S.E.2d 647 (1968).

Quoted in Gay v. Northampton County Schools, 5 N.C. App. 221, 168 S.E.2d 57 (1969).

Stated in Russell v. Western Oil Co., 206 N.C. 341, 174 S.E. 101 (1934); Green v. Briley, 242 N.C. 196, 87 S.E.2d 213 (1955).

Cited in Butts v. Montague Bros., 208 N.C. 186, 179 S.E. 799 (1935); Matros v. Owen, 229 N.C. 472, 50 S.E.2d 509 (1948); Hartsell v. Pickett Cotton Mills, 4 N.C. App. 67, 165 S.E.2d 792 (1969).

§ 97-48. Receipts relieving employer; payment to minors; when payment of claims to dependents subsequent in right discharges employer.—(a) Whenever payment of compensation is made to a widow or widower for her or his use, or for her or his use and the use of the child or children, the written receipt thereof of such widow or widower shall acquit the employer: Provided, however, that in order to protect the interests of minors or incompetents the Industrial Commission may at its discretion change the terms of any award with respect to whom compensation for the benefit of such minors or incompetents shall be paid.

(b) Whenever payment is made to any person 18 years of age or over, the written receipt of such person shall acquit the employer.

(c) Payment of death benefits by an employer in good faith to a dependent subsequent in right to another or other dependents shall protect and discharge the employer, unless and until such dependent or dependents prior in right shall have given notice of his or their claims. In case the employer is in doubt as to the respective rights of rival claimants, he may apply to the Industrial Commission to decide between them.

(d) A minor employee under the age of 18 years may sign agreements and receipts for payments of compensation for temporary total disability, and such agreements and receipts executed by such minor shall acquit the employer. Where the injury results in a permanent disability and the sum to be paid does not exceed five hundred dollars ($500.00) the minor employee may execute agreements and sign receipts and such agreements and receipts shall acquit the employer; provided, that when deemed necessary the Commission may require the signature of a parent or person standing in place of a parent. (1929, c. 120, s. 47; 1931, c. 274, s. 7; 1945, c. 766.)

Payment in Good Faith Discharges Employer. — Payment of award of compensation to mother was in good faith and discharged the employer, where investigation by employer's carrier prior to hearing revealed that mother and brother were next of kin, and mother and brother testified to the same effect at the hearing, and the Commission judicially determined that mother was entitled to all benefits, notwithstanding the fact that thereafter it was discovered that deceased left surviving a wife in another county. Green v. Briley, 242 N.C. 196, 87 S.E.2d 213 (1955).

Cited in Lineberry v. Town of Mebane, 219 N.C. 257, 13 S.E.2d 429 (1941); Hill v. Cahoon, 252 N.C. 295, 113 S.E.2d 569 (1960); Pratt v. Central Upholstery Co., 252 N.C. 716, 115 S.E.2d 27 (1960).

§ 97-49. Benefits of mentally incompetent or minor employees under 18 may be paid to a trustee, etc.—If an injured employee is mentally incompetent or is under 18 years of age at the time when any right or privilege

accrues to him under this Article, his guardian, trustee or committee may in his behalf claim and exercise such right or privilege. (1929, c. 120, s. 48.)

Declaration of Common-Law Rule. — This section is a mere declaration of the common-law rule. Lineberry v. Town of Mebane, 219 N.C. 257, 13 S.E.2d 429 (1941).

§ 97-50. Limitation as against minors or mentally incompetent.—No limitation of time provided in this Article for the giving of notice or making claim under this Article shall run against any person who is mentally incompetent, or a minor dependent, as long as he has no guardian, trustee, or committee. (1929, c. 120, s. 49.)

Application of Section. — This section is applicable only to the mentally incompetent and the minor dependent. Lineberry v. Town of Mebane, 219 N.C. 257, 13 S.E.2d 429 (1941).

Minor Not Barred by Failure to Give Notice of Claim. — A minor dependent under 18 years of age and who is without guardian, trustee or committee, is not barred during such disability by failure to give notice of claim for compensation as required by § 97-22 et seq. McGill v. Bison Fast Freight, Inc., 245 N.C. 469, 96 S.E.2d 438 (1957).

Applied in Wray v. Carolina Cotton & Woolen Mills Co., 205 N.C. 782, 172 S.E. 487 (1934).

Cited in Lineberry v. Town of Mebane, 218 N.C. 737, 12 S.E.2d 252 (1940).

§ 97-51. Joint employment; liabilities.—Whenever an employee, for whose injury or death compensation is payable under this Article, shall at the time of the injury be in joint service of two or more employers subject to this Article, such employers shall contribute to the payment of such compensation in proportion to their wages liability to such employee; provided, however, that nothing in this section shall prevent any reasonable arrangement between such employers for a different distribution as between themselves of the ultimate burden of compensation. (1929, c. 120, s. 50.)

Employment Held Not Joint. — Deceased was employed as teacher and coach by the defendant school district. The State Board of Equalization paid part of his salary as teacher, while the school district paid the remainder of his salary both for teaching and for coaching. Deceased was killed while in performance of his duties as coach. It was held that deceased was an employee of the defendant school district but not of the State Board of Equalization since that body had no voice in his election or power over his actions. Perdue v. State Board of Equalization, 205 N.C. 730, 172 S.E. 396 (1934).

Contract between Owner and Lessee of Truck Not Binding on Employee-Driver. — Deceased employee was a truck driver for X, who leased the truck to other haulers. While hauling goods for a lessee of the truck, and under his full control, deceased met his death. The lease contract between X and his lessee provided that X should carry compensation insurance upon the truck driver. It was held that this contract could not be binding upon the employee-driver, as he was not a party to it. Recovery of compensation was allowed against lessee for the death of the employee. The court left open the question of liability of X to the lessee. Roth v. McCord, 232 N.C. 678, 62 S.E.2d 64 (1950).

§ 97-52. Occupational disease made compensable; "accident" defined.—Disablement or death of an employee resulting from an occupational disease described in G.S. 97-53 shall be treated as the happening of an injury by accident within the meaning of the North Carolina Workmen's Compensation Act and the procedure and practice and compensation and other benefits provided by said act shall apply in all such cases except as hereinafter otherwise provided. The word "accident," as used in the Workmen's Compensation Act, shall not be construed to mean a series of events in employment, of a similar or like nature, occurring regularly, continuously or at frequent intervals in the course of such employment, over extended periods of time, whether such events may or may not be attributable to fault of the employer and disease attributable to such causes shall be compensable only if culminating in an occupational disease mentioned in and compensable under this Article: Provided, however, no compensation shall be payable for

asbestosis and/or silicosis as hereinafter defined if the employee, at the time of entering into the employment of the employer by whom compensation would otherwise be payable, falsely represented himself in writing as not having previously been disabled or laid off because of asbestosis or silicosis. (1935, c. 123.)

Purpose of This Section and § 97-53. — Any scheme or plan for the payment of compensation to disabled employees should include those diseases or abnormal conditions of human beings the causative origin of which is occupational in nature. To meet this need the legislature adopted this section and § 97-53. Henry v. A.C. Lawrence Leather Co., 234 N.C. 126, 66 S.E.2d 693 (1951).

The rights and remedies of an employee under the Workmen's Compensation Act exclude all other rights and remedies, and an employee bound by the act may not maintain an action at common law against the employer and his foreman to recover for injuries caused by an occupational disease not enumerated in this section and § 97-53, even though the disease is the result of negligence. Murphy v. American Enka Corp., 213 N.C. 218, 195 S.E. 536 (1938).

Injury by Accident and Occupational Disease Distinguished. — An injury by accident, as that term is ordinarily understood, is distinguished from an occupational disease in that the former rises from a definite event, the time and place of which can be fixed, while the latter develops gradually over a long period of time. Henry v. A.C. Lawrence Leather Co., 234 N.C. 126, 66 S.E.2d 693 (1951).

Disease Must Be Incident to or Result of Employment. — An award for an occupational disease cannot be sanctioned unless it be shown that the disease was incident to or the result of the particular employment in which the workman was engaged. Duncan v. City of Charlotte, 234 N.C. 86, 66 S.E.2d 22 (1951).

If a disease is not a natural result of a particular employment, but is produced by some extrinsic or independent agency, it is in no real sense an occupational disease, and ordinarily may not be imputed to the occupation or employment. Duncan v. City of Charlotte, 234 N.C. 86, 66 S.E.2d 22 (1951).

And Only Diseases Mentioned in § 97-53 Are Compensable. — Disagreement or death, resulting from any "series of events" in employment shall be treated as the happening of an injury by accident compensable under the act when and only when such series of events culminates in one of the occupational diseases mentioned in § 97-53. Henry v. A.C. Lawrence Leather Co., 234 N.C. 126, 66 S.E.2d 693 (1951).

But Employee May Bring Common-Law Action Where Employer Has Rejected Act. — If an employee contracts an occupational disease while working for an employer who has rejected the act, recovery may be had in an action at common law upon a showing of negligence. Bame v. Palmer Stone Works, 232 N.C. 267, 59 S.E.2d 812 (1950).

Disease Resulting from Accident. — This section, providing that only the occupational diseases specified in this Article shall be compensable, relates only to occupational diseases, which are those resulting from long and continued exposure to risks and conditions inherent and usual in the nature of the employment, and does not preclude compensation for a disease not inherent in or incident to the nature of the employment when it results from an accident arising out of and in the course of the employment. MacRae v. Unemployment Compensation Comm'n, 217 N.C. 769, 9 S.E.2d 595 (1940). See Blassingame v. Southern Asbestos Co., 217 N.C. 223, 7 S.E.2d 478 (1940).

Special Provisions Relating to Asbestosis and Silicosis. — When the special provisions of the occupational disease amendment relating to asbestosis and silicosis are read in their entirety, it is apparent that they are designed to effect these objects: (1) to prevent the employment of unaffected persons peculiarly susceptible to asbestosis or silicosis in industries with dust hazards; (2) to secure compensation to those workers affected with asbestosis or silicosis, whose principal need is compensation; and (3) to provide compulsory changes of occupations for those workmen affected by asbestosis or silicosis, whose primary need is removal to employments without dust hazards. Young v. Whitehall Co., 229 N.C. 360, 49 S.E.2d 797 (1948).

A proper consideration of the special provisions relating to asbestosis and silicosis must rest upon a conviction that in passing these laws the legislature gave due heed to the nature of these diseases. Young v. Whitehall Co., 229 N.C. 360, 49 S.E.2d 797 (1948).

The clear intent of § 97-61.6 to provide compensation for death occurring within 350 weeks from the date of last exposure to silicosis if the employee was at the time of death receiving compensation for disablement due to silicosis, even though the death does not result from silicosis, must be given effect notwithstanding § 97-2, subdivisions (6) and (10), and this section, since the specific provisions relating to silicosis, which were enacted because of the peculiar course of the disease, must be construed as an exception to the general tenor of the Workmen's Compensation Act to provide compensation for death only if it results from an accident arising out of and in the course of the employment.

Davis v. North Carolina Granite Corp., 259 N.C. 672, 131 S.E.2d 335 (1963).

Applied in Willingham v. Bryan Rock & Sand Co., 240 N.C. 281, 82 S.E.2d 68 (1954).

Quoted in Hensley v. Farmers Federation Cooperative, 246 N.C. 274, 98 S.E.2d 289 (1957).

Cited in Edwards v. Piedmont Pub. Co., 227 N.C. 184, 41 S.E.2d 592 (1947); Henry v. A.C. Lawrence Leather Co., 231 N.C. 477, 57 S.E.2d 760 (1950); Midkiff v. North Carolina Granite Corp., 235 N.C. 149, 69 S.E.2d 166 (1952).

§ 97-53. Occupational diseases enumerated; when due to exposure to chemicals.—The following diseases and conditions only shall be deemed to be occupational diseases within the meaning of this Article:

(1) Anthrax.
(2) Arsenic Poisoning.
(3) Brass poisoning.
(4) Zinc poisoning.
(5) Manganese poisoning.
(6) Lead poisoning. Provided the employee shall have been exposed to the hazard of lead poisoning for at least 30 days in the preceding 12 months' period; and, provided further, only the employer in whose employment such employee was last injuriously exposed shall be liable.
(7) Mercury poisoning.
(8) Phosphorous poisoning.
(9) Poisoning by carbon bisulphide, menthanol, naphtha or volatile halogenated hydrocarbons.
(10) Chrome ulceration.
(11) Compressed-air illness.
(12) Poisoning by benzol, or by nitro and amido derivatives of benzol (dinitrolbenzol, anilin, and others).
(13) Any disease, other than hearing loss covered in another subdivision of this section, which is proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment.
(14) Epitheliomatous cancer or ulceration of the skin or of the corneal surface of the eye due to tar, pitch, bitumen, mineral oil, or paraffin, or any compound, product, or residue of any of these substances.
(15) Radium poisoning or disability or death due to radioactive properties of substances or to roentgen rays, X rays or exposure to any other source of ionizing radiation; provided, however, that the disease under this subdivision shall be deemed to have occurred on the date that disability or death shall occur by reason of such disease.
(16) Blisters due to use of tools or appliances in the employment.
(17) Bursitis due to intermittent pressure in the employment.
(18) Miner's nystagmus.
(19) Bone felon due to constant or intermittent pressure in employment.
(20) Synovitis, caused by trauma in employment.
(21) Tenosynovitis, caused by trauma in employment.
(22) Carbon monoxide poisoning.
(23) Poisoning by sulphuric, hydrochloric or hydrofluoric acid.
(24) Asbestosis.
(25) Silicosis.
(26) Psittacosis.
(27) Undulant fever.
(28) Loss of hearing caused by harmful noise in the employment. The following rules shall be applicable in determining eligibility for compensation and the period during which compensation shall be payable:
a. The term "harmful noise" means sound in employment

capable of producing occupational loss of hearing as hereinafter defined. Sound of an intensity of less than 90 decibels, A scale, shall be deemed incapable of producing occupational loss of hearing as defined in this section.

b. "Occupational loss of hearing" shall mean a permanent sensorineural loss of hearing in both ears caused by prolonged exposure to harmful noise in employment. Except in instances of preexisting loss of hearing due to disease, trauma, or congenital deafness in one ear, no compensation shall be payable under this subdivision unless prolonged exposure to harmful noise in employment has caused loss of hearing in both ears as hereinafter provided.

c. No compensation benefits shall be payable for temporary total or temporary partial disability under this subdivision and there shall be no award for tinnitus or a psychogenic hearing loss.

d. An employer shall become liable for the entire occupational hearing loss to which his employment has contributed, but if previous deafness is established by a hearing test or other competent evidence, whether or not the employee was exposed to harmful noise within six months preceding such test, the employer shall not be liable for previous loss so established, nor shall he be liable for any loss for which compensation has previously been paid or awarded and the employer shall be liable only for the difference between the percent of occupational hearing loss determined as of the date of disability as herein defined and the percentage of loss established by the preemployment and audiometric examination excluding, in any event, hearing losses arising from nonoccupational causes.

e. In the evaluation of occupational hearing loss, only the hearing levels at the frequencies of 500, 1,000 and 2,000 cycles per second shall be considered. Hearing losses for frequencies below 500 and above 2,000 cycles per second are not to be considered as constituting compensable hearing disability.

f. The employer liable for the compensation in this section shall be the employer in whose employment the employee was last exposed to harmful noise in North Carolina during a period of 90 working days or parts thereof, and an exposure during a period of less than 90 working days or parts thereof shall be held not to be an injurious exposure; provided, however, that in the event an insurance carrier has been on the risk for a period of time during which an employee has been injuriously exposed to harmful noise, and if after insurance carrier goes off the risk said employee has been further exposed to harmful noise, although not exposed for 90 working days or parts thereof so as to constitute an injurious exposure, such carrier shall, nevertheless, be liable.

g. The percentage of hearing loss shall be calculated as the average, in decibels, of the thresholds of hearing for the frequencies of 500, 1,000 and 2,000 cycles per second. Pure tone air conduction audiometric instruments, properly calibrated according to accepted national standards such as American Standards Association, Inc., (ASA), International Standards Organization (ISO), or American National Standards Institute, Inc., (ANSI), shall be used for measuring hearing loss. If more than one audiogram is taken, the audiogram

having the lowest threshold will be used to calculate occupational hearing loss. If the losses of hearing average 15 decibels (26 db if ANSI or ISO) or less in the three frequencies, such losses of hearing shall not constitute any compensable hearing disability. If the losses of hearing average 82 decibels (93 db if ANSI or ISO) or more in the three frequencies, then the same shall constitute and be total or one hundred percent (100%) compensable hearing loss. In measuring hearing impairment, the lowest measured losses in each of the three frequencies shall be added together and divided by three to determine the average decibel loss. To allow for the average amount of hearing loss from aging and nonoccupational causes found in the population at a given age, there shall be deducted, before determining the percentage of hearing impairment, from the total average decibel loss one-half decibel for each year of the employee's age over 38 at the time of last exposure to harmful noise. For each decibel of loss exceeding 15 decibels, (26 db if ANSI or ISO) an allowance of one and one-half percent (1½%) shall be made up to the maximum of one hundred percent (100%) which is reached at 82 decibels (93 db if ANSI or ISO). In determining the binaural percentage of loss, the percentage of impairment in the better ear shall be multiplied by five. The resulting figure shall be added to the percentage of impairment in the poorer ear, and the sum of the two divided by six. The final percentage shall represent the binaural hearing impairment.

h. There shall be payable for total occupational loss of hearing in both ears 150 weeks of compensation, and for partial occupational loss of hearing in both ears such proportion of these periods of payment as such partial loss bears to total loss.

i. No claim for compensation for occupational hearing loss shall be filed until after six months have elapsed since exposure to harmful noise with the last employer. The last day of such exposure shall be the date of disability. The regular use of employer-provided protective devices capable of preventing loss of hearing from the particular harmful noise where the employee works shall constitute removal from exposure to such particular harmful noise.

j. No consideration shall be given to the question of whether or not the ability of an employee to understand speech is improved by the use of a hearing aid. The employer shall not be obligated to furnish the employee with hearing aids, including accessories and replacement, in cases of occupational hearing loss.

k. No compensation benefits shall be payable for the loss of hearing caused by harmful noise after October 1, 1971, if employee fails to regularly utilize employer-provided protection device or devices, capable of preventing loss of hearing from the particular harmful noise where the employee works.

Occupational diseases caused by chemicals shall be deemed to be due to exposure of an employee to the chemicals herein mentioned only when as a part of the employment such employee is exposed to such chemicals in such form and quantity, and used with such frequency as to cause the occupational disease mentioned in connection with such chemicals. (1935, c. 123; 1949, c. 1078;

1953, c. 1112; 1955, c. 1026, s. 10; 1957, c. 1396, s. 6; 1963, c. 553, s. 1; c. 965; 1971, c. 547, s. 1; c. 1108, s. 1.)

Cross References. — See note to § 97-52. See notes to §§ 97-54, 97-57 through 97-61.7, for cases dealing with asbestosis and silicosis.

Editor's Note. — The 1949 amendment added provisions relating to heart disease of members of fire departments, which were held unconstitutional in Duncan v. City of Charlotte, 234 N.C. 86, 66 S.E.2d 22 (1951), and were deleted in 1957.

For brief comment on the 1949 amendment, see 27 N.C.L. Rev. 495.

The first 1971 amendment rewrote subdivision (13).

The second 1971 amendment added subdivision (28).

Session Laws 1971, c. 547, s. 3, provides: "This act shall be in full force and effect from and after July 1, 1971, and shall apply only to cases originating on and after July 1, 1971."

Session Laws 1971, c. 1108, s. 3, provides: "This act shall be in full force and effect from and after October 1, 1971, and shall apply only to cases in which the last injurious exposure to harmful noise and employment was subsequent to October 1, 1971."

Only those occupational diseases specifically designated are compensable under the Workmen's Compensation Act. Henry v. A.C. Lawrence Leather Co., 231 N.C. 477, 57 S.E.2d 760 (1950), decided prior to the first 1971 amendment which rewrote subdivision (13).

"Occupational Disease" Defined. — The legislature, in listing those diseases which are to be deemed occupational in character, was fully aware of the meaning of the term "occupational disease." Indeed, it in effect defined the term in § 97-52 as a diseased condition caused by a series of events, of a similar or like nature, occurring regularly or at frequent intervals over an extended period of time, in employment. The term has likewise been defined as a diseased condition arising gradually from the character of the employee's work. These are the accepted definitions of the term. Henry v. A.C. Lawrence Leather Co., 234 N.C. 126, 66 S.E.2d 693 (1951).

Technical Words to Be Accorded Their Technical Connotation. — In designating those diseases and conditions which are to be deemed occupational in origin and compensable under the act, the legislature, for the most part, used technical terms. Anthrax, bursitis, asbestosis, silicosis, nystagmus, synovitis, tenosynovitis are technical words. In construing the act the court must accord them their technical connotation. Henry v. A.C. Lawrence Leather Co., 234 N.C. 126, 66 S.E.2d 693 (1951).

Heart Disease. — Heart disease is not an occupational disease. West v. North Carolina Dep't of Conservation & Dev., 229 N.C. 232, 49 S.E.2d 398 (1948); Duncan v. City of Charlotte, 234 N.C. 86, 66 S.E. 22 (1951).

Common-Law Actions Excluded as to Certain Occupational Diseases. — In dealing with certain unscheduled occupational diseases, the Supreme Court has held common-law actions to be excluded by the Workmen's Compensation Act; but in these cases the condition admittedly and allegedly arose out of the employment. Barber v. Minges, 223 N.C. 213, 25 S.E.2d 837 (1943).

But Employee May Bring Common-Law Action against Employer Who Has Rejected Act. — Where silicosis is contracted by an employee whose employer has rejected the act, the employee may recover in an action at common law upon a showing of negligence, but the doctrine of res ipsa loquitur is not applicable. Bame v. Palmer Stone Works, 232 N.C. 267, 59 S.E.2d 812 (1950).

Conflicting expert testimony on the question of whether the deceased employee died as a result of an occupational disease, caused by exposure to benzol poisoning, arising out of and in the course of his employment, was sufficient to sustain the Commission's award of compensation to the employee's dependent. Tindall v. American Furniture Co., 216 N.C. 306, 4 S.E.2d 894 (1939).

Dermatitis resulting from contact with gloves made of commercial rubber is not an occupational disease compensable under the Workmen's Compensation Act. Henry v. A.C. Lawrence Leather Co., 231 N.C. 477, 57 S.E.2d 760 (1950).

Tenosynovitis Caused by Trauma in Employment. — Synovitis is the inflammation of a synovial membrane and tenosynovitis or tendosynovitis is the inflammation of a synovial membrane which forms the protective sheath that encloses the tendon. It is sometimes used to denote the inflammation of both the sheath and the tendon. Henry v. A.C. Lawrence Leather Co., 234 N.C. 126, 66 S.E.2d 693 (1951).

The causative origin of tenosynovitis is either infection or trauma. The clause "caused by trauma in employment" was used by the legislature to modify the word "tenosynovitis" so as to include the occupational and exclude the infectious type — to include the traumatic and exclude the idiopathic. Henry v. A.C. Lawrence Leather Co., 234 N.C. 126, 66 S.E.2d 693 (1951).

In using the modifying phrase, "caused by trauma in employment" the legislature necessarily meant a series of events in employment occurring regularly, or at frequent intervals, over an extended period of time, and

culminating in the condition technically known as tenosynovitis. Henry v. A.C. Lawrence Leather Co., 234 N.C. 126, 66 S.E.2d 693 (1951).

A single blow on the arm might bruise the extensor tendons to such an extent as to cause temporary tenosynovitis. The resulting condition would be properly termed an injury by accident caused by trauma. But it would not constitute an occupational disease, for an occupational disease is a diseased or morbid condition which develops gradually, and is produced by a series of events in employment occurring over a period of time. Henry v. A.C. Lawrence Leather Co., 234 N.C. 126, 66 S.E.2d 693 (1951).

Tenosynovitis attributable to repeated strain or stress on the extensor tendons of claimant's arms incident to the performance of the duties of his employment is "caused by trauma in employment" and is an occupational disease compensable under the provisions of this section, since "trauma" in its technical sense is not limited to injuries resulting from external force or violence. Henry v. A.C. Lawrence Leather Co., 234 N.C. 126, 66 S.E.2d 693 (1951).

Silicosis is an inflammatory disease of the lungs due to the inhalation of particles of silicon dioxide. It is incurable and is one of the most disabling occupational diseases because it makes the lungs susceptible to other infection, particularly tuberculosis. According to the textbook writers, it has been definitely determined that the removal of a man, who has silicosis, from silica exposure, does not stop the progress of the disease at once, but that fibrotic changes continue to develop for another one or two years. Singleton v. D.T. Vance Mica Co., 235 N.C. 315, 69 S.E.2d 707 (1952).

1949 Amendment Unconstitutional. — Former subdivision (26), which was added to this section by Session Laws 1949, c. 1078, and which purported to make certain forms of heart disease compensable occupational diseases when suffered by firemen, was unconstitutional, since it sought to confer upon firemen a special privilege not accorded to other municipal employees, nor to employees in private industry, and created for firemen substantial financial benefits, to be paid from the public treasury under the guise of workmen's compensation benefits, without establishing an occupational disease as the usual incident or result of the particular employment. Duncan v. City of Charlotte, 234 N.C. 86, 66 S.E.2d 22 (1951), commented on in 30 N.C.L. Rev. 98 (1951). See Davis v. City of Winston-Salem, 234 N.C. 95, 66 S.E.2d 28 (1951).

Cited in Johnson v. Erwin Cotton Mills Co., 232 N.C. 321, 59 S.E.2d 828 (1950); Autrey v. Victor Mica Co., 234 N.C. 400, 67 S.E.2d 383 (1951).

§ 97-54. "Disablement" defined.—The term "disablement" as used in this Article as applied to cases of asbestosis and silicosis means the event of becoming actually incapacitated because of asbestosis or silicosis to earn, in the same or any other employment, the wages which the employee was receiving at the time of his last injurious exposure to asbestosis or silicosis; but in all other cases of occupational disease "disablement" shall be equivalent to "disability" as defined in G.S. 97-2(9). (1935, c. 123; 1955, c. 525, s. 1.)

Editor's Note. — The 1955 amendment rewrote this section. Prior to the amendment the section defined "disablement," in cases of asbestosis and silicosis, as incapacity, because of such occupational disease, to perform "normal labor in the last occupation in which remuneratively employed."

The cases in the following note, with one or two exceptions, were decided under this section as it stood before the amendment.

Criterion of Disability in Cases of Asbestosis and Silicosis Prior to 1955 Amendment. — See Young v. Whitehall Co., 229 N.C. 360, 49 S.E.2d 797 (1948); Singleton v. D.T. Vance Mica Co., 235 N.C. 315, 69 S.E.2d 707 (1952); Honeycutt v. Carolina Asbestos Co., 235 N.C. 471, 70 S.E.2d 426 (1952); Brinkley v. United Feldspar & Minerals Corp., 246 N.C. 17, 97 S.E.2d 419 (1957).

When Disablement Deemed to Have Occurred. — The time when disablement is deemed to have occurred depends upon the factual situation under consideration. Fetner v. Rocky Mount Marble & Granite Works, 251 N.C. 296, 111 S.E.2d 324 (1959).

An employee does not contract or develop asbestosis or silicosis in a few weeks or months. These diseases develop as the result of exposure for many years to asbestos dust or dust of silica. Both diseases, according to the textbook writers, are incurable and usually result in total permanent disability. Therefore, it would seem that the victims of these incurable occupational diseases constitute a legitimate burden on the industries in which they were exposed to the hazards that produced their disablement. Such was the intent of the legislature. Honeycutt v. Carolina Asbestos Co., 235 N.C. 471, 70 S.E.2d 426 (1952).

The fact that a worker performed his duties with regularity until the date he was dismissed because he was affected with silicosis does not require a finding that he was not disabled at that time as defined by this section. Young v. Whitehall Co., 229 N.C. 360, 49 S.E.2d 797 (1948).

Medical Testimony Necessary to Establish "Disablement". — Evidence tending to establish "disablement," as that term is used in the statute in reference to silicosis, must be supported by medical testimony, and the finding of the competent medical authority must be to the effect that disablement occurred within two years from the last exposure. Huskins v. United Feldspar Corp., 241 N.C. 128, 84 S.E.2d 645 (1954).

Evidence of Disability from Silicosis. — Due to the nature of silicosis, it is essential to establish the presence of the disease by competent medical authority. But, where it has been established that a person who has been exposed to free silica dust has developed silicosis to the extent that it may be disabling, testimony other than that of a medical expert may be admitted and considered in determining when such person actually became disabled to work or disabled "from performing normal labor in his last occupation in which remuneratively employed." Certainly, a victim of silicosis is competent to testify to his lessened capacity to work, his shortness of breath, the effect that physical exertion has upon him — all of which are normal symptoms of silicosis. Singleton v. D.T. Vance Mica Co., 235 N.C. 315, 69 S.E.2d 707 (1952).

Evidence that plaintiff could do "light work" if no silica dust were involved is insufficient to support a finding that he was not disabled from doing "ordinary work," since the two terms are not synonymous in the realm of manual labor. Young v. Whitehall Co., 229 N.C. 360, 49 S.E.2d 797 (1948).

Evidence Sufficient to Show Claimant Disabled. — See Autrey v. Victor Mica Co., 234 N.C. 400, 67 S.E.2d 383 (1951); Singleton v. D.T. Vance Mica Co., 235 N.C. 315, 69 S.E.2d 707 (1952).

Evidence Insufficient to Show Disablement Occurring within Two Years from Last Exposure. — See Huskins v. United Feldspar Corp., 241 N.C. 128, 84 S.E.2d 645 (1954).

Finding Entitling Employee to Compensation. — See Young v. Whitehall Co., 229 N.C. 360, 49 S.E.2d 797 (1948).

Applied in Willingham v. Bryan Rock & Sand Co., 240 N.C. 281, 82 S.E.2d 68 (1954).

Quoted in Duncan v. Carpenter, 233 N.C. 422, 64 S.E.2d 410 (1951).

Cited in Pitman v. Carpenter, 247 N.C. 63, 100 S.E.2d 231 (1957).

§ 97-55. "Disability" defined.—The term "disability" as used in this Article means the state of being incapacitated as the term is used in defining "disablement" in G.S. 97-54. (1935, c. 123.)

Quoted in Honeycutt v. Carolina Asbestos Co., 235 N.C. 471, 70 S.E.2d 426 (1952).

§ 97-56. Limitation on compensable diseases.—The provisions of this Article shall apply only to cases of occupational disease in which the last exposure in an occupation subject to the hazards of such diseases occurred on or after March 26, 1935. (1935, c. 123.)

§ 97-57. Employer liable.—In any case where compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of such disease, and the insurance carrier, if any, which was on the risk when the employee was so last exposed under such employer, shall be liable.

For the purpose of this section when an employee has been exposed to the hazards of asbestosis or silicosis for as much as 30 working days, or parts thereof, within seven consecutive calendar months, such exposure shall be deemed injurious but any less exposure shall not be deemed injurious; provided, however, that in the event an insurance carrier has been on the risk for a period of time during which an employee has been injuriously exposed to the hazards of asbestosis or silicosis, and if after insurance carrier goes off the risk said employee is further exposed to the hazards of asbestosis or silicosis, although not so exposed for a period of 30 days or parts thereof so as to constitute a further injurious exposure, such carrier shall, nevertheless, be liable. (1935, c. 123; 1945, c. 762; 1957, c. 1396, s.7.)

Findings Required to Support Award for Silicosis. — To support an award to one suffering from silicosis, the Industrial Commission must find, inter alia, that the employee had been exposed to the hazards of silicosis for the period provided by this section and that the employee's work in the State must have exposed him to the inhalation of silica dust for the further period prescribed by § 97-63. Pitman v. Carpenter, 247 N.C. 63, 100 S.E.2d 231 (1957).

Liability of Insurance Carrier. — The

carrier of the insurance during the employee's last 30-day period of exposure to the hazards of an occupational disease is solely liable for compensation allowed for total disability from the occupational disease. This result is not affected by the fact that prior to the time such insurance company became the carrier, medical examinations had disclosed that the employee was suffering with the disease, that the Industrial Commission had advised him as to the compensation and rehabilitation provisions of the act, but had, in the exercise of its discretion, failed to order him to quit the occupation pursuant to former § 97-61. Bye v. Interstate Granite Co., 230 N.C. 334, 53 S.E.2d 274 (1949).

Where compensation insurer carried risk for employer from 1947 through Jan. 31, 1953, and employer did not carry insurance from Feb. 1, 1953 through Feb. 19, 1953, insurer was liable for at least a pro rata part of award based on finding that employee became disabled by silicosis on Feb. 19, 1953, the last date the employee was remuneratively employed by employer. Mayberry v. Oakboro Granite & Marble Co., 243 N.C. 281, 90 S.E.2d 511 (1955), decided under this section as it stood before the 1957 amendment.

Before the 1957 amendment, which added the proviso to the second paragraph to this section, where an employee became disabled from asbestosis while working for a single employer, but different insurers were on the risk during the employee's last 30 days' exposure to the hazards of the disease, the carrier last on the risk, even though it was on the risk for only the last five days the employee worked, was solely liable for the award under a provision of the policy contracts that each policy should apply only to injury by disease of which the last day of the last exposure occurred during the policy period. Hartsell v. Thermoid Co., 249 N.C. 527, 107 S.E.2d 115 (1959).

This section creates an irrebuttable presumption, a presumption of law. The last day of work was the date of disablement and the last 30 days of work was the period of last injurious exposure. The Commission may not arbitrarily select any 30 days of employment, other than the last 30 days, within the seven months' period for convenience or protection of any of the parties, even if there is some evidence which may be construed to support such selection. Fetner v. Rocky Mount Marble & Granite Works, 251 N.C. 296, 111 S.E.2d 324 (1959).

This section does not provide for partnership in responsibility, and has nothing to say as to the length of the last employment or the degree of injury which the deleterious exposure must inflict to merit compensation. It takes the breakdown practically where it occurs — with the last injurious exposure. Haynes v. Feldspar Producing Co., 222 N.C. 163, 22 S.E.2d 275 (1942).

Section Negates Comparative Responsibility of Successive Employers and Insurance Carriers. — Any suggestion of comparative responsibility as between successive employers and their respective carriers, or as between successive carriers for the same employer, is dispelled by the plain language of this section. The liability is upon the employer and carrier on the risk when the employee was "last injuriously exposed" to the hazards of silicosis, as that expression is here defined. Stewart v. Duncan, 239 N.C. 640, 80 S.E.2d 764 (1954).

Where Employee Was Advised That He Had Silicosis before Expiration of 30-Day Period. — Where the evidence supports findings of the Industrial Commission that an employee suffering disability from silicosis was last injuriously exposed to the hazards of the disease for 30 working days within seven consecutive calendar months while in the employment of defendant, this section places liability therefor upon such employer and his insurance carrier during that period, and the mere fact that the employee was advised that he had silicosis prior to the expiration of this 30-day period but continued for a short time to perform his same work is insufficient alone to sustain the insurance carrier's contention that his employment after the discovery of the disease was in bad faith to make the loss fall upon it. Stewart v. Duncan, 239 N.C. 640, 80 S.E.2d 764 (1954).

Applied in Singleton v. D.T. Vance Mica Co., 235 N.C. 315, 69 S.E.2d 707 (1952); Willingham v. Bryan Rock & Sand Co., 240 N.C. 281, 82 S.E.2d 68 (1954).

Cited in Autrey v. Victor Mica Co., 234 N.C. 400, 67 S.E.2d 383 (1951).

§ 97-58. Claims for certain diseases restricted; time limit for filing claims.—(a) Except as otherwise provided in G.S. 97-61.6, an employer shall not be liable for any compensation for asbestosis or silicosis or lead poisoning unless disablement or death results within two years after the last exposure to such disease, or, in case of death, unless death follows continuous disablement from such disease, commencing within the period of two years limited herein, and for which compensation has been paid or awarded or timely claim made as hereinafter provided and results within seven years after such last exposure in the case of lead poisoning, or 350 weeks in the case of asbestosis or silicosis.

(b) The report and notice to the employer as required by G.S. 97-22 shall

apply in all cases of occupational disease except in case of asbestosis, silicosis, or lead poisoning. The time of notice of an occupational disease shall run from the date that the employee has been advised by competent medical authority that he has same.

(c) The right to compensation for occupational disease shall be barred unless a claim be filed with the Industrial Commission within one year after death, disability, or disablement as the case may be. Provided, however, that the right to compensation for radiation injury, disability or death shall be barred unless a claim is filed within one year after the date upon which the employee first suffered incapacity from the exposure to radiation and either knew or in the exercise of reasonable diligence should have known that the occupational disease was caused by his present or prior employment. (1935, c. 123; 1945, c. 762; 1955, c. 525, s. 6; 1963, c. 553, s. 2.)

Subsections (a), (b) and (c) are in pari materia and must be construed together to ascertain the true legislative intent. Duncan v. Carpenter, 233 N.C. 422, 64 S.E.2d 410 (1951).

In this section the legislature recognizes that silicosis is a progressive disease, and provides that an employer may be held liable for compensation for silicosis if disablement results at any time within two years after the last exposure to the disease. Young v. Whitehall Co., 229 N.C. 360, 49 S.E.2d 797 (1948).

Report and Notice to Employer under § 97-22. — The employee is not required to give any notice pursuant to the provisions of § 97-22 to the employer in case of asbestosis, silicosis and lead poisoning. In all other cases of occupational disease the time for giving the notice pursuant to § 97-22 is extended to 30 days after the employee has been advised by competent medical authority that he is suffering from an occupational disease, and the one-year period within which he may file his claim dates from receipt of such advice. Duncan v. Carpenter, 233 N.C. 422, 64 S.E.2d 410 (1951).

Employee Not Required to Diagnose His Own Condition. — It was not the legislative intent to require an employee, in many instances, suffering from any one of these occupational diseases to make a correct medical diagnosis of his own condition or to file his notice and claim for compensation before he knew he had such disease, or run the risk of having his claim barred by the one-year statute. Duncan v. Carpenter, 233 N.C. 422, 64 S.E.2d 410 (1951).

Disablement Dates from Time Claimant Was Advised He Had Disease. — By enacting this section, the legislature intended to authorize the filing of a claim for asbestosis, silicosis or lead poisoning where disablement occurs within two years after the last exposure to such disease; and, although disablement may have existed from the time the employee quit work, such disablement, for the purpose of notice and claim for compensation, should date from the time the employee was notified by competent medical authority that he had such disease. Autrey v. Victor Mica Co., 234 N.C. 400, 67 S.E.2d 383 (1951); Duncan v. Carpenter, 233 N.C. 422, 64 S.E.2d 410 (1951).

Due to the peculiar nature of the disease, the slow process of its development, the similarity of its symptoms to those of other diseases which affect the lungs and for other reasons, a workman, whatever his actual physical condition may be, is not charged with notice that he has silicosis until and unless he is so advised by competent medical authority, and the time within which he must file his claim for compensation begins to run from the date he is so advised. Huskins v. United Feldspar Corp., 241 N.C. 128, 84 S.E.2d 645 (1954).

Advising an employee, who has been exposed to free silica dust, that his examination reveals "evidence of dust disease," is not sufficient to put him on notice that he has silicosis. Singleton v. D.T. Vance Mica Co., 235 N.C. 315, 69 S.E.2d 707 (1952).

The finding of the competent medical authority must be that disablement occurred within two years from the last exposure in cases of asbestosis, silicosis and lead poisoning, and in claims involving other occupational diseases that disability occurred within one year thereof. Duncan v. Carpenter, 233 N.C. 422, 64 S.E.2d 410 (1951); Singleton v. D.T. Vance Mica Co., 235 N.C. 315, 69 S.E.2d 707 (1952).

But Finding Need Not Be Made within Two Years from Last Exposure. — Where disablement from silicosis occurs, as defined in § 97-54, and notice of claim is filed in accord with the provisions contained in this section, the claimant need not be advised by competent medical authority that he has silicosis within two years from the date of his last exposure. Singleton v. D.T. Vance Mica Co., 235 N.C. 315, 69 S.E.2d 707 (1952).

The reason for allowing two years from the date of the last exposure to silica dust in which to determine actual disability from silicosis is that silicosis is a progressive disease, the lung changes continuing to develop for one or two years after removal of the worker from the silica hazard. Brinkley v. United Feldspar & Minerals Corp., 246 N.C. 17, 97 S.E.2d 419 (1957).

Incapacity Not Resulting within Two Years of Last Exposure. — Claimant was removed from the hazard of silica dust before becoming incapacitated within the meaning of § 97-54. He was thereafter employed by the same employer for five years at the same wage at employment free from the hazard of silica dust. It was held that his retirement from such other occupation at the end of five years could not have been caused by incapacity from silicosis resulting within two years of the last exposure to silica dust, and compensation therefor could not be sustained. Brinkley v. United Feldspar & Minerals Corp., 246 N.C. 17, 97 S.E.2d 419 (1957).

Evidence Other than Expert Medical Testimony Is Competent. — While it is essential to establish the presence of silicosis or asbestosis by competent medical authority, evidence other than expert medical testimony is competent on the question of whether claimant is disabled and whether such disablement occurred within two years from date of last exposure. Singleton v. D.T. Vance Mica Co., 235 N.C. 315, 69 S.E.2d 707 (1952).

The employee is entitled to file his notice and claim for compensation at any time within one year from the time he was notified that he had silicosis. Duncan v. Carpenter, 233 N.C. 422, 64 S.E.2d 410 (1951). See Autrey v. Victor Mica Co., 234 N.C. 400, 67 S.E.2d 383 (1951).

For decision under former statute relating to notice of death from occupational disease, see Blassingame v. Southern Asbestos Co., 217 N.C. 223, 7 S.E.2d 478 (1940).

Applied, as to subsection (c), in Willingham v. Bryan Rock & Sand Co., 240 N.C. 281, 82 S.E.2d 68 (1954).

Cited in Whitted v. Palmer-Bee Co., 228 N.C. 447, 46 S.E.2d 109 (1948); Williams v. Ornamental Stone Co., 232 N.C. 88, 59 S.E.2d 193 (1950); Fetner v. Rocky Mount Marble & Granite Works, 251 N.C. 296, 111 S.E.2d 324 (1959).

§ 97-59. Employer to provide treatment.—In the event of disability from an occupational disease, the employer shall provide reasonable medical and/or other treatment for such time as in the judgment of the Industrial Commission will tend to lessen the period of disability or provide needed relief; provided, however, medical and/or other treatment for asbestosis and/or silicosis shall not exceed a period of three years nor cost in excess of one thousand dollars ($1,000) in any one year; and, provided further, all such treatment shall be first authorized by the Industrial Commission after consulting with the advisory medical committee. (1935, c. 123; 1945, c. 762.)

§ 97-60. Examination of employees by advisory medical committee; designation of industries with dust hazards.—The compulsory examination of employees and prospective employees as herein provided applies only to persons engaged or about to engage in an occupation which has been found by the Industrial Commission to expose them to the hazards of asbestosis and/or silicosis. The Industrial Commission shall designate by order each industry found subject to any such hazard and shall notify the employers therein before such examinations are required. On and after March 26, 1935, it shall be the duty of every employer, in the conduct of whose business his employees or any of them are subjected to the hazards of asbestosis and/or silicosis, to provide prior to employment necessary examinations of all new employees for the purpose of ascertaining if any of them are in any degree affected by asbestosis and/or silicosis or peculiarly susceptible thereto; and every such employer shall from time to time, as ordered by the Industrial Commission, provide similar examinations for all of his employees whose employment exposes them to the hazards of asbestosis and/or silicosis. At least one member of the advisory medical committee or other physician designated by the Industrial Commission shall make such examinations or be present when any such examination is made. The refusal of an employee to submit to any such examination shall bar such employee from compensation or other benefits provided by this Article in the event of disablement and/or death resulting from exposure to the hazards of asbestosis and/or silicosis subsequent to such refusal. It shall be the duty of the Industrial Commission to make and/or order inspections of employments and to keep a record of all employments subjecting employees to the hazards of asbestosis and/or silicosis, and to notify the employer in any case where such hazard shall have been found to exist. The unreasonable failure of an employer

to provide for any examination or his unreasonable refusal to permit any inspection herein authorized shall constitute a misdemeanor and shall be punishable as such. (1935, c. 123.)

The provision herein for preemployment examinations was cited by the court in Haynes v. Feldspar Producing Co., 222 N.C. 163, 22 S.E.2d 275 (1942), as a justification for the harsh rule of the statute in throwing full liability on the last employer regardless of how brief the employment and how slight the injury ascribable to it.

Applied in Young v. Whitehall Co., 229 N.C. 360, 49 S.E.2d 797 (1948).

Stated in Duncan v. Carpenter, 233 N.C. 422, 64 S.E.2d 410 (1951).

Cited in Willingham v. Bryan Rock & Sand Co., 240 N.C. 281, 82 S.E.2d 68 (1954); Fetner v. Rocky Mount Marble & Granite Works, 251 N.C. 296, 111 S.E.2d 324 (1959); Davis v. North Carolina Granite Corp., 259 N.C. 672, 131 S.E.2d 335 (1963).

§ 97-61: Rewritten as §§ 97-61.1 to 97-61.7.

Editor's Note. — Session Laws 1955, c. 525, s. 2, rewrote § 97-61 as §§ 97-61.1 through 97-61.7. The rewritten section had been derived from Public Laws 1935, c. 123, and was amended by Session Laws 1945, c. 762.

§ 97-61.1. First examination of and report on employee having asbestosis or silicosis.—When an employee and the Industrial Commission are advised by the State Board of Health that an employee has asbestosis or silicosis, the employer shall be notified by the Industrial Commission, and the employee, when ordered by the Industrial Commission, shall go to a place designated by the Industrial Commission and submit to X rays and a physical examination by the advisory medical committee, at least one of whom shall conduct the examination, and the member or members of the advisory medical committee conducting the examination shall forward the X rays and findings to the member or members of the committee not present for the physical examination. The employer shall pay the expenses connected with the examination in such amounts as shall be directed by the Industrial Commission. Within 30 days after the completion of the examination, the advisory medical committee shall make a written report signed by all of its members setting forth:

(1) The X rays and clinical procedures used by the committee in arriving at its findings.

(2) Whether or not the claimant has contracted asbestosis or silicosis.

(3) The committee's opinion expressed in percentages of the impairment of the employee's ability to perform normal labor in the same or any other employment.

(4) Any other matter deemed pertinent by the committee.

When a competent physician certifies to the Industrial Commission that the employee's physical condition is such that his movement to the place of examination ordered by the Industrial Commission as herein provided in G.S. 97-61.1, 97-61.3 and 97-61.4 would be harmful or injurious to the health of the employee, the Industrial Commission shall cause the examination of the employee to be made by the advisory medical committee as herein provided at some place in the vicinity of the residence of the employee suitable for the purposes of making such examination. (1935, c. 123; 1945, c. 762; 1955, c. 525, s. 2.)

Cross Reference. — See note to § 97-61.

Applied in Pitman v. Carpenter, 247 N.C. 63, 100 S.E.2d 231 (1957).

Cited in Davis v. North Carolina Granite Corp., 259 N.C. 672, 131 S.E.2d 335 (1963).

§ 97-61.2. Filing of first report; right of hearing; effect of report as testimony.—The advisory medical committee shall file its report in triplicate with the Industrial Commission, which shall send one copy thereof to the claimant and one copy thereof to the employer by registered mail or certified

mail. Unless within 30 days from receipt of the copy of said report the claimant and employer, or either of them, shall request the Industrial Commission in writing to set the case for hearing for the purpose of examining and cross-examining the members of the advisory medical committee respecting the report of said committee, and for the purpose of introducing additional testimony, said report shall become a part of the record of the case and shall be accepted by the Industrial Commission as expert medical testimony to be considered as such and in connection with all the evidence in the case in arriving at its decision. (1935, c. 123; 1945, c. 762; 1955, c. 525, s. 2; 1963, c. 450, s. 5.)

Cross Reference. — See note to § 97-61.

§ **97-61.3. Second examination and report.**—As soon as practicable after the expiration of one year following the initial examination by the advisory medical committee and when ordered by the Industrial Commission, the employee shall again appear before the advisory medical committee, at least one of whom shall conduct the examination, and the member or members of the advisory medical committee conducting the examination shall forward the X rays and findings to the member or members of the committee not present for the physical examination. Within 30 days after the completion of the examination, the advisory medical committee shall make a written report to the Industrial Commission signed by all of its members, setting forth any change since the first report in the employee's condition which is due to asbestosis or silicosis, said report to be filed in triplicate with the Industrial Commission, which shall send one copy thereof to the claimant, and one copy to the employer by registered mail or certified mail. The claimant and employer, or either of them, shall have the right only at the final hearing provided for in G.S. 97-61.4 to examine or cross-examine the members of the advisory medical committee respecting the second report of the committee. (1935, c. 123; 1945, c. 762; 1955, c. 525, s. 2; 1959, c. 863, s. 2.)

Cross Reference. — See note to § 97-61.

Applied in Pitman v. Carpenter, 247 N.C. 63, 100 S.E.2d 231 (1957).

Cited in Davis v. North Carolina Granite Corp., 259 N.C. 672, 131 S.E.2d 335 (1963).

§ **97-61.4. Third examination and report.**—As soon as practicable after the expiration of two years from the first examination and when ordered by the Industrial Commission, the employee shall appear before the advisory medical committee, or at least two of them, for final X rays and physical examination. Upon completion of this examination and within 30 days, the advisory medical committee shall make a written report setting forth:

(1) The X rays and clinical procedures used by the committee.

(2) To what extent, if any, has the damage to the employee's lungs due to asbestosis or silicosis changed since the first examination.

(3) The opinion of the committee, expressed in percentages, with respect to the extent of impairment of the employee's ability to earn in the same or any other employment the wages which the employee was receiving at the time of his last injurious exposure to asbestosis or silicosis.

(4) Any other matter deemed pertinent by the committee.

Said report shall be filed in triplicate with the Industrial Commission which shall send one copy thereof to the claimant and one copy to the employer by registered mail or certified mail. (1935, c. 123; 1945, c. 762; 1955, c. 525, s. 2; 1959, c. 863, s. 3.)

Cross Reference. — See note to § 97-61.

Applied in Pitman v. Carpenter, 247 N.C. 63, 100 S.E.2d 231 (1957).

Cited in Davis v. North Carolina Granite Corp., 259 N.C. 672, 131 S.E.2d 335 (1963).

§ 97-61.5. Hearing after first examination and report; removal of employee from hazardous occupation; compensation upon removal from hazardous occupation.—(a) After the employer and employee have received notice of the first committee report, the Industrial Commission, unless it has already approved an agreement between the employer and employee, shall set the matter for hearing at a time and place to be decided by it, to hear any controverted questions, determine if and to whom liability attaches, and where appropriate, file a written opinion with its findings of fact and conclusions of law and cause its award to be issued thereon, all of which shall be subject to modification as provided in G.S. 97-61.6.

(b) If the Industrial Commission finds at the first hearing that the employee has either asbestosis or silicosis or if the parties enter into an agreement to the effect that the employee has silicosis or asbestosis, it shall by order remove the employee from any occupation which exposes him to the hazards of asbestosis or silicosis, and if the employee thereafter engages in any occupation which exposes him to the hazards of asbestosis or silicosis without having obtained the written approval of the Industrial Commission as provided in G.S. 97-61.7, neither he, his dependents, personal representative nor any other person shall be entitled to any compensation for disablement or death resulting from asbestosis or silicosis; provided, that if the employee is removed from the industry the employer shall pay or cause to be paid as in this subsection provided to the employee affected by such asbestosis or silicosis a weekly compensation equal to sixty percent (60%) of his average weekly wages before removal from the industry, but not more than fifty-six dollars ($56.00) or less than twenty dollars ($20.00) a week, which compensation shall continue for a period of 104 weeks. Payments made under this subsection shall be credited on the amounts payable under any final award in the cause entered under G.S. 97-61.6. (1935, c. 123; 1945, c. 762; 1955, c. 525, s. 2; c. 1354; 1957, c. 1217; c. 1396, s. 8; 1963, c. 604, s. 6; 1967, c. 84, s. 7; 1969, c. 143, s. 6; 1971, c. 281, s. 5.)

Cross Reference. — See note to § 97-61.

Editor's Note. — The 1969 amendment increased the maximum weekly compensation in subsection (b) from forty-two dollars to fifty dollars. Section 9 of the amendatory act provides that it shall apply only to cases originating on and after July 1, 1969.

The 1971 amendment substituted "fifty-six dollars ($56.00)" for "fifty dollars ($50.00)" and "twenty dollars ($20.00)" for "ten dollars ($10.00)" in the first sentence of subsection (b).

Session Laws 1971, c. 281, s. 7, provides: "This act shall be in full force from and after July 1, 1971, and shall apply only to cases originating on and after July 1, 1971."

Act Contemplates That Employee Will Seek Other Remunerative Employment. — The Workmen's Compensation Act contemplates that an employee will not be allowed to remain exposed to silica dust or asbestos dust until he becomes actually incapacitated within the meaning of § 97-54, and that if removed from the hazard before such incapacity, he will seek and obtain other remunerative employment. Brinkley v. United Feldspar & Minerals Corp., 246 N.C. 17, 97 S.E.2d 419 (1957).

Compensation Where Employee's Condition Is Complicated by Tuberculosis. — Where an employee is ordered to abstain from employment in an industry having the hazards of silica dust and directed to report for second and third medical examinations under §§ 97-61.3 and 97-61.4, it is proper that he be awarded the compensation provided by subsection (b) of this section without consideration of the fact that his condition was complicated by pulmonary tuberculosis, since the total amount of compensation is to be determined on the hearing after the third medical report as provided in § 97-61.6, at which time consideration should be given to the tubercular condition in accordance with § 97-65. Pitman v. Carpenter, 247 N.C. 63, 100 S.E.2d 231 (1957).

Former Law. — As to removal from hazardous employment and rehabilitation under former § 97-61, now rewritten as §§ 97-61.1 to 97-61.7, see Young v. Whitehall Co., 229 N.C. 360, 49 S.E.2d 797 (1948); Bye v. Interstate Granite Co., 230 N.C. 334, 53 S.E.2d 274 (1949); Midkiff v. North Carolina Granite Corp., 235 N.C. 149, 69 S.E.2d 166 (1952); Honeycutt v. Carolina Asbestos Co., 235 N.C. 471, 70 S.E.2d 426 (1952).

Stated in Davis v. North Carolina Granite Corp., 259 N.C. 672, 131 S.E.2d 335 (1963).

§ 97-61.6. Hearing after third examination and report; compensation for disability and death from asbestosis or silicosis.—After receipt by the employer and employee of the advisory medical committee's third report, the Industrial Commission, unless it has approved an agreement between the employee and employer, shall set a final hearing in the cause, at which it shall receive all competent evidence bearing on the cause, and shall make a final disposition of the case, determining what compensation, if any, the employee is entitled to receive in addition to the 104 weeks already received.

Where the incapacity for work resulting from asbestosis or silicosis is found to be total, the employer shall pay, or cause to be paid, to the injured employee during such total disability a weekly compensation equal to sixty per centum (60%) of his average weekly wages, but not more than fifty-six dollars ($56.00), nor less than twenty dollars ($20.00), a week; and in no case shall the period covered by such compensation be greater than 400 weeks, nor shall the total amount of all compensation exceed twenty thousand dollars ($20,000).

When the incapacity for work resulting from asbestosis or silicosis is partial, the employer shall pay, or cause to be paid, to the affected employee, a weekly compensation equal to sixty per centum (60%) of the difference between his average weekly wages at the time of his last injurious exposure, and the average weekly wages which he is able to earn thereafter, but not more than fifty-six dollars ($56.00) a week, and provided that the total compensation so paid shall not exceed a period of 196 weeks, in addition to the 104 weeks for which the employee has already been compensated.

Provided, however, should death result from asbestosis or silicosis within two years from the date of last exposure, or should death result from asbestosis or silicosis, or from a secondary infection or diseases developing from asbestosis or silicosis within 350 weeks from the date of last exposure and while the employee is entitled to compensation for disablement due to asbestosis or silicosis, either partial or total, then in either of these events, the employer shall pay, or cause to be paid, by one of the methods set forth in G.S. 97-38 a total compensation which, when added to the payments already made for partial or total disability to time of death, shall not exceed twenty thousand dollars ($20,000) including burial expenses.

Provided further that if the employee has asbestosis or silicosis and dies from any other cause, the employer shall pay, or cause to be paid by one of the methods set forth in G.S. 97-38 compensation for any remaining portion of the 104 weeks specified in G.S. 97-61.5 for which the employee has not previously been paid compensation, and in addition shall pay compensation for such number of weeks as the percentage of disability of the employee bears to 196 weeks. (1935, c. 123; 1945, c. 762; 1955, c. 525, s. 2; c. 1354; 1957, c. 1217; 1963, c. 604, s. 7; 1965, c. 907; 1967, c. 84, s. 8; 1969, c. 143, s. 7; 1971, c. 281, s. 6; c. 631.)

Cross Reference. — See note to § 97-61.

Editor's Note. — The 1969 amendment increased the maximum weekly compensation in the second and third paragraphs from forty-two dollars to fifty dollars and the maximum total compensation in the second and fourth paragraphs from fifteen thousand dollars to eighteen thousand dollars. Section 9 of the amendatory act provides that it shall apply only to cases originating on and after July 1, 1969.

The first 1971 amendment substituted "fifty-six dollars ($56.00)" for "fifty dollars ($50.00)" in the second paragraph, substituted "twenty dollars ($20.00)" for "ten dollars ($10.00)" in that paragraph, substituted "twenty thousand dollars ($20,000)" for "eighteen thousand dollars ($18,000)" therein, substituted "fifty-six dollars ($56.00)" for "fifty dollars ($50.00)" in the third paragraph, and substituted "twenty thousand dollars ($20,000)" for "eighteen thousand dollars ($18,000)" near the end of the present fourth paragraph.

Session Laws 1971, c. 281, s. 7, provides: "This act shall be in full force from and after July 1, 1971, and shall apply only to cases originating on and after July 1, 1971."

The second 1971 amendment added the last paragraph.

Purpose of Section. — Because of the difficulty of effecting a cure and the length of time necessary to ascertain the extent of the disability, this section fixes a time in the future when the total amount of compensation will be determined. Pitman v. Carpenter, 247 N.C. 63, 100 S.E.2d 231 (1957).

The language of the fourth paragraph of this section is clear, positive and understandable. When the language of a statute is plain and free from ambiguity, expressing a single, definite and sensible meaning, that meaning is conclusively presumed to be the meaning which the legislature intended, and the statute must be interpreted accordingly. Davis v. North Carolina Granite Corp., 259 N.C. 672, 131 S.E.2d 335 (1963).

The fourth paragraph of this section provides two conditions under which dependents of a deceased employee, who had silicosis, are entitled to compensation on account of his death: (1) if death results from silicosis within two years from the date of last exposure, or (2) if death results within 350 weeks from the date of last exposure and while the employee is entitled to compensation for disablement due to silicosis, either partial or total. These conditions are stated in independent clauses of a compound sentence and neither clause is dependent upon the other. Davis v. North Carolina Granite Corp., 259 N.C. 672, 131 S.E.2d 335 (1963).

When Compensation Allowed Although Death Does Not Result from Silicosis. — Under this section the dependents of a deceased employee are entitled to compensation if the employee dies within 350 weeks from the date of last exposure to silicosis and while he is receiving or is entitled to receive compensation for disability due to silicosis, either partial or total, notwithstanding that the death does not result from silicosis. Davis v. North Carolina Granite Corp., 259 N.C. 672, 131 S.E.2d 335 (1963).

The clear intent of this section to provide compensation for death occurring within 350 weeks from the date of last exposure if the employee was at the time of death receiving compensation for disablement due to silicosis, even though the death does not result from silicosis, must be given effect notwithstanding § 97-2, subdivisions (6) and (10), and § 97-52, since the specific provisions relating to silicosis, which were enacted because of the peculiar course of the disease, must be construed as an exception to the general tenor of the Workmen's Compensation Act to provide compensation for death only if it results from an accident arising out of and in the course of the employment. Davis v. North Carolina Granite Corp., 259 N.C. 672, 131 S.E.2d 335 (1963).

Consideration of Fact That Employee Suffers from Tuberculosis. — See note to § 97-65.

§ 97-61.7. Waiver of right to compensation as alternative to forced change of occupation.—An employee who has been compensated under the terms of G.S. 97-61.5(b) as an alternative to forced change of occupation, may, subject to the approval of the Industrial Commission, waive in writing his right to further compensation for any aggravation of his condition that may result from his continuing in an occupation exposing him to the hazards of asbestosis or silicosis, in which case payment of all compensation awarded previous to the date of the waiver as approved by the Industrial Commission shall bar any further claims by the employee, or anyone claiming through him, provided, that in the event of total disablement or death as a result of asbestosis or silicosis with which the employee was so affected, compensation shall nevertheless be payable, but in no case, whether for disability or death or both, for a longer period than 100 weeks in addition to the 104 weeks already paid. Such written waiver must be filed with the Industrial Commission, and the Commission shall keep a record of each waiver, which record shall be open to the inspection of any interested person. (1935, c. 123; 1945, c. 762; 1955, c. 525, s. 2.)

Cross Reference. — See note to § 97-61.

Waiver Inapplicable as to Subsequent Employment. — A waiver of an employee's right to compensation for silicosis signed by the employee upon his employment by one employer does not apply to or waive the employee's right to compensation for silicosis upon his subsequent employment by an entirely separate employer. Fetner v. Rocky Mount Marble & Granite Works, 251 N.C. 296, 111 S.E.2d 324 (1959).

§ 97-62. "Silicosis" and "asbestosis" defined.—The word "silicosis" shall mean the characteristic fibrotic condition of the lungs caused by the inhalation of dust of silica or silicates. "Asbestosis" shall mean a characteristic fibrotic condition of the lungs caused by the inhalation of asbestos dust. (1935, c. 123.)

Asbestosis is a disease of the lungs occurring in persons working in air laden with asbestos dust. It is infrequent as compared to silicosis, but has somewhat similar symptoms and consequences. Young v. Whitehall Co., 229 N.C. 360, 49 S.E.2d 797 (1948).

Quoted in Midkiff v. North Carolina Granite Corp., 235 N.C. 149, 69 S.E.2d 166 (1952).

Stated in Pitman v. Carpenter, 247 N.C. 63, 100 S.E.2d 231 (1957); Davis v. North Carolina Granite Corp., 259 N.C. 672, 131 S.E.2d 335 (1963).

§ 97-63. Period necessary for employee to be exposed.—Compensa- shall not be payable for disability or death due to silicosis and/or asbestosis unless the employee shall have been exposed to the inhalation of dust of silica or silicates or asbestos dust in employment for a period of not less than two years in this State, provided no part of such period of two years shall have been more than 10 years prior to the last exposure. (1935, c. 123.)

Section Held Applicable to Rehabilitation Benefits under Former § 97-61. — Employee had worked in granite industry from time to time during 18 years. However, from 1940 to 1946 he worked in a nondusty trade outside North Carolina and from 1946 to March, 1949, in a nondusty trade inside this State. From March, 1949, until June, 1950, he worked in defendant's granite shed. He then left the dusty trade and filed claim for rehabilitation benefits, having developed silicosis. An award of rehabilitation benefits under former § 97-61 by the Commission was reversed by the Supreme Court, which held that no benefits can be obtained under the act until the employee has worked at least two years in a dusty trade in this State within the preceding 10 years. Midkiff v. North Carolina Granite Corp., 235 N.C. 149, 69 S.E.2d 166 (1952).

Requirements of This Section and § 97-57 Essential to Award for Silicosis. — See note to § 97-57.

Applied in Hicks v. North Carolina Granite Corp., 245 N.C. 233, 95 S.E.2d 506 (1956).

Cited in Autrey v. Victor Mica Co., 234 N.C. 400, 67 S.E.2d 383 (1951).

§ 97-64. General provisions of act to control as regards benefits.—Except as herein otherwise provided, in case of disablement or death from silicosis and/or asbestosis, compensation shall be payable in accordance with the provisions of the North Carolina Workmen's Compensation Act. (1935, c. 123.)

Purpose of Section. — With a view to averting the unjust and oppressive results of an indiscriminate transfer of workers affected by asbestosis or silicosis from their accustomed occupations to other employments under the economic threat of deprivation of compensation, the legislature established in this section the general rule that an employee becoming disabled by asbestosis or silicosis within the terms of the specific definition embodied in § 97-54 should be entitled to ordinary compensation measured by the general provisions of the Workmen's Compensation Act. Young v. Whitehall Co., 229 N.C. 360, 49 S.E.2d 797 (1948).

Cited in Brinkley v. United Feldspar & Minerals Corp., 246 N.C. 17, 97 S.E.2d 419 (1957).

§ 97-65. Reduction of rate where tuberculosis develops.—In case of disablement or death due primarily from silicosis and/or asbestosis and complicated with tuberculosis of the lungs compensation shall be payable as hereinbefore provided, except that the rate of payments may be reduced one sixth. (1935, c. 123.)

Time for Making Reduction in Award. — It is at the time of determining the total amount of compensation as provided in § 97-61.6 that the Commission should take into consideration the fact that the employee's condition is complicated by pulmonary tuberculosis and determine in its wisdom the extent to which the provisions of this section should affect the compensation payable to the employee. Pitman v. Carpenter, 247 N.C. 63, 100 S.E.2d 231 (1957).

Reduction of Award Rests in Discretion of Commission. — Where the Industrial Commission finds that a disabled employee was suffering from tuberculosis as well as from silicosis, whether the award for disability from silicosis should be reduced one sixth rests in the discretion of the Industrial Commission. Stewart v. Duncan, 239 N.C. 640, 80 S.E.2d 764 (1954); Fetner v. Rocky Mount Marble & Granite Works, 251 N.C. 296, 111 S.E.2d 324 (1959).

Cited in Duncan v. Carpenter, 233 N.C. 422, 64 S.E.2d 410 (1951).

§ 97-66. Claim where benefits are discontinued.—Where compensation payments have been made and discontinued, and further compensation is claimed, whether for disablement, disability or death from lead poisoning, the claim for further compensation shall be made within two years after the last payment, but in all other cases of occupational disease claims for further

compensation shall be made within one year after the last payment, provided, that claims for further compensation for asbestosis or silicosis shall be governed by the final award as set forth in G.S. 97-61.6. (1935, c. 123; 1945, c. 762; 1955, c. 525, s. 3.)

Editor's Note. — Prior to the 1945 amendment this section also related to requirements as to notice of occupational disease to employer or Industrial Commission, and to waiver of notice and claim where payments are made. For present provisions as to report and notice to employer and time for filing claim, see § 97-58.

For decision under former provisions of this section, see Blassingame v. Southern Asbestos Co., 217 N.C. 223, 7 S.E.2d 478 (1940).

Stated in Duncan v. Carpenter, 233 N.C. 422, 64 S.E.2d 410 (1951).

§ 97-67. Postmortem examinations; notice to next of kin and insurance carrier.—Upon the filing of a claim for death from an occupational disease where in the opinion of the Industrial Commission a postmortem examination is necessary to accurately ascertain the cause of death, such examination shall be ordered by the Industrial Commission. A full report of such examination shall be certified to the Industrial Commission. The surviving spouse or next kin and the employer or his insurance carrier, if their identity and whereabouts can be reasonably ascertained, shall be given reasonable notice of the time and place of such postmortem examination, and, if present at such examination, shall be given an opportunity to witness the same. Any such person may be present at and witness such examination either in person or through a duly authorized representative. If such examination is not consented to by the surviving husband or wife or next of kin, all right to compensation shall cease. (1935, c. 123.)

§ 97-68. Controverted medical questions.—The Industrial Commission may at its discretion refer to the advisory medical committee controverted medical questions arising out of occupational disease claims other than asbestosis or silicosis. (1935, c. 123; 1955, c. 525, s. 4.)

Cited in Autrey v. Victor Mica Co., 234 N.C. 400, 67 S.E.2d 383 (1951).

§ 97-69. Examination by advisory medical committee; inspection of medical reports.—The advisory medical committee, upon reference to it of a case of occupational disease shall notify the employee, or, in case he is dead, his dependents or personal representative, and his employer to appear before the advisory medical committee at a time and place stated in the notice. If the employee be living, he shall appear before the advisory medical committee at the time and place specified then or thereafter and he shall submit to such examinations including clinical and X-ray examinations as the advisory medical committee may require. The employee, or, if he be dead, the claimant and the employer shall be entitled to have present at all such examinations, a physician admitted to practice medicine in the State who shall be given every reasonable facility for observing every such examination whose services shall be paid for by the claimant or by the employer who engaged his services. If a physician admitted to practice medicine in the State shall certify that the employee is physically unable to appear at the time and place designated by the advisory medical committee, such committee may, upon the advice of the Industrial Commission, and on notice to the employer, change the place and/or time of the examination so as to reasonably facilitate the examination of the employee, and in any such case the employer shall furnish transportation and provide for other reasonably necessary expenses incidental to necessary travel. The claimant and the employer shall produce to the advisory medical committee all reports of medical and X-ray examinations which may be in their respective possession or control showing the past or present condition of the employee to assist the advisory medical committee in reaching its conclusions. Provided

that this section shall not apply to a living employee who has contracted asbestosis or silicosis. (1935, c. 123; 1955, c. 525, s. 5.)

Cited in Autrey v. Victor Mica Co., 234 N.C. 400, 67 S.E.2d 383 (1951).

§ 97-70. Report of committee to Industrial Commission.—The advisory medical committee, shall, as soon as practicable after it has completed its consideration of a case, report to the Industrial Commission its opinion regarding all medical questions involved in the case. The advisory medical committee shall include in its report a statement of what, if any, physician or physicians were present at the examination on behalf of the claimant or employer and what, if any, medical reports and X rays were produced by or on behalf of the claimant or employer. (1935, c. 123.)

Cited in Autrey v. Victor Mica Co., 234 N.C. 400, 67 S.E.2d 383 (1951).

§ 97-71. Filing report; right of hearing on report.—The advisory medical committee shall file its report in triplicate with the Industrial Commission, which shall send one copy thereof to the claimant and one copy to the employer by registered mail. Unless within 30 days from receipt of the copy of said report the claimant and/or employer shall request the Industrial Commission in writing to set the case for further hearing for the purpose of examining and/or cross-examining the members of the advisory medical committee respecting the report of said committee, said report shall become a part of the record of the case and shall be accepted by the Industrial Commission as expert medical testimony to be considered as such in connection with all the evidence in the case in arriving at its decision. (1935, c. 123.)

Cited in Autrey v. Victor Mica Co., 234 N.C. 400, 67 S.E.2d 383 (1951).

§ 97-72. Appointment of advisory medical committee; terms of office; duties and functions; salaries and expenses.—There shall be an advisory medical committee consisting of three members, who shall be licensed physicians in good professional standing and peculiarly qualified in the diagnosis and/or treatment of occupational diseases. They shall be appointed by the Industrial Commission with the approval of the Governor, and one of them shall be designated as chairman of the committee by the Industrial Commission. The members of committee shall be appointed to serve terms as follows: one for a term of two years, one for a term of four years, and one for a term of six years. Upon the expiration of each term as above mentioned the Industrial Commission shall appoint a successor for a term of six years; except that the terms of the members first appointed shall expire June 30, 1936. The function of the committee shall be to conduct examinations and make reports as required by G.S. 97-61 and 97-68 to 97-71, and to assist in any postmortem examinations provided for in G.S. 97-67 when so directed by the Industrial Commission. Members of the committee shall devote to the duties of the office so much of their time as may be required in the conducting of examinations with reasonable promptness, and they shall attend hearings as scheduled by the Industrial Commission when their attendance is desired for the purpose of examining and cross-examining them respecting any report or reports made by them.

The members of the advisory medical committee shall be paid such salaries and/or fees and expenses, and in monthly installments or in such other manner as may be determined by the Governor and approved by the Advisory Budget Commission. (1935, c. 123; 1955, c. 525, s. 7.)

Editor's Note. — Section 97-61, referred to in the fifth sentence, was rewritten as §§ 97-61.1 through 97-61.7.

§ 97-73. Expenses of making examinations.—The Industrial Commission shall establish a schedule of reasonable charges to defray expenses incurred in making examinations pursuant to G.S. 97-60, 97-61 and 97-67, such charges to be collected in accordance with rules and regulations which shall be adopted by the Industrial Commission. Said charges shall be collected from employers who by order of the Industrial Commission are determined to be subject to the hazards of asbestosis and/or silicosis. (1935, c. 123; 1955, c. 525, s. 8.)

Editor's Note. — Section 97-61, referred to in the first sentence, was rewritten as §§ 97-61.1 through 97-61.7.

§ 97-74. Expense of hearings taxed as costs in compensation cases; fees collected directed to general fund.—In hearings arising out of claims for disability and/or death resulting from occupational diseases the Industrial Commission shall tax as a part of the costs in cases in which compensation is awarded a reasonable allowance for the services of members of the advisory medical committee attending such hearings and reasonable allowances for the services of members of the advisory medical committee for making investigations in connection with all claims for compensation on account of occupational diseases, including uncontested cases, as well as contested cases, and whether or not hearings shall have been conducted in connection therewith. All such charges, fees and allowances to be collected by the Industrial Commission shall be paid into the general fund of the State treasury to constitute a fund out of which to pay the expenses of the advisory medical committee. (1935, c. 123.)

§ 97-75. Making up deficiency by assessment upon employers in hazardous industries; provision for annual fund.—In the event the amount appropriated by the General Assembly and the charges, fees and allowances so assessed and collected and paid into the State treasury shall not be sufficient to pay the full cost incurred by the advisory medical committee in making examinations of employees, and conducting postmortem examinations, and in making investigations of claims arising under this Article, and in testifying before the Industrial Commission, the Industrial Commission shall assess against the employers found by the Industrial Commission to be subject to the hazards of asbestosis and/or silicosis an amount sufficient to pay such cost, said amount to be assessed against such employers pro rata on the basis of annual payroll. The Industrial Commission is authorized to assess and collect in advance in the beginning of any year from the employers subject to such hazard an amount estimated as necessary to pay such cost. Said amount when so assessed shall be paid by such employers within 10 days after the notice of assessment, and when collected by the Industrial Commission shall be paid into the State treasury as a part of the fund out of which to pay the expenses of the advisory medical committee. In the event such amount so assessed shall be found to be in excess of the cost incurred by such advisory medical committee in the performance of its duties under this Article, such excess shall be credited against the estimate of the cost to be incurred by said committee for the succeeding year. In case the amount so assessed shall be insufficient to pay such cost the Industrial Commission is authorized to make an additional assessment to be made at the end of the regular assessment period and to be collected from the employers subject to the hazards of asbestosis and/or silicosis. (1935, c. 123.)

§ 97-76. Inspection of hazardous employments; refusal to allow inspection made misdemeanor.—The Industrial Commission shall make inspections of employments for the purpose of ascertaining whether such employments, or any of them, are subject to the hazards of asbestosis and/or silicosis, and for the purpose of making studies and recommendations with a

view to reducing and/or eliminating such hazards. The Industrial Commission, and/or any person selected by it, is authorized to enter upon the premises of employers where employments covered by this Article are being carried on to make examinations and studies as aforesaid. Any employer, or any officer or agent of an employer, who unreasonably prevents or obstructs any such examinations or study shall be guilty of a misdemeanor. (1935, c. 123.)

Cited in Young v. Whitehall Co., 229 N.C. 360, 49 S.E.2d 797 (1948); Midkiff v. North Carolina Granite Corp., 235 N.C. 149, 69 S.E.2d 166 (1952).

§ 97-77. North Carolina Industrial Commission created; members appointed by Governor; terms of office; chairman.—There is hereby created a commission to be known as the North Carolina Industrial Commission, consisting of three commissioners who shall devote their entire time to the duties of the Commission. The Governor shall appoint the members of the Commission, one for a term of two years, one for a term of four years, and one for a term of six years. Upon the expiration of each term as above mentioned, the Governor shall appoint a successor for a term of six years, and thereafter the term of office of each commissioner shall be six years. Not more than one appointee shall be a person who, on account of his previous vocation, employment or affiliations, can be classed as a representative of employers, and not more than one appointee shall be a person who, on account of his previous vocation, employment or affiliations, can be classed as a representative of employees. One member, to be designated by the Governor, shall act as chairman. (1929, c. 120, s. 51; 1931, c. 274, s. 8.)

Editor's Note. — For act authorizing the Industrial Commission to hear and determine certain listed tort claims against certain State departments and agencies, see Session Laws 1949, c. 1138.

State Government Reorganization. — The Industrial Commission was transferred to the Department of Commerce by § 143A-176, enacted by Session Laws 1971, c. 864.

Governor Not Required to Appoint a Representative of Employers and a Representative of Employees. — See opinion of Attorney General to the Honorable Robert W. Scott, Governor of North Carolina, 40 N.C.A.G. 311 (1970).

The Industrial Commission is a creature of the General Assembly and was created by statute. Bowman v. Comfort Chair Co., 271 N.C. 702, 157 S.E.2d 378 (1967).

The Industrial Commission is primarily an administrative agency of the State, charged with the duty of administering the provisions of the Workmen's Compensation Act. Hanks v. Southern Pub. Util. Co., 210 N.C. 312, 186 S.E. 252 (1936), citing In re Hayes, 200 N.C. 133, 156 S.E. 791 (1931). See Brice v. Robertson House Moving, Wrecking & Salvage Co., 249 N.C. 74, 105 S.E.2d 439 (1958).

The Commission is not a court of general jurisdiction. It can have no implied jurisdiction beyond the presumption that it is clothed with power to perform the duties required of it by the law entrusted to it for administration. Barber v. Minges, 223 N.C. 213, 25 S.E.2d 837 (1943).

The Industrial Commission is not a court of general jurisdiction. It is an administrative board with quasi-judicial functions and has a special or limited jurisdiction created by statute and confined to its terms. Letterlough v. Atkins, 258 N.C. 166, 128 S.E.2d 215 (1962); Bowman v. Comfort Chair Co., 271 N.C. 702, 157 S.E.2d 378 (1967); Morse v. Curtis, 276 N.C. 371, 172 S.E.2d 495 (1970).

The Industrial Commission is not a court of general jurisdiction. It has no jurisdiction except that conferred upon it by statute. Bryant v. Dougherty, 267 N.C. 545, 148 S.E.2d 548 (1966).

Jurisdiction Limited. — In its functions as a court, the jurisdiction of the Industrial Commission is limited, and jurisdiction cannot be conferred on it by agreement or waiver. Chadwick v. North Carolina Dep't of Conservation & Dev., 219 N.C. 766, 14 S.E.2d 842 (1941).

The jurisdiction of the Industrial Commission may not be enlarged or extended by act or consent of parties, nor may jurisdiction be conferred by agreement or waiver. Letterlough v. Atkins, 258 N.C. 166, 128 S.E.2d 215 (1962); Morse v. Curtis, 276 N.C. 371, 172 S.E.2d 495 (1970).

Commission Is Special Tribunal When Considering Claims. — When a claim for compensation has been filed and the employer and employee have failed to reach an agreement, the statute authorizes the Commission to hear and determine all matters in dispute. Thereupon, the Commission is constituted a special or limited tribunal, and is invested with certain judicial functions, and

possesses the powers and incidents of a court, within the provisions of the act, and necessary to determine the rights and liabilities of employees and employers. Hanks v. Southern Pub. Util. Co., 210 N.C. 312, 186 S.E. 252 (1936).

The Industrial Commission, while primarily an administrative agency of the State, is constituted a special or limited tribunal to hear and determine matters in dispute between employer and employee in a claim for compensation under the Workmen's Compensation Act. Hodge v. Robertson, 2 N.C. App. 216, 162 S.E.2d 594 (1968).

In approving settlements the Commission acts in its judicial capacity. Letterlough v. Atkins, 258 N.C. 166, 128 S.E.2d 215 (1962).

The legislature intended that the Industrial Commission should administer the Workmen's Compensation Act under summary and simple procedure, distinctly its own, so as to furnish speedy, substantial, and complete relief to parties bound by the act. Greene v. Spivey, 236 N.C. 435, 73 S.E.2d 488 (1952).

The Commission may not ex mero motu institute a proceeding. Letterlough v. Atkins, 258 N.C. 166, 128 S.E.2d 215 (1962).

Majority of Commission. — The Commission is a continuing body. As a commission it acts by a majority of its qualified members at the time decision is made. A vote of two of the then members, therefore, constituted a majority of the Commission empowered to act for the Commission. Gant v. Crouch, 243 N.C. 604, 91 S.E.2d 705 (1956).

A hearing commissioner has no authority to award plaintiff an attorney's fee as part of the costs upon an initial hearing in a workmen's compensation matter. Bowman v. Comfort Chair Co., 271 N.C. 702, 157 S.E.2d 378 (1967).

Cited in Worley v. Pipes, 229 N.C. 465, 50 S.E.2d 504 (1948).

§ 97-78. Salaries and expenses; secretary and other clerical assistance; annual report.—(a) The salaries of the chairman and each of the other commissioners shall be fixed by the Governor, subject to the approval of the Advisory Budget Commission, such salaries to be payable in monthly installments.

(b) The Commission may appoint a secretary whose duties shall be prescribed by the Commission, and who shall be subject to the State Personnel System and who, upon entering upon his duties, shall give bond in such sum as may be fixed by the Commission, and who may be removed at the will of the Commission. The Commission may also employ such clerical or other assistance as it may deem necessary, and fix the compensation of all persons so employed, such compensation to be in keeping with the compensation paid to the persons employed to do similar work in other State departments.

(c) The members of the Commission and its assistants shall be entitled to receive from the State their actual and necessary expenses while traveling on the business of the Commission, but such expenses shall be certified by the person who incurred the same, and shall be approved by the chairman of the Commission before payment is made.

(d) All salaries and expenses of the Commission shall be audited and paid out of the State treasury, in the manner prescribed for similar expenses in other departments or branches of the State service, and to defray such salaries and expenses a sufficient appropriation shall be made under the General Appropriation Act as made to other departments, commissions and agencies of the State government.

(e) The Commission shall publish annually for free distribution a report of the administration of this Article, together with such recommendations as the Commission deems advisable. (1929, c. 120, s. 52; 1931, c. 274, s. 9; 1941, c. 358, s. 2; 1947, c. 823; 1957, c. 541, s. 6; 1971, c. 527, s. 1; c. 1147, s. 1.)

Editor's Note. — Both 1971 amendments substituted "who shall be subject to the State Personnel System" for "whose salary shall be fixed by the Governor subject to the approval of the Advisory Budget Commission" in the first sentence of subsection (b).

§ 97-79. Offices and supplies; deputies with power to subpoena witnesses and to take testimony; meetings; hearings.—(a) The Commission shall be provided with adequate offices in which the records shall be kept and its official business transacted during regular business hours; it shall also be provided with necessary office furniture, stationery, and other supplies.

(b) The Commission may appoint deputies who shall have the same power to issue subpoenas, administer oaths, conduct hearings, take evidence, and enter orders, opinions, and awards based thereon as is possessed by the members of the Commission, and such deputy or deputies shall be subject to the State Personnel System.

(c) The Commission or any member thereof may hold sessions at any place within the State as may be deemed necessary by the Commission.

(d) Hearings before the Commission shall be open to the public and shall be stenographically reported, and the Commission is authorized to contract for the reporting of such hearings. The Commission shall by regulation provide for the preparation of a record of the hearings and other proceedings.

(e) The North Carolina Industrial Commission, or any member thereof, or any deputy is authorized by appropriate order, to make additional parties plaintiff or defendant in any proceeding pending before the North Carolina Industrial Commission when it is made to appear that such new party is either a necessary party or a proper party to a final determination of the proceeding. (1929, c. 120, s. 53; 1931, c. 274, s. 10; 1951, c. 1059, s. 7; 1955, c. 1026, s. 11; 1971, c. 527, s. 2; c. 1147, s. 2.)

Editor's Note. — Both 1971 amendments substituted "such deputy or deputies shall be subject to the State Personnel System" for "the compensation of such deputy or deputies shall be fixed by the Commission" at the end of subsection (b).

For comment on the 1951 amendment, which rewrote subsection (b), see 29 N.C.L. Rev. 416.

Appointment of Deputies Discretionary. — It is inherent in this section that the Commission has the discretion to appoint deputies for such purposes as are appropriate for the conduct of its business. Hedgecock v. Frye, 1 N.C. App. 369, 161 S.E.2d 647 (1968).

No Particular Title Need Be Conferred on Deputy. — The authority to appoint a deputy does not require that any particular title be conferred upon the deputy, nor does it require that his title must include the word "deputy." Hedgecock v. Frye, 1 N.C. App. 369, 161 S.E.2d 647 (1968).

The Commission has the authority to appoint a chief claims examiner as its deputy to act for it in approval or disapproval of agreements for compensation. Hedgecock v. Frye, 1 N.C. App. 369, 161 S.E.2d 647 (1968).

View of Premises and Method of Doing Work. — In Johnson v. Erwin Cotton Mills Co., 232 N.C. 321, 59 S.E.2d 828 (1950), the hearing commissioner, claimant and defendant viewed the premises and the method of doing the work in which plaintiff had been employed. Although apparently approved by the court, the point was not discussed. See also Rewis v. New York Life Ins. Co., 226 N.C. 325, 38 S.E.2d 97 (1946).

§ 97-80. Rules and regulations; subpoena of witnesses; examination of books and records; depositions; costs.—(a) The Commission may make rules, not inconsistent with this Article, for carrying out the provisions of this Article. Processes and procedure under this Article shall be as summary and simple as reasonably may be. The Commission or any member thereof, or any person deputized by it, shall have the power, for the purpose of this Article, to subpoena witnesses, administer or cause to have administered oaths, and to examine or cause to be examined such parts of the books and records of the parties to a proceeding as relate to questions in dispute. Any party to a proceeding under this Article may, upon application to the Commission, which application shall set forth the materiality of the evidence to be given, cause the depositions of witnesses residing within or without the State to be taken, the costs to be taxed as other costs by Commission. Such depositions shall be taken after giving the notice and in the manner prescribed by law for depositions in action at law, except that they shall be directed to the Commission, the commissioner, or the deputy commissioner before whom the proceedings may be pending.

(b) The county sheriffs and their respective deputies shall serve all subpoenas of the Commission or its deputies, and shall receive the same fees as are now provided by law for like services; each witness who appears in obedience to such subpoena of the Commission shall receive for attendance the fees and mileage for witnesses in civil cases in courts of the county where the hearing is held.

(c) The superior court shall, on application of the Commission or any member or deputy thereof, enforce by proper proceedings the attendance and testimony of witnesses and the production and examination of books, papers and records. (1929, c. 120, s. 54.)

Cross Reference. — For decisions relative to jurisdiction, see note to § 97-77.

Editor's Note. — For discussion of section, see 8 N.C.L. Rev. 427.

Rule-Making Power Relates Only to Administrative Matters. — The rule-making power here granted relates only to administrative matters. There can be no delegation of the power to make law. Motsinger v. Perryman, 218 N.C. 15, 9 S.E.2d 511 (1940).

Construction and Application of Rules. — Under this section the North Carolina Industrial Commission has the power not only to make rules governing its administration of the act, but also to construe and apply such rules. Its construction and application of its rules, duly made and promulgated, in proceedings pending before the Commission, ordinarily are final and conclusive and not subject to review by the courts of this State, on an appeal from an award made by said Industrial Commission. Winslow v. Carolina Conference Ass'n, 211 N.C. 571, 191 S.E. 403 (1937).

Rules promulgated by the Commission are for the benefit of the Commission and must be complied with by the parties to a proceeding brought pursuant to the provisions of the Workmen's Compensation Act. Brewer v. Powers Trucking Co., 256 N.C. 175, 123 S.E.2d 608 (1962); Petty v. Associated Transp., 4 N.C. App. 361, 167 S.E.2d 38 (1969).

And Do Not Limit Its Power to Review Findings of Fact. — Rules promulgated by the Commission do not limit the power of the Commission to review, modify, adopt, or reject the findings of fact found by a deputy commissioner or by an individual member of the Commission when acting as a hearing commissioner. Petty v. Associated Transp., 4 N.C. App. 361, 167 S.E.2d 38 (1969).

Rules Inconsistent with Article. — The power to make rules may not be exercised when the rule is inconsistent with this Article. Evans v. Asheville Citizens Times Co., 246 N.C. 669, 100 S.E.2d 75 (1957), holding that Rule XVI of the Commission was inconsistent with § 97-30.

The Industrial Commission was not entitled to relax its rule that fees for practical nursing would not be allowed unless written authority was obtained from the Commission in advance, so as to award mother of injured employee an amount for practical nursing services rendered to injured employee where the record showed Commission never gave its written or oral permission for rendition of services. Hatchett v. Hitchcock Corp., 240 N.C. 591, 83 S.E.2d 539 (1954).

Rule requiring notice of cancellation of policy to be given to Commission does not become a part of the policy contract. Motsinger v. Perryman, 218 N.C. 15, 9 S.E.2d 511 (1940).

Rule Relative to New Evidence on Review. — The rules of the Industrial Commission, adopted pursuant to this section, relative to the introduction of new evidence on a review by the full Commission, are in accord with the decisions of the Supreme Court as to granting new trials for newly discovered evidence. Tindall v. American Furniture Co., 216 N.C. 306, 4 S.E.2d 894 (1939); Hall v. Thomason Chevrolet, Inc., 263 N.C. 569, 139 S.E.2d 857 (1965); McCulloh v. Catawba College, 266 N.C. 513, 146 S.E.2d 467 (1966).

Procedure before the Industrial Commission need not necessarily conform strictly to judicial procedure in courts of law unless the statute so requires or the court of last resort shall consider such procedure indispensable to the preservation of the essentials of justice and the principles of due process of law, and procedure adopted by the Commission with respect to the reception and consideration of evidence will be given liberal treatment by the courts, since this section empowers the Commission to make rules for carrying out the provisions of the act, and requires processes and procedure to be summary and simple. Maley v. Thomasville Furniture Co., 214 N.C. 589, 200 S.E. 438 (1939).

Determination of Jurisdiction Is First Order of Business. — In every proceeding before the Commission determination of jurisdiction is the first order of business. Letterlough v. Atkins, 258 N.C. 166, 128 S.E.2d 215 (1962).

Basis of Facts Found. — Determinative facts upon which rights of parties are made to rest must be found from judicial admissions made by the parties, facts agreed, stipulations entered into and noted at the hearing, and evidence offered in open court, after all parties have been given full opportunity to be heard. Recourse may not be had to records, files, evidence, or data not thus presented to the court. Letterlough v. Atkins, 258 N.C. 166, 128 S.E.2d 215 (1962).

Hearsay evidence is not competent to establish either that the accident arose out of or in the course of the employment. Plyler v. Charlotte Country Club, 214 N.C. 453, 199 S.E. 622 (1938).

It is clear, however, that the award of the Commission will not be disturbed because of the presence of hearsay testimony when there is other competent evidence upon which to base the findings. Hearsay evidence offered without objection may serve to corroborate and explain

the other evidence in the case. Maley v. Thomasville Furniture Co., 214 N.C. 589, 200 S.E. 438 (1939). For other cases involving hearsay, see note to § 97-2.

The report of an accident filed by the employer with the Commission, being in the nature of an admission, is competent evidence in a hearing involving the accident. Russell v. Western Oil Co., 206 N.C. 341, 174 S.E. 101 (1934).

Even if a report filed by defendant's manager contained some statement of fact not of his personal knowledge, it was competent as a declaration against interest. Carlton v. Bernhardt-Seagle Co., 210 N.C. 655, 188 S.E. 77 (1936) (where the only evidence to show the cause of injury was that contained in the employer's report).

Unsigned Letter from Doctor Reporting on Employee's Condition. — Pending hearing in the superior court, a copy of an unsigned letter from a doctor reporting the condition of employee's eye was added to the record by the Commission's supplemental certificate. On later appeal and reversal for other reasons, the Supreme Court declared that this letter was "incompetent" and "has no place in the record and evidence." Logan v. Johnson, 218 N.C. 200, 10 S.E.2d 653 (1940). See note, "Evidence before North Carolina Tribunals," 19 N.C.L. Rev. 568.

Evidence as to the course of dealing between employer and employee is of value to show the interpretation which they put upon the character of the employment and their intention regarding it. Smith v. City of Gastonia, 216 N.C. 517, 5 S.E.2d 540 (1939).

The Commission is the sole judge of the credibility of witnesses, and there is no obligation to accord unquestioned credence to any testimony, even if uncontradicted. Anderson v. Northwestern Motor Co., 233 N.C. 372, 64 S.E.2d 265 (1951).

The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony. West v. Stevens, 6 N.C. App. 152, 169 S.E.2d 517 (1969).

The function of the Industrial Commission is to weigh and evaluate the entire evidence and determine as best it can where the truth lies. West v. Stevens, 6 N.C. App. 152, 169 S.E.2d 517 (1969).

And It Is Not Compelled to Find According to Testimony of Particular Witness. — In its consideration of claims the Industrial Commission is not compelled to find in accordance with testimony of any particular witness. West v. Stevens, 6 N.C. App. 152, 169 S.E.2d 517 (1969).

The Commission is the fact-finding body under the Workmen's Compensation Act. Petty v. Associated Transp., 4 N.C. App. 361, 167 S.E.2d 38 (1969).

The finding of facts is one of the primary duties of the Commission. Petty v. Associated Transp., 4 N.C. App. 361, 167 S.E.2d 38 (1969).

Findings of Fact Are Conclusive upon Courts. — The findings of fact by the Industrial Commission are conclusive and binding upon the courts when supported by competent evidence. West v. Stevens, 6 N.C. App. 152, 169 S.E.2d 517 (1969).

Judicial Review of Findings of Fact of Hearing Commissioner. — A finding of fact by a hearing commissioner or by a deputy commissioner never reaches the superior court or the Court of Appeals unless it has been affirmed by the Commission. Petty v. Associated Transp., 4 N.C. App. 361, 167 S.E.2d 38 (1969).

Power to Force Witness to Testify. — This section does not deprive the Commission of the power to force a witness who is before it to testify and to punish for contempt a witness who refuses to testify. In re Hayes, 200 N.C. 133, 156 S.E. 791, 73 A.L.R. 1179 (1931).

Rehearing. — While there is no direct statutory provision giving the Industrial Commission power to order a rehearing of an award made by it for newly discovered evidence, the Commission has such power in proper instances in accordance with its rules and regulations, as provided by this section, it being the intent of the legislature, as gathered from the whole act, to give the Industrial Commission continuing jurisdiction of all proceedings begun before it with appellate jurisdiction in the superior court on matters of law only. Butts v. Montague Bros., 208 N.C. 186, 179 S.E. 799 (1935).

Costs. — For other provisions as to costs, see § 97-89 (medical fees); § 97-74 (medical committee fees); § 97-88 (costs on review); § 97-100(f) (attorney's fees in tax collection proceedings).

Quoted in Pratt v. Central Upholstery Co., 252 N.C. 716, 115 S.E.2d 27 (1960); Hodge v. Robertson, 2 N.C. App. 216, 162 S.E.2d 594 (1968).

Stated in Worley v. Pipes, 229 N.C. 465, 50 S.E.2d 504 (1948); White v. Shoup Boat Corp., 261 N.C. 495, 135 S.E.2d 216 (1964).

Cited in Tucker v. Lowdermilk, 233 N.C. 185, 63 S.E.2d 109 (1951); McGinnis v. Old Fort Finishing Plant, 253 N.C. 493, 117 S.E.2d 490 (1960); Wake County Hosp. Sys., Inc. v. North Carolina Indus. Comm'n, 8 N.C. App. 259, 174 S.E.2d 292 (1970).

§ 97-81. Blank forms and literature; statistics; safety provisions; accident reports; studies and investigations and recommendations to General Assembly; to cooperate with other agencies for prevention of injury.—(a) The Commission shall prepare and cause to be printed, and upon

request furnish, free of charge to any employee or employer, such blank forms and literature as it shall deem requisite to facilitate or prompt the efficient administration of this Article.

(b) The Commission shall tabulate the accident reports received from employers in accordance with G.S. 97-92 and shall publish the same in the annual report of the Commission and as often as it may deem advisable, in such detailed or aggregate form as it may deem best. The name of the employer or employee shall not appear in such publications, and the employers' reports shall be private records of the Commission, and shall not be open for public inspection except for the inspection of the parties directly involved, and only to the extent of such interest. These reports shall not be used as evidence against any employer in any suit at law brought by any employee for the recovery of damages.

(c) The Commission shall make studies and investigations with respect to safety provisions and the causes of injuries in employments covered by this Article, and shall from time to time make to the General Assembly and to employers and carriers such recommendations as it may deem proper as to the best means of preventing such injuries.

(d) In making such studies and investigations the Commission is authorized

(1) To cooperate with any agency of the United States charged with the duty of enforcing any law securing safety against injury in any employment covered by this Article, or with any State agency engaged in enforcing any laws to assure safety for employees, and

(2) To permit any such agency to have access to the records of the Commission.

In carrying out the provisions of this section the Commission or any officer or employee of the Commission is authorized to enter at any reasonable time upon any premises, tracks, wharf, dock, or other landing place, or to enter any building, where an employment covered by this Article is being carried on, and to examine any tool, appliance, or machinery used in such employment. (1929, c. 120, s. 55.)

§ 97-82. Memorandum of agreement between employer and employee to be submitted to Commission on prescribed forms for approval.—If after seven days after the date of the injury, or at any time in case of death, the employer and the injured employee or his dependents reach an agreement in regard to compensation under this Article, a memorandum of the agreement in the form prescribed by the Industrial Commission, accompanied by a full and complete medical report, shall be filed with and approved by the Commission; otherwise such agreement shall be voidable by the employee or his dependents.

If approved by the Commission, thereupon the memorandum shall for all purposes be enforceable by the court's decree as hereinafter specified. (1929, c. 120, s. 56.)

Purpose and Effect of Section. — The section was inserted in the Workmen's Compensation Act to protect the employees of the State against the disadvantages arising out of their economic status and give assurance that the settlement is in accord with the intent and purpose of the act. Therefore, in approving the settlement in which compensation is awarded, the Commission acts in a judicial capacity. The voluntary settlement as approved becomes an award enforceable by a court decree. Biddix v. Rex Mills, Inc., 237 N.C. 660, 75 S.E.2d 777 (1953).

The legislature anticipated employers and employees would, in most cases, be able to reach an agreement with respect to the employee's right to compensation; hence, it inserted in the Workmen's Compensation Act a provision authorizing such agreements when made in the manner prescribed by the Industrial Commission. White v. Shoup Boat Corp., 261 N.C. 495, 135 S.E.2d 216 (1964).

When Jurisdiction of Commission Invoked. — The jurisdiction of the Commission is invoked either when a claim for compensation is filed or a voluntary settlement is submitted for approval. Letterlough v. Atkins, 258 N.C. 166, 128 S.E.2d 215 (1962); Tabron v. Gold Leaf Farms, Inc., 269 N.C. 393, 152 S.E.2d 533 (1967).

Section Contemplates Only Settlement in Respect of Amount of Compensation. — The only "settlement" contemplated by this section

is a settlement in respect of the amount of compensation to which claimants are entitled under the act. McGill v. Bison Fast Freight, Inc., 245 N.C. 469, 96 S.E.2d 438 (1957).

And Does Not Apply to Compromise and Settlement of Common-Law Claim. — Compromise and settlement of the common-law claim of the administratrix of a deceased employee for the wrongful death of the employee, executed under the mistaken belief that the Workmen's Compensation Act was not applicable, will not be disturbed on the ground that the Industrial Commission did not approve such settlement as provided in this section. McGill v. Bison Fast Freight, Inc., 245 N.C. 469, 96 S.E.2d 438 (1957).

Commission Acts in Judicial Capacity. — In approving settlements the Commission acts in a judicial capacity. Letterlough v. Atkins, 258 N.C. 166, 128 S.E.2d 215 (1962).

Conclusiveness of Commission's Approval. — The Commission's approval of stipulated facts and payment is as conclusive as if made upon a determination of facts in an adversary proceeding. Stanley v. Brown, 261 N.C. 243, 134 S.E.2d 321 (1964).

Interlocutory Award. — The approval by the Industrial Commission of an agreement of the parties for compensation was not, under the circumstances, a final award, but an interlocutory award, and the Industrial Commission retained jurisdiction to enter a final award upon the filing of a full and complete medical report. Pratt v. Central Upholstery Co., 252 N.C. 716, 115 S.E.2d 27 (1960).

Change of Condition. — After plaintiff had been awarded compensation for partial disability, a hearing was had to determine whether there had been a change of condition. Plaintiff alleged partial deafness. The matter was heard several times, and finally a compromise was approved whereby plaintiff was paid a lump sum "as a full and complete settlement." Later plaintiff asked for another hearing because of another change of condition. It was held that in the absence of fraud or mutual mistake, or in the absence of consent on defendant's part, the agreement was binding. Recovery was denied. Morgan v. Town of Norwood, 211 N.C. 600, 191 S.E. 345 (1937).

§ 97-83. In event of disagreement, Commission is to make award after hearing.—If the employer and the injured employee or his dependents fail to reach an agreement, in regard to compensation under this Article within 14 days after the employee has knowledge of the injury or death, or if they have reached such an agreement which has been signed and filed with the Commission, and compensation has been paid or is due in accordance therewith, and the parties thereto then disagree as to the continuance of any weekly payment under such agreement, either party may make application to the Industrial Commission for a hearing in regard to the matters at issue, and for a ruling thereon.

Immediately after such application has been received the Commission shall set the date of a hearing, which shall be held as soon as practicable, and shall notify the parties at issue of the time and place of such hearing. The hearing or hearings shall be held in the city or county where the injury occurred, unless otherwise authorized by the Industrial Commission. (1929, c. 120, s. 57; 1955, c. 1026, s. 12½.)

Cross Reference. — See note to § 97-82.

Provisions for Settlement of Any Matter in Dispute. — In this section and §§ 97-84 through 97-86 the General Assembly has prescribed an adequate remedy by which any matter in dispute and incident to any claim under the provisions of the Workmen's Compensation Act may be determined and settled. Worley v. Pipes, 229 N.C. 465, 50 S.E.2d 504 (1948).

The Industrial Commission has exclusive authority to find facts except in matters determinative of jurisdiction. Hargus v. Select Foods, Inc., 271 N.C. 369, 156 S.E.2d 737 (1967).

Remedy Is Exclusive. — The remedy provided by this section and §§ 97-84 through 97-86 is exclusive. Worley v. Pipes, 229 N.C. 465, 50 S.E.2d 504 (1948).

Physician's Claim for Services. — The sole remedy of a physician to recover for services to an injured employee, where the employee and employer are subject to the Workmen's Compensation Act, is by application to the Industrial Commission in accordance with this section and §§ 97-84 through 97-86 to consider plaintiff's bill for such services, notwithstanding that the employer denies liability for the injury on the ground that it did not arise out of and in the course of the employment. The physician may not challenge the constitutionality of the relevant provisions of this Chapter by an independent suit against the employee to recover for the medical services. Matros v. Owen, 229 N.C. 472, 50 S.E.2d 509 (1948).

Where a physician renders services to an injured employee under private contract without knowledge that the injury was covered

by the Workmen's Compensation Act, and thereafter upon discovery that the injury is compensable files claim for such services with the Industrial Commission in order that the employee may get the benefit thereof, his remedy upon approval by the Industrial Commission in a sum less than the full amount of his claim, is to request a hearing before the Commission with right of appeal to the courts for review (this section and §§ 97-84 through 97-86), and this remedy is exclusive and precludes the physician from maintaining an action against the employee to recover the full contractual amount for the services and attacking the constitutionality of the relevant provisions of the act. Worley v. Pipes, 229 N.C. 465, 50 S.E.2d 504 (1948).

A proceeding before the Industrial Commission for compensation is not a lawsuit in the strict sense, and many of the prerequisites of an action at law are not required. Thus, an infant employee 18 years of age or over may prosecute his claim directly without the appointment of a next friend or guardian. Lineberry v. Town of Mebane, 218 N.C. 737, 12 S.E.2d 252 (1940).

How Minor Under 18 May Prosecute Claim. — While, for the purposes of the act, a minor becomes sui juris upon attaining the age of 18 years, until then he may prosecute his proceeding for compensation only when represented by general guardian or other legal representative. McGill v. Bison Fast Freight, Inc., 245 N.C. 469, 96 S.E.2d 438 (1957).

Proceeding Should Not Be in Name of Deceased Employee. — A proceeding under the Workmen's Compensation Act to determine liability of defendants to the next of kin of a deceased employee should not be brought in the name of the deceased employee. Slade v. Willis Hosiery Mills, 209 N.C. 823, 184 S.E. 844 (1936).

When Administratrix Is Proper Claimant. — The administratrix of the decedent is the proper claimant in a proceeding for compensation only when there are no dependents, whole or partial. However, the joinder of the administratrix with the dependents in the prosecution of a claim will be treated as surplusage. McGill v. Bison Fast Freight, Inc., 245 N.C. 469, 96 S.E.2d 438 (1957). See § 97-40.

Determination of Conflicting Claims to Compensation Already Paid. — While the Industrial Commission has jurisdiction to amend its award in regard to persons entitled to receive compensation awarded by it, it has no jurisdiction to enter a judgment in favor of a party to recover compensation theretofore paid to another, but the superior court has jurisdiction to determine conflicting claims of persons in regard to compensation which has already been paid. Hill v. Cahoon, 252 N.C. 295, 113 S.E.2d 569 (1960).

Cited in Hanks v. Southern Pub. Util. Co., 210 N.C. 312, 186 S.E. 252 (1936); Brice v. Robertson House Moving, Wrecking & Salvage Co., 249 N.C. 74, 105 S.E.2d 439 (1958); Smith v. Allied Exterminators, Inc., 11 N.C. App. 76, 180 S.E.2d 390 (1971).

§ 97-84. Determination of disputes by Commission or deputy.—The Commission or any of its members shall hear the parties at issue and their representatives and witnesses, and shall determine the dispute in a summary manner. The award, together with a statement of the findings of fact, rulings of law, and other matters pertinent to the questions at issue shall be filed with the record of the proceedings, and a copy of the award shall immediately be sent to the parties in dispute. The parties may be heard by a deputy, in which event the hearing shall be conducted in the same way and manner prescribed for hearings which are conducted by a member of the Industrial Commission, and said deputy shall proceed to a complete determination of the matters in dispute, file his written opinion, and cause to be issued an award pursuant to such determination. (1929, c. 120, s. 58; 1951, c. 1059, s. 7.)

Cross Reference. — As to exclusiveness of remedy provided by §§ 97-83 through 97-86, see note to § 97-83.

Editor's Note. — For comment on the 1951 amendment, which gave a deputy authority to make a complete determination of a dispute, see 29 N.C.L. Rev. 416.

Commission Constituted a Special Tribunal. — The Industrial Commission is primarily an administrative agency of the State, but when a claim for compensation is presented the Commission is constituted a special tribunal, and is invested with certain judicial functions, and possesses the powers and incidents of a court. Hanks v. Southern Pub. Util. Co., 210 N.C. 312, 186 S.E. 252 (1936).

Fact-Finding Body. — Under this section the Commission is made a fact-finding body. The finding of facts is one of its primary duties. Beach v. McLean, 219 N.C. 521, 14 S.E.2d 515 (1941); Brice v. Robertson House Moving, Wrecking & Salvage Co., 249 N.C. 74, 105 S.E.2d 439 (1958).

The Commission is the sole fact-finding agency in cases in which it has jurisdiction. The finding of facts is one of the primary duties of the Commission. Morgan v. Thomasville

Furniture Indus., 2 N.C. App. 126, 162 S.E.2d 619 (1968).

The Industrial Commission is the sole judge of the truthfulness and weight of the testimony of the witnesses in the discharge of its function as the fact-finding authority under the Workmen's Compensation Act. Henry v. A.C. Lawrence Leather Co., 231 N.C. 477, 57 S.E.2d 760 (1950).

Contradictions in the testimony go to its weight, which is for the fact-finding body, the Industrial Commission. Evans v. Topstyle, Inc., 270 N.C. 134, 153 S.E.2d 851 (1967).

The Commission is the sole judge of the credibility of the witnesses and the weight to be given to their testimony. It may accept all the testimony of a witness or reject all the testimony of a witness. It may accept a part of the testimony of a witness and reject a part of the testimony of such witness. It is not required to accept the uncontradicted testimony of a witness. Morgan v. Thomasville Furniture Indus., 2 N.C. App. 126, 162 S.E.2d 619 (1968).

The North Carolina Industrial Commission is the judge of the credibility of the evidence and is the fact-finding body under the Workmen's Compensation Act. Where the evidence before the Commission is contradictory, the findings of fact by the Commission, which are nonjurisdictional, are conclusive on appeal to the Court of Appeals. Priddy v. Blue Bird Cab Co., 9 N.C. App. 291, 176 S.E.2d 26 (1970).

In passing upon issues of fact, the Commission, like any other trier of facts, is the sole judge of the credibility of the witnesses, and of the weight to be given to their testimony. It may accept or reject the testimony of a witness, either in whole or in part, depending solely upon whether it believes or disbelieves the same. Anderson v. Northwestern Motor Co., 233 N.C. 372, 64 S.E.2d 265 (1951); Moses v. Bartholomew, 238 N.C. 714, 78 S.E.2d 923 (1953).

It would be contrary to the essence of the fact-finding authority conferred by this section to make it obligatory upon the Commission to accord unquestioned credence even to uncontradicted testimony. Anderson v. Northwestern Motor Co., 233 N.C. 372, 64 S.E.2d 265 (1951).

Proper Exercise of Fact-Finding Authority Essential. — It is impossible to exaggerate how essential the proper exercise of the fact-finding authority of the Industrial Commission is to the due administration of the Workmen's Compensation Act. The findings of fact of the Industrial Commission should tell the full story of the event giving rise to the claim for compensation. They must be sufficiently positive and specific to enable the court on appeal to determine whether they are supported by the evidence and whether the law has been properly applied to them. It is obvious that the court cannot ascertain whether the findings of fact are supported by the evidence unless the Industrial Commission reveals with at least a fair degree of positiveness what facts it finds. It is likewise plain that the court cannot decide whether the conclusions of laws and the decision of the Industrial Commission rightly recognize and effectively enforce the rights of the parties upon the matters in controversy if the Industrial Commission fails to make specific findings as to each material fact upon which those rights depend. Morgan v. Thomasville Furniture Indus., 2 N.C. App. 126, 162 S.E.2d 619 (1968).

Specific findings of fact by the Industrial Commission are required. These must cover the crucial questions of fact upon which plaintiff's right to compensation depends. State v. Haywood Elec. Membership Corp., 260 N.C. 59, 131 S.E.2d 865 (1963); Guest v. Brenner Iron & Metal Co., 241 N.C. 448, 85 S.E.2d 596 (1955); Pardue v. Blackburn Bros. Oil & Tire Co., 260 N.C. 413, 132 S.E.2d 747 (1963).

But the Commission is not required to make a finding as to each detail of the evidence or at every inference or shade of meaning to be drawn therefrom. Guest v. Brenner Iron & Metal Co., 241 N.C. 448, 85 S.E.2d 596 (1955).

Specific findings of fact by the Industrial Commission, covering the crucial questions of fact upon which the plaintiff's right to compensation depends, are required. Nello L. Teer Co. v. North Carolina State Highway Comm'n, 265 N.C. 1, 143 S.E.2d 247 (1965).

Specific findings of fact by the Industrial Commission are required. These must cover the crucial questions of fact upon which plaintiff's right to compensation depends. Otherwise, the Supreme Court cannot determine whether an adequate basis exists, either in fact or in law, for the ultimate finding as to whether plaintiff was injured by accident arising out of and in the course of his employment. State ex rel. Util. Comm'n v. Queen City Coach Co., 4 N.C. App. 116, 166 S.E.2d 441 (1969).

The Commission is not required to make a finding as to each fact presented by the evidence. However, specific findings by the Commission with respect to the crucial facts, upon which the question of plaintiff's right to compensation depends, are required. Morgan v. Thomasville Furniture Indus., 2 N.C. App. 126, 162 S.E.2d 619 (1968).

Findings May Not Rest upon Evidence Not Presented to Commission. — In judicial proceedings before the Commission the facts found must rest upon admissions made by the parties, facts agreed, stipulations entered into and noted at the hearing, and evidence offered in open court, after all parties have been given full opportunity to be heard. Recourse may not be had to records, files, evidence, or data not thus presented to the Commission for consideration. Biddix v. Rex Mills, Inc., 237 N.C. 660, 75 S.E.2d 777 (1953).

Admission of Incompetent Evidence. — As to the effect of the provision for hearing and determining the dispute "in a summary manner" on the question of admitting incompetent evidence, see corresponding language of § 97-80 and notes to §§ 97-80, 97-86.

Agreement Approved by Commission Is as Binding as Award. — An agreement for the payment of compensation when approved by the Commission is as binding on the parties as an order, decision or award of the Commission unappealed from, or an award of the Commission affirmed on appeal. Neal v. Clary, 259 N.C. 163, 130 S.E.2d 39 (1963).

Commission May Vacate Award Entered Contrary to Law. — The Commission is privileged to vacate an award which the Commission itself admits was entered contrary to law. Ruth v. Carolina Cleaners, 206 N.C. 540, 174 S.E. 445 (1934).

Cited in Champion v. Vance County Bd. of Health, 221 N.C. 96, 19 S.E.2d 239 (1942); Worley v. Pipes, 229 N.C. 465, 50 S.E.2d 504 (1948); Thomason v. Red Bird Cab Co., 235 N.C. 602, 70 S.E.2d 706 (1952); Parsons v. Alleghany County Bd. of Educ., 4 N.C. App. 36, 165 S.E.2d 776 (1969).

§ 97-85. Review of award.—If application is made to the Commission within seven days from the date when notice of the award shall have been given, the full Commission shall review the award, and, if good ground be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives, and, if proper, amend the award: Provided, however, when application is made for review of an award, and such an award has been heard and determined by a commissioner of the North Carolina Industrial Commission, the commissioner who heard and determined the dispute in the first instance, as specified by G.S. 97-84, shall be disqualified from sitting with the full Commission on the review of such award, and the chairman of the Industrial Commission shall designate a deputy commissioner to take such commissioner's place in the review of the particular award. The deputy commissioner so designated, along with the two other commissioners, shall compose the full Commission upon review. (1929, c. 120, s. 59; 1963, c. 402.)

Cross Reference. — As to exclusiveness of remedy provided by §§ 97-83 through 97-86, see note to § 97-83.

Continuing Jurisdiction of Commission. — The Industrial Commission has, within the limits prescribed by statute, continuing jurisdiction, and hence as an administrative agency empowered to hear evidence and render awards thereon affecting the rights of workers, has and ought to have authority to make its own records speak the truth in order to protect its own decrees from mistake of material facts and the blight of fraud; therefore when the full Commission finds and asserts that the award was not made in compliance with the provisions of the statute, then manifestly the Commission is entitled to vacate an award which the Commission itself admits was contrary to law. McDowell v. Town of Kure Beach, 251 N.C. 818, 112 S.E.2d 390 (1960).

The Commission is the fact-finding body under the Workmen's Compensation Act. The finding of facts is one of the primary duties of the Commission. Brewer v. Powers Trucking Co., 256 N.C. 175, 123 S.E.2d 608 (1962).

Rules promulgated by the Commission do not limit the power of the Commission to review, modify, adopt, or reject the findings of fact found by a deputy commissioner or by an individual member of the Commission when acting as a hearing commissioner. Brewer v. Powers Trucking Co., 256 N.C. 175, 123 S.E.2d 608 (1962).

Power to Modify or Strike Out Findings of Fact. — The power to review the evidence, reconsider it, receive evidence, rehear the parties or their representatives, and, if proper, to amend the award, carries with it the power to modify or strike out findings of fact made by the deputy commissioner or hearing commissioner if in the judgment of the Commission such finding is not proper. Brewer v. Powers Trucking Co., 256 N.C. 175, 123 S.E.2d 608 (1962).

Power to Grant Rehearing on Grounds of Newly Discovered Evidence. — The North Carolina Industrial Commission has the power to grant a rehearing of a proceeding before it and in which it has made an award on the grounds of newly discovered evidence. Harris v. Frank L. Blum Constr. Co., 10 N.C. App. 413, 179 S.E.2d 148 (1971).

Or in Its Discretion to Receive Other Further Evidence. — The Industrial Commission, upon an appeal to it from an opinion and award of the hearing commissioner, has the discretionary authority to receive further evidence regardless of whether it is newly discovered evidence. Harris v. Frank L. Blum Constr. Co., 10 N.C. App. 413, 179 S.E.2d 148 (1971).

Hearing New or Additional Testimony. — An appellant to the full Commission has no substantive right to require it to hear new additional testimony, but the Commission's duty to do so applies only if good ground therefor be shown, and its rules in regard thereto, adopted pursuant to § 97-80, are in accord with the decision of the Supreme Court relating to the granting of new trials for newly discovered evidence. Tindall v. American Furniture Co., 216 N.C. 306, 4 S.E.2d 894 (1939).

The plaintiff does not have a substantial right to require the Commission to hear additional testimony, and the duty to do so applies only if good ground therefor is shown. Eaton v. Klopman Mills, Inc., 2 N.C. App. 363, 163 S.E.2d 17 (1968).

The rules of the Industrial Commission, adopted pursuant to the Workmen's Compensation Act, relative to the introduction of new evidence at a review by the full Commission, are in accord with the decisions of the Supreme Court as to granting new trials on newly discovered evidence. Hall v. Thomason Chevrolet, Inc., 263 N.C. 569, 139 S.E.2d 857 (1965).

Underlying the limitation upon the right of a party to have an award in a compensation case opened for newly discovered evidence is the principle of universal authority, whose base is public policy, and is expressed in the maxim "interest reipublicae ut sit finis litium"; however, this principle does not have the strict application in proceedings for workmen's compensation that it has as regards proceedings in the courts. Hall v. Thomason Chevrolet, Inc., 263 N.C. 569, 139 S.E.2d 857 (1965).

Where an issue has been fairly litigated, with proof offered by both parties upon an issue, a claimant should not be entitled to a further hearing to introduce cumulative evidence, unless its character or force be such that it would be likely to produce a different result. Hall v. Thomason Chevrolet, Inc., 263 N.C. 569, 139 S.E.2d 857 (1965).

Mere inadvertence on claimant's part, mere negligence, without intentional withholding of evidence, particularly where there is no more than technical prejudice to the adverse party, should not necessarily debar him of his rights, and despite these circumstances a commissioner in the exercise of his discretion might be justified in opening an award. Hall v. Thomason Chevrolet, Inc., 263 N.C. 569, 139 S.E.2d 857 (1965).

In view of the fact that the Workmen's Compensation Act does not require all damages to be assessed at one time and awarded in a lump sum, the rules in regard to res judicata are not to be so strictly enforced as in civil cases generally, and an award will not preclude a review for newly discovered evidence relating to the extent of disability, particularly when claimant, because of his disability and the circumstances of the case, could not reasonably have obtained the additional evidence at the time of the hearing. Hall v. Thomason Chevrolet, Inc., 263 N.C. 569, 139 S.E.2d 857 (1965).

A party to a compensation case is not entitled to try his case piecemeal, to present a part of the evidence reasonably available to him, and then, if he loses, have a rehearing to offer testimony he might as well have presented at the original hearing. He must be assumed to be reasonably familiar with his rights and with the proof necessary to establish his claim; and to permit him intentionally to withhold proof, or to shut his eyes to the reasonably obvious sources of proof open to him, would be fair neither to the commissioner and the court nor to the defendant. Hall v. Thomason Chevrolet, Inc., 263 N.C. 569, 139 S.E.2d 857 (1965).

Circumstances to Be Considered. — No definite rule can be formulated, but the policy that litigation should be brought to as speedy an end as is reasonably compatible with justice to the parties, prejudice, or lack of it to the opposing party, the conduct of the party seeking to open the award, particularly with regard to any reason he may have for not having produced the evidence at the original hearing, the nature of the testimony and its probable effect upon the conclusion reached, and the other relevant circumstances, must all be considered. The matter is one which must lie very largely within the discretion of the commissioner. Hall v. Thomason Chevrolet, Inc., 263 N.C. 569, 139 S.E.2d 857 (1965).

Refusal to Remand to Hear Evidence Not Newly Discovered Not Abuse of Discretion. — The Industrial Commission did not abuse its discretion and did not commit error in denying plaintiff's motion to remand to the hearing commissioner for the purpose of taking testimony which was not newly discovered evidence. Harris v. Frank L. Blum Constr. Co., 10 N.C. App. 413, 179 S.E.2d 148 (1971).

Objection to the admission of incompetent evidence should be made before the hearing commissioner, and objection taken for the first time at the hearing before the full Commission on appeal is too late. Maley v. Thomasville Furniture Co., 214 N.C. 589, 200 S.E. 438 (1939).

Failure of Employer to File Notice of Appeal. — Defendant carrier filed apt notice of appeal to the full Commission and later to the superior court. The employer failed to file such notice. It was held that the employer's liability, he not being a party to the appeal, would not have been affected even if the case were reversed. McPherson v. Henry Motor Sales Corp., 201 N.C. 303, 160 S.E. 283, appeal dismissed, 286 U.S. 527, 52 S. Ct. 499, 76 L. Ed. 1269 (1932).

Judicial Review of Findings of Fact of Hearing Commissioner. — A finding of fact

by a hearing commissioner or by a deputy commissioner never reaches the superior court or the Supreme Court unless it has been affirmed by the Commission. Brewer v. Powers Trucking Co., 256 N.C. 175, 123 S.E.2d 608 (1962).

Applied in Crawford v. Wayne County Bd. of Educ., 275 N.C. 354, 168 S.E.2d 33 (1969); Owens v. Standard Mineral Co., 10 N.C. App. 84, 177 S.E.2d 775 (1970).

Cited in Champion v. Vance County Bd. of Health, 221 N.C. 96, 19 S.E.2d 239 (1942); Worley v. Pipes, 229 N.C. 465, 50 S.E.2d 504 (1948); Nello L. Teer Co. v. North Carolina State Highway Comm'n, 265 N.C. 1, 143 S.E.2d 247 (1965); Swaney v. George Newton Constr. Co., 5 N.C. App. 520, 169 S.E.2d 90 (1969).

§ 97-86. Award conclusive as to facts; appeal; certified questions of law.—The award of the Industrial Commission, as provided in G.S. 97-84, if not reviewed in due time, or an award of the Commission upon such review, as provided in G.S. 97-85, shall be conclusive and binding as to all questions of fact; but either party to the dispute may, within 30 days from the date of such award or within 30 days after receipt of notice to be sent by registered mail or certified mail of such award, but not thereafter, appeal from the decision of said Commission to the Court of Appeals for errors of law under the same terms and conditions as govern appeals from the superior court to the Court of Appeals in ordinary civil actions. The appellant shall cause to be prepared a statement of the case as required by the rules of the Court of Appeals. A copy of this statement shall be served on the respondent within 45 days from the entry of the appeal taken; within 20 days after such service, the respondent shall return the copy with his approval or specified amendments endorsed or attached; if the case be approved by the respondent, it shall be filed with the clerk of the Court of Appeals as a part of the record; if not returned with objections within the time prescribed, it shall be deemed approved. The chairman of the Industrial Commission shall have the power, in the exercise of his discretion, to enlarge the time in which to serve statement of case on appeal and exceptions thereto or counterstatement of case.

If the case on appeal is returned by the respondent with objections as prescribed, or if a countercase is served on appellant, the appellant shall immediately request the chairman of the Industrial Commission to fix a time and place for settling the case before him. If the appellant delays longer than 15 days after the respondent serves his countercase or exceptions to request the chairman to settle the case on appeal, and delays for such period to mail the case and countercase or exceptions to the chairman, then the exceptions filed by the respondent shall be allowed, or the countercase served by him shall constitute the case on appeal; but the time may be extended by agreement of counsel.

The chairman shall forthwith notify the attorneys of the parties to appear before him for the purpose at a certain time and place, which time shall not be more than 20 days from the receipt of the request. At the time and place stated, the chairman of the Industrial Commission shall settle and sign the case and deliver a copy to the attorneys of each party. The appellant shall within five days thereafter file it with the clerk of the Court of Appeals, and if he fails to do so the respondent may file his copy.

The Industrial Commission of its own motion may certify questions of law to the Court of Appeals for decision and determination by said Court. In case of an appeal from the decision of the Commission, or of a certification by said Commission of questions of law, to the Court of Appeals, said appeal or certification shall operate as a supersedeas, and no employer shall be required to make payment of the award involved in said appeal or certification until the questions at issue therein shall have been fully determined in accordance with the provisions of this Article. If the employer is a noninsurer, then the appeal of such employer shall not act as a supersedeas and the plaintiff in such case shall have the same right to issue execution or to satisfy the award from the

property of the employer pending the appeal as obtains to the successful party in an action in the superior court.

When any party to an appeal from an award of the Commission is unable, by reason of his poverty, to make the deposit or to give the security required by law for said appeal, the chairman of the Industrial Commission may, in his discretion, enter an order allowing said party to appeal from the award of the Commission without giving security therefor. The party desiring to appeal from the judgment shall, within 30 days from the filing of the award by the full Commission, make an affidavit that he is unable by reason of his poverty to give the security required by law, and that he is advised by a practicing attorney that there is error in the matters of law in the award of the Commission in said case. The affidavit must be accompanied by a written statement from a practicing attorney of North Carolina that he has examined the affiant's case, and is of the opinion that the decision of the Commission, in said case, is contrary to law. The request for appeal shall be passed upon and granted or denied by the chairman of the Commission within 30 days from receipt of the affidavit and letter as specified above. (1929, c. 120, s. 60; 1947, c. 823; 1957, c. 1396, s. 9; 1959, c. 863, s. 4; 1967, c. 669; 1971, c. 1189.)

Cross References. — As to exclusiveness of remedy provided by §§ 97-83 through 97-86, see note to § 97-83. For additional cases pertaining to conclusiveness of Industrial Commission's findings, see note to § 97-2, analysis line IV, A.

Editor's Note. — The 1967 amendment gave appellate jurisdiction over decisions of the Industrial Commission to the Court of Appeals. The superior court formerly had such appellate jurisdiction. Many of the cases cited in the notes to this section were decided when the superior court had appellate jurisdiction.

The 1971 amendment added the fifth paragraph.

For a note on "jurisdictional fact" review by superior courts, see 37 N.C.L. Rev. 219 (1959). For survey of case law as to findings of jurisdictional facts upon judicial review of decisions of Industrial Commission, see 44 N.C.L. Rev. 892 (1966). For case law survey as to judicial review of decisions of administrative agencies, see 45 N.C.L. Rev. 816 (1967).

Rules of Practice Prevail over Section. — To the extent that this section is in conflict with the Rules of Practice in the Court of Appeals, the Rules of Practice will prevail. Fetherbay v. Sharpe Motor Lines, 8 N.C. App. 58, 173 S.E.2d 589 (1970).

Appeal May Be Taken Only from Award of Full Commission. — See Hollowell v. North Carolina Dep't of Conservation & Dev., 201 N.C. 616, 161 S.E. 89 (1931), decided prior to the 1967 amendment.

Scope of Review. — While findings of fact of the Industrial Commission are conclusive on appeal when supported by evidence the courts must review the reasonableness of the inferences of fact deduced from the basic facts found, and the conclusions of law predicated upon them. Evans v. Tabor City Lumber Co., 232 N.C. 111, 59 S.E.2d 612 (1950).

The findings of fact of the Industrial Commission are conclusive on appeal only when supported by evidence, and the court, on appeal, may review the evidence to determine as a matter of law whether there is any evidence tending to support the findings. Vause v. Vause Farm Equip. Co., 233 N.C. 88, 63 S.E.2d 173 (1951).

On appeal from an award of the Industrial Commission the jurisdiction of the courts is limited to the questions of law as to whether there was competent evidence before the Commission to support its findings of fact and whether such findings justify the legal conclusions and decision of the Commission. Henry v. A.C. Lawrence Leather Co., 231 N.C. 477, 57 S.E.2d 760 (1950); Thomason v. Red Bird Cab Co., 235 N.C. 602, 70 S.E.2d 706 (1952); Green v. Eastern Constr. Co., 1 N.C. App. 300, 161 S.E.2d 200 (1968).

When called upon to review the findings of fact, conclusions of law, and awards of the Industrial Commission in compensation cases, the courts determine as a matter of law whether the facts found support the Commission's conclusions, and whether they justify the awards. McRae v. Wall, 260 N.C. 576, 133 S.E.2d 220 (1963).

When the assignments of error bring up for review the findings of fact of the Commission, the court will review the evidence to determine as a matter of law whether there is any competent evidence tending to support the findings; if so, the findings of fact are conclusive on the court. If a finding of fact is a mixed question of fact and law, it is conclusive also, if there is sufficient evidence to sustain the facts involved. If a question of law alone, it is reviewable. Lewter v. Abercrombie Enterprises, 240 N.C. 399, 82 S.E.2d 410 (1954).

When the party aggrieved appeals to court from a decision of the full Commission on the theory that the underlying findings of fact of the full Commission are not supported by competent evidence, the court does not retry

the facts. The court merely determines from the proceedings had before the Commission whether there was sufficient competent evidence before the Commission to support the findings of fact of the full Commission. Moses v. Bartholomew, 238 N.C. 714, 78 S.E.2d 923 (1953).

It is the duty of the court to determine whether, in any reasonable view of the evidence, it is sufficient to support the critical findings necessary to permit an award of compensation. Keller v. Electric Wiring Co., 259 N.C. 222, 130 S.E.2d 342 (1963).

If the findings of fact of the Industrial Commission are supported by competent evidence and are determinative of all of the questions at issue in the proceeding, the court must accept such findings as final truth and merely determine whether they justify the legal conclusions and decision of the Commission. Pardue v. Blackburn Bros. Oil & Tire Co., 260 N.C. 413, 132 S.E.2d 747 (1963); Morgan v. Thomasville Furniture Indus., 2 N.C. App. 126, 162 S.E.2d 619 (1968).

In no event may the superior court [now the Court of Appeals] or the Supreme Court consider the evidence in a proceeding involving an appeal from the Industrial Commission for the purpose of finding the facts for itself. Pardue v. Blackburn Bros. Oil & Tire Co., 260 N.C. 413, 132 S.E.2d 747 (1963); Byers v. North Carolina State Highway Comm'n, 3 N.C. App. 139, 164 S.E.2d 535 (1968).

Neither the superior court [now the Court of Appeals] nor the Supreme Court may receive or consider any evidence not introduced in the hearings before the hearing commissioner or the full Commission. Huffman v. Douglass Aircraft Co., 260 N.C. 308, 132 S.E.2d 614 (1963).

The court's duty in a workmen's compensation case goes no further than to determine whether the record contains any evidence tending to support the finding. Anderson v. Lincoln Constr. Co., 265 N.C. 431, 144 S.E.2d 272 (1965); Hollman v. City of Raleigh, 273 N.C. 240, 159 S.E.2d 874 (1968).

In passing upon an appeal from an award of the Industrial Commission, the reviewing court is limited in its inquiry to two questions of law, namely: (1) whether there was any competent evidence before the Commission to support its findings of fact; and (2) whether the findings of fact of the Commission justify its legal conclusions and decisions. Brice v. Robertson House Moving, Wrecking & Salvage Co., 249 N.C. 74, 105 S.E.2d 439 (1958); Byers v. North Carolina State Highway Comm'n, 275 N.C. 229, 166 S.E.2d 649 (1969); Waggoner v. North Carolina Bd. of Alcoholic Control, 7 N.C. App. 692, 173 S.E.2d 548 (1970).

The court cannot consider the evidence in the proceeding in any event for the purpose of finding the facts for itself. If the findings of fact of the Industrial Commission are supported by competent evidence and are determinative of all the questions at issue in the proceeding, the court must accept such findings as final truth and merely determine whether or not they justify the legal conclusions and decision of the Commission. But if the findings of fact of the Industrial Commission are insufficient to enable the court to determine the rights of the parties upon the matters in controversy, the proceeding must be remanded to the Commission for proper findings. Brice v. Robertson House Moving, Wrecking & Salvage Co., 249 N.C. 74, 105 S.E.2d 439 (1958).

The Court of Appeals has appellate jurisdiction to review an award of the Industrial Commission for errors of law when a party to the proceeding in which the appeal is made appeals to it. Morgan v. Thomasville Furniture Indus., 2 N.C. App. 126, 162 S.E.2d 619 (1968).

As to review of errors of law prior to 1967 amendment, see Thomason v. Red Bird Cab Co., 235 N.C. 602, 70 S.E.2d 706 (1952).

In appeals from the Industrial Commission, the superior court [now the Court of Appeals] sits as a Court of Appeals. As such it may determine upon proper exceptions that the facts found by the Industrial Commission were or were not supported by competent evidence; that the findings so supported do or do not sustain the legal conclusions and the award of the Industrial Commission. Byers v. North Carolina State Highway Comm'n, 275 N.C. 229, 166 S.E.2d 649 (1969).

The Commission's legal conclusions are subject to court review. Jackson v. North Carolina State Highway Comm'n, 272 N.C. 697, 158 S.E.2d 865 (1968).

The Court of Appeals can neither find facts nor adjudicate matters within the jurisdiction of the Industrial Commission. Byers v. North Carolina State Highway Comm'n, 275 N.C. 229, 166 S.E.2d 649 (1969).

Unreviewable Matters. — There is such a thing in compensation procedure as completely unreviewable matters, just as there is in ordinary judicial procedure. Morse v. Curtis, 6 N.C. App. 620, 170 S.E.2d 491 (1969).

Findings as to Whether Accident Arose Out of and in Course of Employment. — The findings of fact by the Industrial Commission as to whether injury to an employee was by accident arising out of and in the course of his employment are conclusive on the courts upon appeal when the findings are supported by competent evidence of sufficient probative force. Perdue v. State Bd. of Equalization, 205 N.C. 730, 172 S.E. 396 (1934).

When the record contains evidence to support either a finding that the accident did or did not arise out of and in the course of employment,

the findings of the Industrial Commission are conclusive on appeal. Ashley v. F-W Chevrolet Co., 222 N.C. 25, 21 S.E.2d 834 (1942); Hegler v. Cannon Mills Co., 224 N.C. 669, 31 S.E.2d 918 (1944); Fox v. Cramerton Mills, 225 N.C. 580, 35 S.E.2d 869 (1945); DeVine v. Dave Steel Co., 227 N.C. 684, 44 S.E.2d 77 (1947). See also Chambers v. Union Oil Co., 199 N.C. 28, 153 S.E. 594 (1930).

A finding that an injury arose out of and in the course of the employment is a mixed question of law and fact and, when supported by competent evidence, is conclusive. Marsh v. Bennett College for Women, 212 N.C. 662, 194 S.E. 303 (1937); Lockey v. Cohen, Goldman & Co., 213 N.C. 356, 196 S.E. 342 (1938).

When the finding of the Industrial Commission that an accident arose out of the employment is supported by evidence, it is therefore conclusive upon appeal. Stubblefield v. Watson Elec. Constr. Co., 277 N.C. 444, 177 S.E.2d 882 (1970).

Whether an accident grew out of the employment within the purview of the Workmen's Compensation Act is a mixed question of law and fact, which the court has the right to review on appeal, and when the detailed findings of fact force a conclusion opposite that reached by the Commission, it is the duty of the court to reverse the Commission. Alford v. Quality Chevrolet Co., 246 N.C. 214, 97 S.E.2d 869 (1957).

Where there is no evidence of causal relationship between the accident and injury, the claim must be denied. Anderson v. Lincoln Constr. Co., 265 N.C. 431, 144 S.E.2d 272 (1965).

Where the evidence is conflicting, the Commission's finding of causal connection between the accident and the disability is conclusive. Anderson v. Lincoln Constr. Co., 265 N.C. 431, 144 S.E.2d 272 (1965).

Where an employee, while about his work, suffers an injury in the ordinary course of his employment, the cause of which is unexplained but which is a natural and probable result of a risk thereof, and the Commission finds from all the attendant facts and circumstances that the injury arose out of the employment, an award will be sustained. If, however, the cause is known and is independent of, unrelated to, and apart from the employment, compensation will not be allowed. Vause v. Vause Farm Equip. Co., 233 N.C. 88, 63 S.E.2d 173 (1951).

Where there is evidence that the driver of the employer's oil truck habitually carried a pistol in order to protect his employer's property, and that the employer acquiesced therein, and that the plaintiff was injured while filling a fuel tank in the course of his employment by the accidental explosion of the pistol carried by the driver when the driver threw it back into his truck after he and the plaintiff had joked about whether the pistol would shoot, the evidence discloses that the injury arose out of the employment and is sufficient to support the finding of fact by the Industrial Commission to that effect, which is conclusive and binding on appeal. Chambers v. Union Oil Co., 199 N.C. 28, 153 S.E. 594 (1930).

A watchman on one section of a road construction job came over to the section of another and after "an acrimonious colloquy" over matters unrelated to their work, the visitor killed the one on the job. The finding of the Commission that this death was not caused by accident arising out of the employment was proper and conclusive on the court even though the facts might have sustained a contrary conclusion, and the superior court [now the Court of Appeals] erred in reversing the Commission. McNeill v. C.A. Ragland Constr. Co., 216 N.C. 744, 6 S.E.2d 491 (1940).

Adoption of Findings by Reference. — If the court's findings are in agreement with those of the Commission, it may by reference in the judgment adopt the latter as its own. Askew v. Leonard Tire Co., 264 N.C. 168, 141 S.E.2d 280 (1965); Patterson v. L.M. Parker & Co., 2 N.C. App. 43, 162 S.E.2d 571 (1968).

Exceptions and Objections. — Where appellant on appeal to the superior court [now the Court of Appeals] does not except to any finding of the Industrial Commission or to the award, but merely gives notice of appeal for a review as to errors of law, the single question presented to the court is whether the facts found were sufficient to support the award. Likewise, a sole exception to the judgment of the court presents only the question of whether the facts found support the judgment. Wyatt v. Sharp, 239 N.C. 655, 80 S.E.2d 762 (1954).

Questions of law which appellant desires the Supreme Court to review, including questions of whether specific findings of fact are supported by the evidence, must be presented by exceptions duly taken and assignments of error duly made which point out specifically and distinctly the alleged error, and the Supreme Court, upon a broadside exception, will not make a voyage of discovery through the record to ascertain if error was committed at some time in some way during the progress of the trial or case. Worsley v. S. & W. Rendering Co., 239 N.C. 547, 80 S.E.2d 467 (1954).

The effect of an exception to the judgment of the Industrial Commission is only to challenge the correctness of the judgment, and presents the single question whether the facts found are sufficient to support the judgment. Hatchell v. Cooper, 266 N.C. 345, 146 S.E.2d 62 (1966).

Matters to Be Considered on Appeal. — While findings of fact by the Industrial Commission, when supported by competent evidence, are conclusive, the rulings of the Commission are subject to review on questions of law, whether the Industrial Commission has jurisdiction, whether the findings are supported by evidence, and whether upon the

facts established the decision is correct. Smith v. Southern Waste Paper Co., 226 N.C. 47, 36 S.E.2d 730 (1946).

An appeal from the Industrial Commission is permitted only on matters of law. Fox v. Cramerton Mills, 225 N.C. 580, 35 S.E.2d 869 (1945).

The jurisdiction of the superior court [now the Court of Appeals] is limited to questions of law only. Byrd v. Gloucester Lumber Co., 207 N.C. 253, 176 S.E. 572 (1934).

On appeal from the Industrial Commission, the court has no power to review the findings of fact by the Commission. It can consider only errors of law appearing in the record, as certified by the Commission. Winslow v. Carolina Conference Ass'n, 211 N.C. 571, 191 S.E. 403 (1937).

The appellate court has jurisdiction to review only for errors of law. Byers v. North Carolina State Highway Comm'n, 3 N.C. App. 139, 164 S.E.2d 535 (1968).

The award of the Industrial Commission is conclusive and binding as to all questions of fact, and the appeal to the court is for error of law only. Ballenger Paving Co. v. North Carolina State Highway Comm'n, 258 N.C. 691, 129 S.E.2d 245 (1963).

On appeal from the Industrial Commission to the court, review is limited to questions of law. Whether the record contains any competent evidence to support the facts as found and whether the facts found are sufficient to support the conclusions of the Commission are questions of law. Moore v. Adams Elec. Co., 259 N.C. 735, 131 S.E.2d 356 (1963).

The appellate court may not receive or consider new evidence not introduced in the hearing before the Commission. Byers v. North Carolina State Highway Comm'n, 3 N.C. App. 139, 164 S.E.2d 535 (1968).

Review Limited to Record as Certified by Industrial Commission. — When an appeal is taken from the Industrial Commission, it is heard by the presiding judge of the superior court [now the Court of Appeals] who sits as an appellate court. His function is to review alleged errors of law made by the Industrial Commission, as disclosed by the record and as presented to him by exceptions duly entered. Necessarily, the scope of review is limited to the record as certified by the Commission and to the questions of law therein presented. Penland v. Bird Coal Co., 246 N.C. 26, 97 S.E.2d 432 (1957).

The scope of review is limited to the record as certified by the Industrial Commission and to the questions of law therein presented. Byers v. North Carolina State Highway Comm'n, 3 N.C. App. 139, 164 S.E.2d 535 (1968).

On appeal from a judgment of superior court [now the Court of Appeals] affirming or reversing an award of the Industrial Commission, the Supreme Court acts upon the record that was before the superior court [now the Court of Appeals], and upon that alone, and if the record was defective, it should have been amended in the superior court. Penland v. Bird Coal Co., 246 N.C. 26, 97 S.E.2d 432 (1957).

Matters which were not in the record before the superior court [now the Court of Appeals], but which are sent up with the transcript to the Supreme Court, are no more a part of the record in the Supreme Court than they were in the superior court [now the Court of Appeals], and may not be made so by certificate of the court below. Penland v. Bird Coal Co., 246 N.C. 26, 97 S.E.2d 432 (1957).

Raising Question of Commission's Jurisdiction. — The Commission's jurisdiction may be questioned at any stage and even where an appeal, by stipulation, raises only the question of who was claimant's employer. If the record fails to show by testimony or admission that appellant had the requisite number of employees, the Commission is not shown to have acquired jurisdiction. The stipulation here made that there is only one question at issue will not serve as an admission of the jurisdictional fact. Chadwick v. North Carolina Dep't of Conservation & Dev., 219 N.C. 766, 14 S.E.2d 842 (1941).

A jurisdictional question may be raised at any stage of the proceeding. Askew v. Leonard Tire Co., 264 N.C. 168, 141 S.E.2d 280 (1965).

Evidence Not Considered. — Under this section an award of the Industrial Commission is conclusive and binding as to all questions of fact when supported by sufficient, competent evidence, and neither the Supreme Court nor the superior court [now the Court of Appeals] can consider the evidence for the purpose of determining the facts on appeal. Reed v. Lavender Bros., 206 N.C. 898, 172 S.E. 877 (1934); Thomason v. Red Bird Cab Co., 235 N.C. 602, 70 S.E.2d 706 (1952). See Walker v. J.D. Wilkins, Inc., 212 N.C. 627, 194 S.E. 89 (1937).

The court does not have the right to weigh the evidence in a workmen's compensation case and decide the issue on the basis of its weight. Anderson v. Lincoln Constr. Co., 265 N.C. 431, 144 S.E.2d 272 (1965); Hollman v. City of Raleigh, 273 N.C. 240, 159 S.E.2d 874 (1968).

Commission Sole Judge of Weight and Credibility of Testimony. — The Industrial Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony. Anderson v. Lincoln Constr. Co., 265 N.C. 431, 144 S.E.2d 272 (1965); Hollman v. City of Raleigh, 273 N.C. 240, 159 S.E.2d 874 (1968).

Authority to Find Facts Is Vested Exclusively in Industrial Commission. — The authority to find facts necessary for an award pursuant to the provisions of the Workmen's Compensation Act is vested exclusively in the Industrial Commission. Moore v. Adams Elec. Co., 259 N.C. 735, 131 S.E.2d 356 (1963);

Anderson v. Lincoln Constr. Co., 265 N.C. 431, 144 S.E.2d 272 (1965).

The Industrial Commission is the sole trier of the facts. Hall v. W.A. Davis Milling Co., 1 N.C. App. 380, 161 S.E.2d 780 (1968).

This section vests the Industrial Commission with full authority to find essential facts. Hollman v. City of Raleigh, 273 N.C. 240, 159 S.E.2d 874 (1968).

The Industrial Commission is vested with the judicial function and the authority and duty to determine whether, under the established facts and applicable law, the plaintiff has a compensable claim. Nello L. Teer Co. v. North Carolina State Highway Comm'n, 265 N.C. 1, 143 S.E.2d 247 (1965).

The findings of fact of the Industrial Commission are conclusive on the courts when the findings are supported by any competent evidence, notwithstanding that the court, if it had been the fact-finding body, might have reached a different conclusion, the finding of facts from the evidence being the exclusive function of the Industrial Commission. McGill v. Lumberton, 218 N.C. 586, 11 S.E.2d 873 (1940). See Withers v. Black, 230 N.C. 428, 53 S.E.2d 668 (1949).

A finding of fact of the Industrial Commission is conclusive on appeal if supported by evidence, notwithstanding that the evidence upon the entire record might also support a contrary finding. Riddick v. Richmond Cedar Works, 227 N.C. 647, 43 S.E.2d 850 (1947).

The factual determinations of the Industrial Commission are conclusive on appeal to the superior court [now the Court of Appeals] and in the Supreme Court. Brown v. Carolina Aluminum Co., 224 N.C. 766, 32 S.E.2d 320 (1944).

Under this section findings of fact by the Industrial Commission, on a claim properly constituted under the Workmen's Compensation Act, are conclusive on appeal, both in the superior court [now the Court of Appeals] and in the Supreme Court, when supported by competent evidence. Fox v. Mills, Inc., 225 N.C. 580, 35 S.E.2d 869 (1945); McCraw v. Calvine Mills, Inc., 233 N.C. 524, 64 S.E.2d 658 (1951); Rice v. Thomasville Chair Co., 238 N.C. 121, 76 S.E.2d 311 (1953); Moses v. Bartholomew, 238 N.C. 714, 78 S.E. 2d 923 (1953); Hinkle v. City of Lexington, 239 N.C. 105, 79 S.E.2d 220 (1953); McGinnis v. Old Fort Finishing Plant, 253 N.C. 493, 117 S.E.2d 490 (1960); Osborne v. Colonial Ice Co., 249 N.C. 387, 106 S.E.2d 573 (1959).

The Industrial Commission has the exclusive duty and authority to find the facts relative to controverted claims, and its findings of fact, with the exception of jurisdictional findings, are conclusive on the courts when supported by any competent evidence. Buchanan v. State Highway & Pub. Works Comm'n, 217 N.C. 173, 7 S.E.2d 382 (1940); Mallard v. Bohannon, 220 N.C. 536, 18 S.E.2d 189 (1942); Hawes v. Mutual Benefit & Accident Ass'n, 243 N.C. 62, 89 S.E.2d 739 (1955); Penland v. Bird Coal Co., 246 N.C. 26, 97 S.E.2d 432 (1957).

The findings of fact of the Industrial Commission are conclusive and binding upon appeal when supported by competent evidence. Henry v. A.C. Lawrence Leather Co., 231 N.C. 477, 57 S.E.2d 760 (1950); Williams v. Ornamental Stone Co., 232 N.C. 88, 59 S.E.2d 193 (1950); Vause v. Vause Farm Equip. Co., 233 N.C. 88, 63 S.E.2d 173 (1951); Anderson v. Northwestern Motor Co., 233 N.C. 372, 64 S.E.2d 265 (1951); Thomason v. Red Bird Cab Co., 235 N.C. 602, 70 S.E.2d 706 (1952); Byrd v. Farmers Fed'n Cooperative, 260 N.C. 215, 132 S.E.2d 348 (1963); Huffman v. Douglass Aircraft Co., 260 N.C. 308, 132 S.E.2d 614 (1963); McRae v. Wall, 260 N.C. 576, 133 S.E.2d 220 (1963); Perry v. American Bakeries Co., 262 N.C. 272, 136 S.E.2d 643 (1964).

If there is any competent evidence to support a finding of fact of the Industrial Commission, such finding is conclusive on appeal, even though there is evidence that would have supported a finding to the contrary. Tucker v. Lowdermilk, 233 N.C. 185, 63 S.E.2d 109 (1951); Johnson v. Erwin Cotton Mills Co., 232 N.C. 321, 59 S.E.2d 828 (1950); Hawes v. Mutual Benefit Health & Accident Ass'n, 243 N.C. 62, 89 S.E.2d 739 (1955); Champion v. Hardin-Dixon Tractor Co., 246 N.C. 691, 99 S.E.2d 917 (1957); Humphrey v. Quality Cleaners & Laundry, 251 N.C. 47, 110 S.E.2d 467 (1959); Osborne v. Colonial Ice Co., 249 N.C. 387, 106 S.E.2d 573 (1959); Sandy v. Stackhouse, Inc., 258 N.C. 194, 128 S.E.2d 218 (1962); Keller v. Electric Wiring Co., 259 N.C. 222, 130 S.E.2d 342 (1963); Jones v. Myrtle Desk Co., 264 N.C. 401, 141 S.E.2d 632 (1965); Eaton v. Klopman Mills, Inc., 2 N.C. App. 363, 163 S.E.2d 17 (1968).

The courts are bound by the Commission's findings if supported by competent evidence, even though the evidence would have supported a different or contrary finding. Osborne v. Colonial Ice Co., 249 N.C. 387, 106 S.E.2d 573 (1959).

A finding by the Industrial Commission, if supported by competent evidence, is binding on the judge who reviews the case and is likewise binding on the Supreme Court on the appeal. Osborne v. Colonial Ice Co., 249 N.C. 387, 106 S.E.2d 573 (1959); Evans v. Topstyle, Inc., 270 N.C. 134, 153 S.E.2d 851 (1967).

Where the evidence before the Commission is such as to permit either one of two contrary findings, the determination of the Commission is conclusive on appeal to superior court [now the Court of Appeals] and in the Supreme Court. Taylor v. Twin City Club, 260 N.C. 435, 132 S.E.2d 865 (1963).

The rule as to findings of nonjurisdictional facts is that the Commission's findings of fact

are conclusive on appeal when supported by competent evidence. Askew v. Leonard Tire Co., 264 N.C. 168, 141 S.E.2d 280 (1965).

An award of the Commission is, if not reviewed in due time as provided in the act, conclusive and binding as to all questions of fact. Hall v. Thomason Chevrolet, Inc., 263 N.C. 569, 139 S.E.2d 857 (1965).

The Industrial Commission's findings of fact, except jurisdictional findings, are conclusive on appeal if supported by competent evidence. Nello L. Teer Co. v. North Carolina State Highway Comm'n, 265 N.C. 1, 143 S.E.2d 247 (1965).

The Commission's findings of fact are conclusive on appeal, even though there may be contrary evidence. Crawford v. Central Bonded Warehouse, Div. of Bayside Warehouse Co., 263 N.C. 826, 140 S.E.2d 548 (1965).

If the evidence and the stipulations, viewed in the light most favorable to claimant, support the findings of the Industrial Commission, the courts are bound by them. Maurer v. The Salem Co., 266 N.C. 381, 146 S.E.2d 432 (1966).

If the findings of fact of the Industrial Commission in a proceeding over which it has jurisdiction are supported by competent evidence and are determinative of all of the questions at issue in the proceeding, the court on appeal must accept such findings as true and merely determine whether they justify the legal conclusions and the decision made by the Commission. Byers v. North Carolina State Highway Comm'n, 3 N.C. App. 139, 164 S.E.2d 535 (1968).

A finding by the Industrial Commission that the claimant sustained a compensable injury is conclusive upon an appeal to the courts if, but only if, the Commission had before it competent evidence sufficient to support such a finding. Rhinehart v. Roberts Super Mkt., Inc., 271 N.C. 586, 157 S.E.2d 1 (1967).

Under the Workmen's Compensation Act, the Industrial Commission is constituted the agency to hear evidence, resolve conflicts therein, make findings of fact, and state its conclusions. If the findings are supported by competent evidence, they are conclusive on the courts. Jackson v. North Carolina State Highway Comm'n, 272 N.C. 697, 158 S.E.2d 865 (1968).

When supported by competent evidence, the findings of fact by the Industrial Commission on a claim properly constituted under the Workmen's Compensation Act are conclusive on appeal. Williams v. Brunswick County Bd. of Educ., 1 N.C. App. 89, 160 S.E.2d 102 (1968).

Findings by the Industrial Commission upon competent evidence that the deceased employee and the femme claimant were married and lived together as husband and wife until the husband's death, thereby entitling the wife to an award of compensation, is binding upon the reviewing court, even though there is evidence that the wife's first marriage had not been dissolved. Green v. Eastern Constr. Co., 1 N.C. App. 300, 161 S.E.2d 200 (1968).

Findings of fact of the Industrial Commission are conclusive on the courts when supported by any competent evidence. Green v. Eastern Constr. Co., 1 N.C. App. 300, 161 S.E.2d 200 (1968).

The findings of fact by the Industrial Commission, which are nonjurisdictional, are conclusive on appeal when supported by competent evidence, even though there is evidence that would have supported findings to the contrary. Hollman v. City of Raleigh, 273 N.C. 240, 159 S.E.2d 874 (1968).

The findings of fact of the Industrial Commission are binding on appeal when they are supported by any competent evidence, even though there be evidence that would have supported a contrary finding. Hales v. North Hills Constr. Co., 5 N.C. App. 564, 169 S.E.2d 24 (1969).

The Commission occupies a position analogous to that of a referee, the difference being that the findings of fact by the Commission are binding, if there is any evidence to support them, while those of a referee are not. Singleton v. Durham Laundry Co., 213 N.C. 32, 195 S.E. 34 (1937). This is true not only of the full Commission but also of the hearing commissioner. Maley v. Thomasville Furniture Co., 214 N.C. 589, 200 S.E. 438 (1948).

Findings of fact made by the Commission are, when supported by any evidence, conclusive on appeal. Claimant is entitled to urge, in support of the findings, every reasonable inference which can be drawn from the testimony; but when all the evidence and the inferences to be drawn therefrom result in only one conclusion, liability is a question of law subject to review. Hensley v. Farmers Fed'n Cooperative, 246 N.C. 274, 98 S.E.2d 289 (1957).

For other examples of the application of the rule that when supported by competent legal evidence, the findings of fact of the Commission are conclusive even though they may be contrary to the opinion of the appellate court, see Williams v. Thompson, 200 N.C. 463, 157 S.E. 430 (1931); Wimbish v. Home Detective Co., 202 N.C. 800, 164 S.E. 344 (1932); Moore v. Summers Drug Co., 206 N.C. 711, 175 S.E. 96 (1934); Johnson v. Foreman-Blades Lumber Co., 216 N.C. 123, 4 S.E.2d 334 (1939); Blythe v. Welborn, 223 N.C. 857, 25 S.E.2d 555 (1940).

Jurisdictional Facts Not Conclusive on Appeal. — Both a proper construction of the language of this section, and well-settled principles of law, lead to the conclusion that where the jurisdiction of the Industrial Commission to hear and consider a claim for compensation under the provisions of the Workmen's Compensation Act is challenged by an employer, on the ground that he is not

subject to the provisions of the act, the findings of fact made by the Commission, on which its jurisdiction is dependent, are not conclusive on the superior court [now the Court of Appeals], and that said court has both the power and the duty, on the appeal of either party to the proceeding, to consider all evidence in the record, and find therefrom the jurisdictional facts, without regard to the finding of such facts by the Commission. Aycock v. Cooper, 202 N.C. 500, 163 S.E. 569 (1932); Aylor v. Barnes, 242 N.C. 223, 87 S.E.2d 269 (1955).

The Commission's findings of jurisdictional facts are not conclusive on appeal to superior court [now the Court of Appeals], even if supported by competent evidence. Askew v. Leonard Tire Co., 264 N.C. 168, 141 S.E.2d 280 (1965); Patterson v. L.M. Parker & Co., 2 N.C. App. 43, 162 S.E.2d 571 (1968).

It is error for the judge [now the Court of Appeals] to proceed upon the theory that he is bound by the Commission's findings of jurisdictional facts. Askew v. Leonard Tire Co., 264 N.C. 168, 141 S.E.2d 280 (1965).

When a party challenges the jurisdiction of the Industrial Commission, the findings of fact made by the Commission, on which its jurisdiction is dependent, are not conclusive on the superior court [now the Court of Appeals] and the court has the power, and it is its duty, on appeal, to consider all the evidence in the record, and to make therefrom independent findings of jurisdictional facts. Richards v. Nationwide Homes, 263 N.C. 295, 139 S.E.2d 645 (1965); Askew v. Leonard Tire Co., 264 N.C. 168, 141 S.E.2d 280 (1965).

If a party to the proceedings requests the court to make independent findings of jurisdictional facts, it is error to fail to do so. Patterson v. L.M. Parker & Co., 2 N.C. App. 43, 162 S.E.2d 571 (1968).

Where the judge is of the opinion, upon a fair and impartial consideration of the evidence in the record, that the Commission's findings of jurisdictional facts lead to an improper assumption or rejection of jurisdiction by the Commission, he has the duty to make independent findings of jurisdictional facts and to set them out in the judgment. Patterson v. L.M. Parker & Co., 2 N.C. App. 43, 162 S.E.2d 571 (1968).

Findings Not Supported by Competent Evidence. — The findings of fact of the Industrial Commission, when supported by competent evidence, are binding upon the courts upon appeal, but findings not supported by competent evidence are not conclusive and must be set aside. Logan v. Johnson, 218 N.C. 200, 10 S.E.2d 653 (1940); Penland v. Bird Coal Co., 246 N.C. 26, 97 S.E.2d 432 (1957).

The court may set aside a finding of fact of the Industrial Commission only upon the ground it lacks evidentiary support. McRae v. Wall, 260 N.C. 576, 133 S.E.2d 220 (1963); Anderson v. Lincoln Constr. Co., 265 N.C. 431, 144 S.E.2d 272 (1965).

The rule declared by the statute and uniformly upheld by the Supreme Court that the findings of fact made by the Industrial Commission when supported by any competent evidence, are conclusive on appeal, does not mean that the conclusions of the Commission from the evidence are in all respects unexceptionable. If those findings, involving mixed questions of law and fact, are not supported by evidence, the award cannot be upheld. Perley v. Ballenger Paving Co., 228 N.C. 479, 46 S.E.2d 298 (1948).

The findings of the Commission are conclusive only if there is evidence to show that the facts are as found. Hildebrand v. McDowell Furniture Co., 212 N.C. 100, 193 S.E. 294 (1937).

This evidence must be legally competent. A finding based on imcompetent testimony is not conclusive. Plyler v. Charlotte Country Club, 214 N.C. 453, 199 S.E. 622 (1938).

The findings of fact made by the Industrial Commission, in a proceeding pending before it, are conclusive on an appeal to the superior court [now the Court of Appeals] only when there was evidence before the Commission tending to show that the facts are as found by the Commission. Otherwise the findings are not conclusive, and the superior court [now the Court of Appeals], on an appeal from the award of the Commission, has jurisdiction to review all the evidence for the purpose of determining whether as a matter of law there was evidence tending to support the finding by the Commission. And if the fact as found by the Industrial Commission is jurisdictional, and there was no evidence tending to support the finding, the award should be set aside and vacated. Poole v. Sigmon, 202 N.C. 172, 162 S.E. 198 (1932).

Effect of Admission of Incompetent Evidence. — Where each of the essential facts found by the Industrial Commission is supported by competent evidence, the findings are conclusive on appeal, even though some incompetent evidence was also admitted upon the hearing. Carlton v. Bernhardt-Seagle Co., 210 N.C. 655, 188 S.E. 77 (1936). See Tomlinson v. Town of Norwood, 208 N.C. 716, 182 S.E. 659 (1935); Swink v. Carolina Asbestos Co., 210 N.C. 303, 186 S.E. 258 (1936); Porter v. Noland Co., 215 N.C. 724, 2 S.E.2d 853 (1939); Baxter v. W.H. Arthur Co., 216 N.C. 276, 4 S.E.2d 621 (1939); Tindall v. American Furniture Co., 216 N.C. 306, 4 S.E.2d 894 (1939); Stallcup v. Carolina Wood Turning Co., 217 N.C. 302, 7 S.E.2d 550 (1940); MacRae v. Unemployment Compensation Comm'n, 217 N.C. 769, 9 S.E.2d 595 (1940); Blevins v. Teer, 220 N.C. 135, 16 S.E.2d 659 (1941); Miller v. Caudle, 220 N.C. 308, 17 S.E.2d 487 (1941); Haynes v. Feldspar Producing Co., 222 N.C. 163, 22 S.E.2d 275 (1942); Stanley v. Hyman-Michaels Co., 222

N.C. 257, 22 S.E.2d 570 (1942); Kearns v. Biltwell Chair & Furniture Co., 222 N.C. 438, 23 S.E.2d 310 (1942); Archie v. Greene Brothers Lumber Co., 222 N.C. 477, 23 S.E.2d 834 (1943); Penland v. Bird Coal Co., 246 N.C. 26, 97 S.E.2d 432 (1957).

The introduction of incompetent evidence cannot be held prejudicial where the record contains sufficient competent evidence to support the findings. Eaton v. Klopman Mills, Inc., 2 N.C. App. 363, 163 S.E.2d 17 (1968).

On admission of hearsay and other incompetent evidence generally, see note to § 97-80.

Findings Based on Incompetent Testimony. — Where the record specifically discloses that the Commission's findings of fact are based upon incompetent testimony such as the direct testimony of a witness who refused to be cross-examined or the transcript of previous testimony given in a criminal action the findings are not only not conclusive but there is error and the cause will be remanded. Citizens Bank & Trust Co. v. Reid Motor Co., 216 N.C. 432, 5 S.E.2d 318 (1939).

The rule is that the evidence must be legally competent, and a finding based on incompetent evidence is not conclusive. Penland v. Bird Coal Co., 246 N.C. 26, 97 S.E.2d 432 (1957).

Where the facts are not in dispute, the effect to be given such facts is a matter of law reviewable on appeal. Perkins v. Sprott, 207 N.C. 462, 177 S.E. 404 (1934).

Court Is Not Bound by Facts Found under Misapprehension of Law. — In order to implement the remedial purposes of the Workmen's Compensation Act the Industrial Commission is constituted the fact-finding body, and the statute declares that the findings of the Commission shall be "conclusive and binding as to all questions of fact." But this does not mean that the conclusions of the Commission from the facts found are in all respects unexceptionable, and when facts are found by the Commission under a misapprehension of the law, the court is not bound by such findings. Cooper v. Colonial Ice Co., 230 N.C. 43, 51 S.E.2d 889 (1949); Hawes v. Mutual Benefit Health & Accident Ass'n, 243 N.C. 62, 89 S.E.2d 739 (1955).

Facts found by the Industrial Commission under a misapprehension of law are not binding on appeal. Whitted v. Palmer-Bee Co., 228 N.C. 447, 46 S.E.2d 109 (1948).

Findings Must Be Specific and Definite. — It is the duty of the Commission to make such specific and definite findings upon the evidence as will enable the court to determine whether the general findings or conclusions should stand. Singleton v. Durham Laundry Co., 213 N.C. 32, 195 S.E. 34 (1938).

The findings of fact of the Industrial Commission should tell the full story of the event giving rise to the claim for compensation. They must be sufficiently positive and specific to enable the court on appeal to determine whether they are supported by the evidence and whether the law has been properly applied to them. Thomason v. Red Bird Cab Co., 235 N.C. 602, 70 S.E.2d 706 (1952).

It is required that the Industrial Commission find all the crucial and specific facts upon which the right to compensation depends in order that it may be determined on appeal whether adequate basis exists for the ultimate findings as to whether plaintiff was injured by accident arising out of and in the course of his employment, but it is not required that the Commission make a finding as to each detail of the evidence or as to every shade of meaning to be drawn therefrom. Guest v. Brenner Iron & Metal Co., 241 N.C. 448, 85 S.E.2d 596 (1955).

Specific Findings and Inferences Therefrom Considered in Determining Factual Basis for Ultimate Finding. — When the specific, crucial findings of fact are made, and the Industrial Commission thereupon finds that plaintiff was injured by accident arising out of and in the course of his employment, the Supreme Court considers such specific findings of fact, together with every reasonable inference that may be drawn therefrom, in plaintiff's favor in determining whether there is a factual basis for such ultimate finding. Guest v. Brenner Iron & Metal Co., 241 N.C. 448, 85 S.E.2d 596 (1955); Clark v. Gastonia Ice Cream Co., 261 N.C. 234, 134 S.E.2d 354 (1964).

Finding Too Indefinite to Serve as Basis for Valid Award. — Where it was found by the Commission that the deceased was killed while acting either as deputy sheriff or jailer, the court held that the finding was too indefinite to serve as a basis for a valid award. Gowens v. Alamance County, 214 N.C. 18, 197 S.E. 538 (1938), decided prior to the 1939 amendment to § 97-2.

The finding of the Industrial Commission that deceased was an employee of defendant at the time of his fatal injury is conclusive on the courts if supported by competent evidence, notwithstanding that the court might have reached a different conclusion if it had been the fact-finding body. Cloninger v. Ambrosia Cake Bakery Co., 218 N.C. 26, 9 S.E.2d 615 (1940).

But see Francis v. Carolina Wood Turning Co., 204 N.C. 701, 169 S.E. 654 (1933), wherein it was held that the finding by the Commission on the question of whether the claimant was an employee was one of jurisdiction and not conclusive on appeal.

The relationship of employer and employee created by the facts found by the Commission is a question of law and the conclusion of the Commission based on those facts is reviewable. Hawes v. Mutual Benefit Health & Accident Ass'n, 243 N.C. 62, 89 S.E.2d 739 (1955).

Whether an accident was proximately

caused by the violation of a safety statute is a question for the fact-finding body. Osborne v. Colonial Ice Co., 249 N.C. 387, 106 S.E.2d 573 (1959).

Finding of fact that the superior of an injured workman was a supervisory employee and not an independent contractor is conclusive on appeal when supported by competent evidence. Scott v. Waccamaw Lumber Co., 232 N.C. 162, 59 S.E.2d 425 (1950).

Question Whether Claimant Was Employed by Defendant. — In Farmer v. Bemis Lumber Co., 217 N.C. 158, 7 S.E.2d 376 (1940), the Supreme Court recognized that the question of whether claimant was employed by defendant or by an independent subcontractor, as contended, was one of law, and reviewable, once the facts as to the arrangements between the parties and their actions with reference to it had been determined by the Commission.

Finding as to Cause of Death. — Determination of the Industrial Commission that additional hazard created by artificial heat was the direct and superinducing cause of plaintiff's intestate's death was conclusive on appeal. Fields v. Tompkins-Johnston Plumbing Co., 224 N.C. 841, 32 S.E.2d 623 (1945).

Procedure Provided by Section Must Be Followed. — When the applicable statute provides an appeal from an administrative agency, the procedure provided in the act must be followed. McDowell v. Town of Kure Beach, 251 N.C. 818, 112 S.E.2d 390 (1960).

Hence, a writ of certiorari cannot be used as a substitute for an appeal either before or after the time for appeal has expired. McDowell v. Town of Kure Beach, 251 N.C. 818, 112 S.E.2d 390 (1960).

The statutes regulating appeals from a justice of the peace are applicable and control in appeals from the Industrial Commission to the superior court [now the Court of Appeals], this section failing to provide the procedure for such appeals. Higdon v. Nantahala Power & Light Co., 207 N.C. 39, 175 S.E. 710 (1934).

Since the Workmen's Compensation Act does not provide any specific machinery governing appeals to the superior court [now the Court of Appeals], resort may be had to statutes regulating appeals in analogous cases, ordinarily those regulating appeals from a justice of the peace, so far as same are reasonably applicable and consonant with the language of the statute and the legislative intent. Summerell v. Chilean Nitrate Sales Corp., 218 N.C. 451, 11 S.E.2d 304 (1940).

But This Rule Refers Only to Mechanics of Appeal. — While the Workmen's Compensation Act does not set out with particularity the procedure on appeal, it has been held by the Supreme Court that by analogy that prescribed for appeals from judgments of justices of the peace, when practical, should apply; but this rule refers only to the mechanics of appeal, as to notice and docketing, for the appeal from the Industrial Commission is only on matters of law and not de novo. Fox v. Cramerton Mills, 225 N.C. 580, 35 S.E.2d 869 (1945).

In Winslow v. Carolina Conference Ass'n, 211 N.C. 571, 191 S.E. 403 (1937), it is said that statutory provisions with respect to appeals from judgments of justices of the peace to the superior court [now the Court of Appeals], where the trial must be de novo, are not controlling with respect to appeals from awards of the Industrial Commission to superior court [now Court of Appeals], where only errors of law appearing in the record may be considered.

Time for Docketing Appeal. — See Summerell v. Chilean Nitrate Sales Corp., 218 N.C. 451, 11 S.E.2d 304 (1940), decided prior to the 1967 amendment.

Notice of Appeal. — See Higdon v. Nantahala Power & Light Co., 207 N.C. 39, 175 S.E. 710 (1934); Johnson v. Foreman-Blades Lumber Co., 216 N.C. 123, 4 S.E.2d 334 (1939), decided prior to the 1967 amendment.

Time within Which Assignment of Error Must Be Filed. — See Wilson v. Utah Constr. Co., 243 N.C. 96, 89 S.E.2d 864 (1955), decided prior to the 1967 amendment.

Record on Appeal. — See Anderson v. Wray Plumbing & Heating Co., 238 N.C. 138, 76 S.E.2d 458 (1953), decided prior to the 1967 amendment.

Time within Which Transcript of Record Must Be Filed. — See Winslow v. Carolina Conference Ass'n, 211 N.C. 571, 191 S.E. 403 (1937), decided prior to the 1967 amendment.

Right to Reverse and Remand Cause. — Where all the facts are admitted and the Industrial Commission denies compensation on the facts as a matter of law, the superior court [now the Court of Appeals], on appeal, has jurisdiction, in view of this section, to reverse the Industrial Commission and remand the cause. Perkins v. Sprott, 207 N.C. 462, 177 S.E. 404 (1934).

Remand on Ground of Newly Discovered Evidence. — When a proceeding for compensation under the provisions of this act has been duly docketed in the superior court [now the Court of Appeals], upon an appeal from an award of the Industrial Commission, the superior court [now the Court of Appeals] has the power in a proper case to order a rehearing of the proceeding by the Industrial Commission on the ground of newly discovered evidence, and to that end to remand the proceeding to the Commission. Byrd v. Gloucester Lumber Co., 207 N.C. 253, 176 S.E. 572 (1934); McCulloh v. Catawba College, 266 N.C. 513, 146 S.E.2d 467 (1966); Hall v. W.A. Davis Milling Co., 1 N.C. App. 380, 161 S.E.2d 780 (1968).

The burden is upon the applicant for a rehearing to rebut the presumption that the

award is correct and that there has been a lack of due diligence. McCulloh v. Catawba College, 266 N.C. 513, 146 S.E.2d 467 (1966); Hall v. W.A. Davis Milling Co., 1 N.C. App. 380, 161 S.E.2d 780 (1968).

Applicant for a rehearing makes out "a proper case" for the granting of a new hearing upon the ground of newly discovered evidence only when it appears by affidavit: (1) That the witness will give the newly discovered evidence; (2) that it is probably true; (3) that it is competent, material, and relevant; (4) that due diligence has been used and the means employed, or that there has been no laches, in procuring the testimony at the trial; (5) that it is not merely cumulative; (6) that it does not tend only to contradict a former witness or to impeach or discredit him; (7) that it is of such a nature as to show that on another trial a different result will probably be reached and that the right will prevail. McCulloh v. Catawba College, 266 N.C. 513, 146 S.E.2d 467 (1966); Hall v. W.A. Davis Milling Co., 1 N.C. App. 380, 161 S.E.2d 780 (1968).

The appellate court may remand a cause to the Industrial Commission on the ground of newly discovered evidence only when a proper case is made to appear by affidavit meeting the seven requirements set out in Johnson v. Seaboard Air Line Ry., 163 N.C. 431, 79 S.E. 690, 1915B Ann. Cas. 598 (1913). Byers v. North Carolina State Highway Comm'n, 3 N.C. App. 139, 164 S.E.2d 535 (1968).

Remand Where Commission Fails to Find Facts. — Where the Commission fails to find facts and justice demands, the cause will be remanded. Stanley v. Hyman-Michaels Co., 222 N.C. 257, 22 S.E.2d 570 (1942).

Where the Industrial Commission failed to find the facts necessary for a determination of the rights of the parties, the judgment of the superior court [now the Court of Appeals] was reversed in order that it could remand to the Industrial Commission with directions to make necessary findings of fact on which the rights of the parties could be determined. Moore v. Adams Elec. Co., 259 N.C. 735, 131 S.E.2d 356 (1963).

Remand Where Facts Found under Misapprehension of Law. — Where it appears that the Industrial Commission has found the facts under a misapprehension of the law, the cause will be remanded for findings by the Commission upon consideration of the evidence in its true legal light. McGill v. Town of Lumberton, 215 N.C. 752, 3 S.E.2d 324 (1939); Nello L. Teer Co. v. North Carolina State Highway Comm'n, 265 N.C. 1, 143 S.E.2d 247 (1965).

Remand Where Findings Insufficient. — When the findings of the Industrial Commission are insufficient for a proper determination of the question involved, the proceeding will be remanded to the Industrial Commission for additional findings. Farmer v. Bemis Lumber Co., 217 N.C. 158, 7 S.E.2d 376 (1940); Thomason v. Red Bird Cab Co., 235 N.C. 602, 70 S.E.2d 706 (1952); Pardue v. Blackburn Bros. Oil & Tire Co., 260 N.C. 413, 132 S.E.2d 747 (1963).

If the findings of fact of the Commission are insufficient to enable the court to determine the rights of the parties upon the matters in controversy the proceeding must be remanded to the end that the Commission make proper findings. Pardue v. Blackburn Bros. Oil & Tire Co., 260 N.C. 413, 132 S.E.2d 747 (1963); Byers v. North Carolina State Highway Comm'n, 3 N.C. App. 139, 164 S.E.2d 535 (1968); Morgan v. Thomasville Furniture Indus., 2 N.C. App. 126, 162 S.E.2d 619 (1968).

In case the findings are insufficient upon which to determine the rights of the parties, the Court of Appeals may remand the proceeding to the Industrial Commission for additional findings. Byers v. North Carolina State Highway Comm'n, 275 N.C. 229, 166 S.E.2d 649 (1969); Hales v. North Hills Constr. Co., 5 N.C. App. 564, 169 S.E.2d 24 (1969); Crawford v. Pressley, 6 N.C. App. 641, 171 S.E.2d 197 (1969).

Remand for More Complete Findings. — Where the Commission's findings of fact are supported by competent evidence, the superior court [now the Court of Appeals] has no power to remand for more complete findings. Blevins v. Teer, 220 N.C. 135, 16 S.E.2d 659 (1941).

Remand for Specific Findings. — Stipulations to the effect that plaintiff employee became disabled while at work are insufficient alone to support an award of compensation, and a case is properly remanded to the Industrial Commission for specific findings from the evidence and stipulations as to whether claimant was injured by accident. Hargus v. Select Foods, Inc., 271 N.C. 369, 156 S.E.2d 737 (1967).

Remand for Taking of Additional Evidence. — Ordinarily the limited authority of the reviewing court does not permit it to order remand of the case for the taking of additional evidence. Byers v. North Carolina State Highway Comm'n, 3 N.C. App. 139, 164 S.E.2d 535 (1968).

Recovery in Wrongful Death Action Not Exempt from Disbursement by Commission. —There is no authority either in the statutes or in case law for holding recovery in a wrongful death action is exempt from disbursement by the Industrial Commission if the Workmen's Compensation Act is applicable to the injured employee. Byers v. North Carolina State Highway Comm'n, 275 N.C. 229, 166 S.E.2d 649 (1969).

It is error for the court to direct an award for compensation. The correct procedure is to remand the case to the Industrial Commission. Francis v. Wood Turning Co., 204 N.C. 701, 169

S.E. 654 (1933), decided prior to the 1967 amendment.

Surrender of Jurisdiction by Court. — When a proceeding is remanded to the Commission for a specific purpose, the superior court [now the Court of Appeals] surrenders jurisdiction and the Commission acquires it for all purposes. Butts v. Montague Bros., 208 N.C. 186, 179 S.E. 799 (1935).

Judgment Should Refer to Specific Assignments of Error. — Where upon an appeal from the Industrial Commission the exceptions point out specific assignments of error, the judgment in the superior court [now the Court of Appeals] thereon properly should overrule or sustain respectively each of the exceptions on matters of law thus designated. And where the judgment in the superior court [now the Court of Appeals] merely decreed that the award be in all respects affirmed, the Supreme Court will presume that the judge below considered each of the assignments of error and overruled them. Fox v. Cramerton Mills, 225 N.C. 580, 35 S.E.2d 869 (1945).

Applied in Smith v. S.E. Hauser & Co., 206 N.C. 562, 174 S.E. 455 (1934); Latham v. Southern Fish & Grocery Co., 208 N.C. 505, 181 S.E. 640 (1935).

Cited in Early v. W.H. Basnight & Co., 214 N.C. 103, 198 S.E. 577 (1938); Raynor v. Commissioners for Town of Louisburg, 220 N.C. 348, 17 S.E.2d 495 (1941); Champion v. Vance County Bd. of Health, 221 N.C. 96, 19 S.E.2d 239 (1942); Worley v. Pipes, 229 N.C. 465, 50 S.E.2d 504 (1948); Pratt v. Central Upholstery Co., 252 N.C. 716, 115 S.E.2d 27 (1960); State ex rel. North Carolina Util. Comm'n v. Old Fort Finishing Plant, 264 N.C. 416, 142 S.E.2d 8 (1965); Martin v. Georgia-Pacific Corp., 5 N.C. App. 37, 167 S.E.2d 790 (1969).

§ 97-87. Filing agreements approved by Commission or awards; judgment in accordance therewith; discharge or restoration of lien.—Any party in interest may file in the superior court of the county in which the injury occurred a certified copy of a memorandum of agreement approved by the Commission, or of an order or decision of the Commission, or of an award of the Commission unappealed from or of an award of the Commission affirmed upon appeal, whereupon said court shall render judgment in accordance therewith, and notify the parties. Such judgment shall have the same effect, and all proceedings in relation thereto shall thereafter be the same, as though said judgment had been rendered in a suit duly heard and determined by said court: Provided, if the judgment debtor shall file a certificate duly issued by the Industrial Commission showing compliance with G.S. 97-93 with the clerk of the superior court in the county or counties where such judgment is docketed, then such clerk shall make upon the judgment roll an entry showing the filing of such certificate which shall operate as a discharge of the lien of the said judgment, and no execution shall be issued thereon; provided, further, that if at any time there is default in the payment of any installment due under the award set forth in said judgment the court may, upon application for cause and after 10 days' notice to judgment debtor, order the lien of such judgment restored, and execution may be immediately issued thereon for past due installments and for future installments as they may become due. (1929, c. 120, s. 61.)

Remedy Exclusive. — The Workmen's Compensation Act does not provide for the enforcement of an award of the Industrial Commission by execution or otherwise. Nor does it authorize or contemplate the institution and maintenance of a civil action based on such award. The exclusive remedy of plaintiff (claimant) in a proceeding under the Workmen's Compensation Act is that provided by this section. Bryant v. Poole, 261 N.C. 553, 135 S.E.2d 629 (1964).

Where No Appeal Taken. — The procedure for the enforcement of an award of the Industrial Commission when no appeal is taken therefrom is by filing a certified copy of the award in the superior court, whereupon said court shall render judgment in accordance therewith and notify the parties. Champion v. Vance County Bd. of Health, 221 N.C. 96, 19 S.E.2d 239 (1942).

Section Refers to Judgment of Superior Court.— The text of this section is clear. The judgment referred to therein is a judgment of the superior court, not an award of the Industrial Commission. Bryant v. Poole, 261 N.C. 553, 135 S.E.2d 629 (1964).

Mandamus to Compel County Board of Health to Pay Award. — Mandamus to compel a municipal corporation, governmental agency or public officer to pay a claim is equivalent to execution, and therefore a suit to compel a county board of health to pay an award rendered against it by the Industrial Commission from which no appeal was taken

will not lie until judgment on the award has been rendered by the superior court in accordance with the procedure outlined by this section. Champion v. Vance County Bd. of Health, 221 N.C. 96, 19 S.E.2d 239 (1942).

An agreement for the payment of compensation when approved by the Commission is as binding on the parties as an order, decision or award of the Commission unappealed from, or an award of the Commission affirmed upon appeal. Tucker v. Lowdermilk, 233 N.C. 185, 63 S.E.2d 109 (1951); Tabron v. Gold Leaf Farms, Inc., 269 N.C. 393, 152 S.E.2d 533 (1967); Hedgecock v. Frye, 1 N.C. App. 369, 161 S.E.2d 647 (1968).

Applied in Pratt v. Central Upholstery Co., 252 N.C. 716, 115 S.E.2d 27 (1960).

Cited in Biddix v. Rex Mills, Inc., 237 N.C. 660, 75 S.E.2d 777 (1953); Watkins v. Central Motor Lines, 279 N.C. 132, 181 S.E.2d 588 (1971).

§ 97-88. Expenses of appeals brought by insurers.—If the Industrial Commission at a hearing on review or any court before which any proceedings are brought on appeal under this Article, shall find that such hearing or proceedings were brought by the insurer and the Commission or court by its decision orders the insurer to make, or to continue payments of benefits, including compensation for medical expenses, to the injured employee, the Commission or court may further order that the cost to the injured employee of such hearing or proceedings including therein reasonable attorney's fee to be determined by the Commission shall be paid by the insurer as a part of the bill of costs. (1929, c. 120, s. 62; 1931, c. 274, s. 11; 1971, c. 500.)

Editor's Note. — This section formerly allowed costs in any proceeding found to have been prosecuted or defended without reasonable grounds to be thrown on the party so acting unreasonably. See 9 N.C.L. Rev. 407 commenting on change brought about by the 1931 amendment.

The 1971 amendment substituted "benefits, including compensation for medical expenses" for "compensation."

Validity. — This section is valid. Russell v. Western Oil Co., 206 N.C. 341, 174 S.E. 101 (1934).

This section is applicable only when proceedings are brought by the insurer and the court orders the insurer to make or to continue payments of compensation to the injured employee. Bowman v. Comfort Chair Co., 271 N.C. 702, 157 S.E.2d 378 (1967).

Jurisdiction of Industrial Commission. — The North Carolina Industrial Commission is a creature of the General Assembly and has a special or limited jurisdiction created by statute and confined to its terms. Ashley v. Rent-A-Car Co., 1 N.C. App. 171, 160 S.E.2d 521 (1968).

This section includes carriers, self insurers, and noninsurers. Morris v. Laughlin Chevrolet Co., 217 N.C. 428, 8 S.E.2d 484 (1940).

The costs may be assessed either by the Commission or by the court. Morris v. Laughlin Chevrolet Co., 217 N.C. 428, 8 S.E.2d 484 (1940).

Discretion of Court. — The power given the court under this section to order that the cost to the injured employee of such proceedings, including a reasonable attorney's fee to be determined by the Commission, shall be paid by the insurer as part of the bill of costs is within the discretion of the court, and an order appearing in the judgment will not be reviewed by the Supreme Court. Perdue v. State Bd. of Equalization, 205 N.C. 730, 172 S.E. 396 (1934).

When Section Inapplicable. — The portion of this section requiring defendant carrier to pay plaintiff's costs, including attorney's fee, incident to the appeal by defendants from the Commission to the superior court does not apply when the Supreme Court finds error in the Commission's decision in respect to the sole controversy presented by the appeal. Liles v. Faulkner Neon & Elec. Co., 244 N.C. 653, 94 S.E.2d 790 (1956); Barnhardt v. Yellow Cab Co., 266 N.C. 419, 146 S.E.2d 479 (1966).

The allowance of attorneys' fees to claimant's attorneys in a proceeding under the Workmen's Compensation Act was held authorized by this section. Brooks v. Carolina Rim & Wheel Co., 213 N.C. 518, 196 S.E. 835 (1938); Gant v. Crouch, 243 N.C. 604, 91 S.E.2d 705 (1956).

This section authorizes reasonable attorney's fees as a part of the bill of costs only when the decision orders the insurer to make, or to continue, payments of compensation to the injured employee. Ashley v. Rent-A-Car Co., 1 N.C. App. 171, 160 S.E.2d 521 (1968).

Although the Commission is authorized to approve fees received by attorneys for services rendered in workmen's compensation matters (§ 97-90), the only statutory authority to award fees as a part of the costs is contained in this section. Bowman v. Comfort Chair Co., 271 N.C. 702, 157 S.E.2d 378 (1967).

Affirmance by the full Commission of the hearing commissioner's findings of fact, conclusions, and award, and approval of a fee of $150.00 for claimant's counsel, in addition to the fee for claimant's counsel approved by the hearing commissioner, and an order that such

fee be assessed against defendant as a part of the costs of the appeal in accordance with the provisions of this section was not error. Bass v. Mecklenburg County, 258 N.C. 226, 128 S.E.2d 570 (1962).

Applied in Williams v. Thompson, 203 N.C. 717, 166 S.E. 906 (1932); Brooks v. Carolina Rim & Wheel Co., 213 N.C. 518, 196 S.E. 835 (1939); Swaney v. George Newton Constr. Co., 5 N.C. App. 520, 169 S.E.2d 90 (1969).

Cited in Petty v. Associated Transp., Inc., 276 N.C. 417, 173 S.E.2d 321 (1970).

§ 97-89. Commission may appoint qualified physician to make necessary examinations; expenses; fees.—The Commission or any member thereof may, upon the application of either party, or upon its own motion, appoint a disinterested and duly qualified physician or surgeon to make any necessary medical examination of the employee, and to testify in respect thereto. Said physician or surgeon shall be allowed traveling expenses and a reasonable fee to be fixed by the Commission, not exceeding ten dollars ($10.00) for each examination and report, but the Commission may allow additional reasonable amounts in extraordinary cases. The fees and expenses of such physician or surgeon shall be paid by the employer. (1929, c. 120, s. 63; 1931, c. 274, s. 12.)

§ 97-90. Legal and medical fees to be approved by Commission; misdemeanor to receive fees unapproved by Commission, or to solicit employment in adjusting claims; agreement for fee or compensation.—(a) Fees for attorneys and physicians and charges of hospitals for services and charges for nursing services, medicines and sick travel under this Article shall be subject to the approval of the Commission; but no physician shall be entitled to collect fees from an employer or insurance carrier until he has made the reports required by the Industrial Commission in connection with the case.

(b) Any person (i) who receives any fee, other consideration, or any gratuity on account of services so rendered, unless such consideration or gratuity is approved by the Commission or such court, or (ii) who makes it a business to solicit employment for a lawyer or for himself in respect of any claim or award for compensation, shall be guilty of a misdemeanor, and upon conviction thereof shall, for each offense, be punished by a fine of not more than five hundred dollars ($500.00) or by imprisonment not to exceed one year, or by both such fine and imprisonment.

(c) If an attorney has an agreement for fee or compensation under this Article, he shall file a copy or memorandum thereof with the hearing officer or Commission prior to the conclusion of the hearing. If the agreement is not considered unreasonable, the hearing officer or Commission shall approve it at the time of rendering decision. If the agreement is found to be unreasonable by the hearing officer or Commission, the reasons therefor shall be given and what is considered to be a reasonable fee allowed. If within five days after receipt of notice of such fee allowance, the attorney shall file notice of appeal to the full Commission, the full Commission shall hear the matter and determine whether or not the attorney's agreement as to a fee or the fee allowed is unreasonable. If the full Commission is of the opinion that such agreement or fee allowance is unreasonable and so finds, then the attorney may, by filing written notice of appeal within 10 days after receipt of such action by the full Commission, appeal to the resident judge of the superior court or the judge holding the courts of the district of or in the county in which the cause of action arose or in which the claimant resides; and upon such appeal said judge shall consider the matter and determine in his discretion the reasonableness of said agreement or fix the fee and direct an order to the Commission following his determination therein. The Commission shall, within 20 days after receipt of notice of appeal from its action concerning said agreement or allowance, transmit its findings and reasons as to its action concerning such agreement or allowance to the judge of the superior court designated in the notice of appeal. In all other cases where there is no agreement for fee or compensation, the attorney or claimant may, by filing written notice of appeal within five days after receipt of notice of action of the full Commission with respect to

attorneys' fees, appeal to the resident judge of the superior court or the judge holding the courts of the district of the county in which the cause arose or in which the claimant resides; and upon such appeal said judge shall consider the matter of such fee and determine in his discretion the attorneys' fees to be allowed in the cause. The Commission shall, within 20 days after notice of appeal has been filed, transmit its findings and reasons as to its action concerning such fee or compensation to the judge of the superior court designated in the notice of appeal; provided that the Commission shall in no event have any jurisdiction over any attorneys' fees in any third-party action.

(d) Provided, that nothing contained in this section shall prevent the collection of such reasonable fees of physicians and charges for hospitalization as may be recovered in an action, or embraced in settlement of a claim, against a third-party tort-feasor as described in G.S. 97-10. (1929, c. 120, s. 64; 1955, c. 1026, s. 4; 1959, cc. 1268, 1307.)

Cross References. — For related subject in reference to fees of physicians and hospital charges, see § 97-26. As to attorney's fees as costs in certain appeals, see § 97-88.

Editor's Note. — G.S. 97-10, cited at the end of subsection (d), has been repealed and §§ 97-10.1 through 97-10.3 inserted in lieu thereof.

Agreement by Employee to Pay Physician Held Void. — An agreement by an injured employee to pay the physician engaged by him any balance due on his account after application of the amount approved by the Industrial Commission for the services is unenforceable and void, since this section makes the receipt of any fee for such services not approved by the Commission a misdemeanor. Worley v. Pipes, 229 N.C. 465, 50 S.E.2d 504 (1948).

The sole remedy of a physician to recover for services rendered to an injured employee in cases where the employee and his employer are subject to the Workmen's Compensation Act is by application to the Industrial Commission in accordance with the act, with right of appeal to the courts for review, and this remedy is exclusive. This decision is equally applicable to charges for hospital services rendered to employees in workmen's compensation cases. Wake County Hosp. Sys., Inc. v. North Carolina Indus. Comm'n, 8 N.C. App. 259, 174 S.E.2d 292 (1970).

Remedy Where Physician's Bill Approved for Less than Full Amount. — Where a physician has submitted his bill to the Industrial Commission for its approval, and received approval for less than the full amount, his remedy is to request a hearing before the Commission with the right of appeal to the courts under §§ 97-83 through 97-86, and this remedy is exclusive. Worley v. Pipes, 229 N.C. 465, 50 S.E.2d 504 (1948). See Matros v. Owen, 229 N.C. 472, 50 S.E.2d 509 (1949).

Independent Action by Physician against Employee. — Where a physician has submitted his bill to the Industrial Commission for its approval, and received approval for less than the full amount, and has failed to pursue his exclusive statutory remedy of a hearing before the Industrial Commission with the right of appeal to the courts under §§ 97-83 through 97-86, he has no standing to attack the constitutionality of this section in an independent suit against the employee to recover for the medical services. Worley v. Pipes, 229 N.C. 465, 50 S.E.2d 504 (1948). See Matros v. Owen, 229 N.C. 472, 50 S.E.2d 509 (1949).

Review of Medical Fees by Commission. — Persons who disagree with the allowance of medical fees in any case may make application for and obtain a full review of the matter before the Commission as in all other cases provided. Wake County Hosp. Sys., Inc. v. North Carolina Indus. Comm'n, 8 N.C. App. 259, 174 S.E.2d 292 (1970).

Review of Commission's Decision as to Attorney's Fee. — Before the first 1959 amendment, which added subsection (c) to this section, it was held that the provisions of this section that the Industrial Commission approve fees for attorneys implied the exercise of discretion and judgment by the Commission, and that the superior court on appeal was without power to hear evidence upon the question and strike out the fee allowed by the Commission and approve a fee in a different amount. Brice v. Robertson House Moving, Wrecking & Salvage Co., 249 N.C. 74, 105 S.E.2d 439 (1958).

Question Presented by Action Challenging Schedule of Hospital Charges Is Determinable by Commission. — An action by a nonprofit hospital which challenged the validity of the schedule of hospital charges approved by the Industrial Commission in the treatment of workmen's compensation cases presents a question arising under the Workmen's Compensation Act which is determinable by the Commission. Wake County Hosp. Sys., Inc. v. North Carolina Indus. Comm'n, 8 N.C. App. 259, 174 S.E.2d 292 (1970).

Fees in Special Hardship Cases. — The fees prescribed by the Commission shall govern except that in special hardship cases where sufficient reason therefor is demonstrated to the Commission, fees in excess of those

published may be allowed. Wake County Hosp. Sys., Inc. v. North Carolina Indus. Comm'n, 8 N.C. App. 259, 174 S.E.2d 292 (1970).

Applied in Salmons v. E.L. Trogden Lumber Co., 1 N.C. App. 390, 161 S.E.2d 632 (1968); Priddy v. Blue Bird Cab Co., 2 N.C. App. 331, 163 S.E.2d 20 (1968).

Stated in Hatchett v. Hitchcock Corp., 240 N.C. 591, 83 S.E.2d 539 (1954).

§ 97-91. Commission to determine all questions.—All questions arising under this Article if not settled by agreements of the parties interested therein, with the approval of the Commission, shall be determined by the Commission, except as otherwise herein provided. (1929, c. 120, s. 65.)

"Questions arising under this Article" would seem to consist primarily, if not exclusively, of questions for decision in the determination of rights asserted by or on behalf of an injured employee or his dependents. Clark v. Gastonia Ice Cream Co., 261 N.C. 234, 134 S.E.2d 354 (1964).

This section is not limited in its application solely to questions arising out of an employer-employee relationship or in the determination of rights asserted by or on behalf of an injured employee. Wake County Hosp. Sys., Inc. v. North Carolina Indus. Comm'n, 8 N.C. App. 259, 174 S.E.2d 292 (1970).

Jurisdiction of Commission Exclusive. — In an action instituted in the superior court under the Declaratory Judgment Act or otherwise, when the pleadings disclose an employee-employer relationship exists so as to make the parties subject to the provisions of the Workmen's Compensation Act, dismissal is proper, for the Industrial Commission has exclusive jurisdiction in such cases. Cox v. Pitt County Transp. Co., 259 N.C. 38, 129 S.E.2d 589 (1963).

The Declaratory Judgment Act may not be used to determine whether or not the employer's insurance carrier is entitled to the right of subrogation against the funds received from the third-party tort-feasor, under the provisions of § 97-10.2, since the Industrial Commission has the exclusive original jurisdiction to determine the question. Cox v. Pitt County Transp. Co., 259 N.C. 38, 129 S.E.2d 589 (1963).

Original Jurisdiction of Workmen's Compensation Actions. — By statute the superior court is divested of original jurisdiction of all actions which come within the provisions of the Workmen's Compensation Act. Morse v. Curtis, 276 N.C. 371, 172 S.E.2d 495 (1970).

Questions Respecting Existence of Insurance and Liability of Insurance Carrier. — The Commission is specifically vested by statute with jurisdiction to hear "all questions arising under" the Workmen's Compensation Act. This jurisdiction under the statute ordinarily includes the right and duty to hear and determine questions of fact and law respecting the existence of insurance coverage and liability of the insurance carrier. Greene v. Spivey, 236 N.C. 435, 73 S.E.2d 488 (1952); Clark v. Gastonia Ice Cream Co., 261 N.C. 234, 134 S.E.2d 354 (1964).

But Greene v. Spivey, 236 N.C. 435, 73 S.E.2d 488 (1952) may not be considered authority for the proposition that the Commission has equitable jurisdiction to determine whether a compensation insurance policy should be reformed. Clark v. Gastonia Ice Cream Co., 261 N.C. 234, 134 S.E.2d 354 (1964).

The Workmen's Compensation Act does not confer upon the Commission, expressly or by implication, jurisdiction to determine, in a proceeding in which plaintiff asserts no claim against insurer, employer's asserted right to reform the policy and to recover from insurer the amount of plaintiff's award. Clark v. Gastonia Ice Cream Co., 261 N.C. 234, 134 S.E.2d 354 (1964).

The sole remedy of a physician to recover for services rendered to an injured employee in cases where the employee and his employer are subject to the Workmen's Compensation Act is by application to the Industrial Commission in accordance with the act, with right of appeal to the courts for review, and this remedy is exclusive. This decision is equally applicable to charges for hospital services rendered to employees in workmen's compensation cases. Wake County Hosp. Sys., Inc. v. North Carolina Indus. Comm'n, 8 N.C. App. 259, 174 S.E.2d 292 (1970).

Question Presented by Action Challenging Schedule of Hospital Charges Is Determinable by Commission.—An action by a nonprofit hospital which challenged the validity of the schedule of hospital charges approved by the Industrial Commission in the treatment of workmen's compensation cases presents a question arising under the Workmen's Compensation Act which is determinable by the Commission. Wake County Hosp. Sys., Inc. v. North Carolina Indus. Comm'n, 8 N.C. App. 259, 174 S.E.2d 292 (1970).

Applied in Worley v. Pipes, 229 N.C. 465, 50 S.E.2d 504 (1948).

§ 97-92. Employer's record and report of accidents; records of Commission not open to public; supplementary report upon termination of disability; penalty for refusal to make report; when insurance carrier

liable.—(a) Every employer shall hereafter keep a record of all injuries, fatal or otherwise, received by his employees in the course of their employment on blanks approved by the Commission. Within five days after the occurrence and knowledge thereof as provided in G.S. 97-22 of an injury to an employee, causing his absence from work for more than one day, a report thereof shall be made in writing and mailed to the Industrial Commission on blanks to be procured from the Commission for this purpose.

(b) The records of the Commission, insofar as they refer to accidents, injuries, and settlements shall not be open to the public, but only to the parties satisfying the Commission of their interest in such records and the right to inspect them.

(c) Upon the termination of the disability of the injured employee, or if the disability extends beyond a period of 60 days, then, also, at the expiration of such period the employer shall make a supplementary report to the Commission on blanks to be procured from the Commission for the purpose.

(d) The said report shall contain the name, nature, and location of the business of the employer and name, age, sex, and wages and occupation of the injured employee, and shall state the date and hour of the accident causing injury, the nature and cause of the injury, and such other information as may be required by the Commission.

(e) Any employer who refuses or neglects to make the report required by this section shall be liable for a penalty of not less than five dollars ($5.00) and not more than twenty-five dollars ($25.00) for each refusal or neglect. The fine herein provided may be assessed by the Commission in an open hearing, with the right of review and appeal as in other cases. In the event the employer has transmitted the report to the insurance carrier for transmission by such insurance carrier to the Industrial Commission, the insurance carrier willfully neglecting or failing to transmit the report shall be liable for the said penalty. (1929, c. 120, s. 66; 1945, c. 766.)

Cross References. — As to admissibility of employer's report in evidence of hearing, see also note to § 97-80. As to tabulation and publication of employers' reports in annual report of Commission, see § 97-81(b).

Report as Evidence. — The report signed by the manager of an incorporated employer and filed with the Industrial Commission, as required by this section, is competent upon the hearing and statements contained therein not within the personal knowledge of the manager are competent as an admission against interest. Carlton v. Bernhardt-Seagle Co., 210 N.C. 655, 188 S.E. 77 (1936).

Report as Claim. — Where the employer has filed a report with the Commission within the prescribed time upon verbal information elicited from the representative of the employee by its claim agent, the representative being unable to read or write, and, the employer admitting liability, the report has been filed with the Industrial Commission as a claim within one year from date of the accident and contains all facts necessary to make an award. Hanks v. Southern Pub. Util. Co., 210 N.C. 312, 186 S.E. 252 (1936). See note to § 97-24.

Applied in Whitted v. Palmer-Bee Co., 228 N.C. 447, 46 S.E.2d 109 (1948).

§ 97-93. Employers required to carry insurance or prove financial ability to pay for benefits.—Every employer who accepts the provisions of this Article relative to the payment of compensation shall insure and keep insured his liability thereunder in any authorized corporation, association, organization, or in any mutual insurance association formed by a group of employers so authorized, or shall furnish to the Industrial Commission satisfactory proof of his financial ability to pay direct the compensation in the amount and manner and when due, as provided for in this Article. In the latter case the Commission may require the deposit of an acceptable security, indemnity or bond to secure the payment of the compensation liabilities as they are incurred. (1929, c. 120, s. 67; 1943, c. 543.)

Cross Reference. — See note to § 97-103.

Editor's Note. — For comment on the provisions of this and other sections in relation to the law of contracts, see 13 N.C.L. Rev. 102.

The manifest legislative intent is that the employer's liability should be insured at all times. Moore v. Adams Elec. Co., 264 N.C. 667, 142 S.E.2d 659 (1965).

Employer Primarily Liable. — An award was entered in favor of the dependents of a deceased employee for payment of compensation in weekly installments for the death of the employee. After the insurance carrier had paid several installments, it defaulted in the payment of the balance because of insolvency. Under the provisions of the Workmen's Compensation Act the employer is primarily liable to the employee, which obligation is unimpaired by its contract with an insurer for insurance protection, or by the insurer's subrogation to the rights of the employer upon paying or assuming the payment of an award, and the employer is not relieved of its liability to the dependents of the deceased employee for the balance of the weekly payments because of the insolvency of the insurer. Roberts v. City Ice & Coal Co., 210 N.C. 17, 185 S.E. 438 (1936).

The employer, held liable for the balance of an award after the insolvency of the insurer, is not entitled to a credit for the amount paid the dependents out of the judgment against the third-person tort-feasor or for the amount paid plaintiff's attorneys in that action, the amount paid the dependents out of the judgment being an amount in addition to the award, and the award not being subject to reduction by such amount. Roberts v. City Ice & Coal Co., 210 N.C. 17, 185 S.E. 438 (1936).

Cancellation of Policy. — Employer's insurance policy was cancellable on 10 days' written notice. Notice was held effective from the time of receipt by insured, even though he mislaid it and never read it or knew its purport. Nor was the policy kept in force as to a later injured employee by failure of the carrier to give notice to the Industrial Commission or to the North Carolina Rating Bureau in accordance with their rules, even though the policy is made expressly subject to the law concerning cancellation notices. The rules of these bodies do not have the force of law as to such matters. Motsinger v. Perryman, 218 N.C. 15, 9 S.E.2d 511 (1940).

Quoted in Ashe v. Barnes, 255 N.C. 310, 121 S.E.2d 549 (1961).

Stated in Thompson's Dependents v. Johnson Funeral Home, 205 N.C. 801, 172 S.E. 500 (1934).

Cited in Matros v. Owen, 229 N.C. 472, 50 S.E.2d 509 (1948); Evans v. Tabor City Lumber Co., 232 N.C. 111, 59 S.E.2d 612 (1950).

§ 97-94. Employers required to give proof within 30 days that they have complied with preceding section; fine for not keeping liability insured; review; liability for compensation; failure to secure payment of compensation a misdemeanor.—(a) Every employer accepting the compensation provisions of this Article shall, within 30 days, after this Article takes effect, file with the Commission, in form prescribed by it, and thereafter, annually or as often as may be necessary, evidence of his compliance with the provisions of G.S. 97-93 and all others relating thereto.

(b) Any employer required to secure the payment of compensation under this Article who refuses or neglects to secure such compensation shall be punished by a fine of ten cents (10¢) for each employee, but not less than one dollar ($1.00) nor more than fifty dollars ($50.00) for each day of such refusal or neglect, and until the same ceases; and he shall be liable during continuance of such refusal or neglect to an employee either for compensation under this Article or at law in the same manner as provided in G.S. 97-14.

The fine herein provided may be assessed by the Commission in an open hearing, with the right of review and appeal as in other cases.

(c) Any employer required to secure the payment of compensation under this Article who wilfully refuses or neglects to secure such compensation shall be guilty of a misdemeanor and upon conviction shall be fined or imprisoned, or both, in the discretion of the court. (1929, c. 120, s. 68; 1945, c. 766; 1963, c. 499.)

Quoted in Roberts v. City Ice & Coal Co., 210 N.C. 17, 185 S.E. 438 (1936).

§ 97-95. Actions against employers failing to effect insurance or qualify as self-insurer.—As to every employer subject to the provisions of this Article who shall fail or neglect to keep in effect a policy of insurance against compensation liability arising hereunder with some insurance carrier as provided in G.S. 97-93, or who shall fail to qualify as a self-insurer as provided in the Article, in addition to other penalties provided by this Article, such employer shall be liable in a civil action which may be instituted by the

claimant for all such compensation as may be awarded by the Industrial Commission in a proceeding properly instituted before said Commission, and such action may be brought by the claimant in the county of his residence or in any county in which the defendant has any property in this State; and in said civil action, ancillary remedies provided by law in civil actions of attachment, receivership, and other appropriate ancillary remedies shall be available to plaintiff therein. Said action may be instituted before the award shall be made by the Industrial Commission in such case for the purpose of preventing the defendant from disposing of or removing from the State of North Carolina for the purpose of defeating the payment of compensation any property which the defendant may own in this State. In said action, after being instituted, the court may, after proper amendment to the pleadings therein, permit the recovery of a judgment against the defendant for the amount of compensation duly awarded by the North Carolina Industrial Commission and subject any property seized in said action for payment of the judgment so awarded. The institution of said action shall in no wise interfere with the jurisdiction of said Industrial Commission in hearing and determining the claim for compensation in full accord with the provisions of this Article. Nothing in this section shall be construed to limit or abridge the rights of an employee as provided in subsection (b) of G.S. 97-94. (1941, c. 352.)

Section Held Valid. — This section was held valid as applied to a claim arising and an award made before its passage. Byrd v. Johnson, 220 N.C. 184, 16 S.E.2d 843 (1941).

This section affects procedure only and does not disturb any vested rights. It must be construed prospectively and not retrospectively. Byrd v. Johnson, 220 N.C. 184, 16 S.E.2d 843 (1941).

Attachment. — The provisions of this section, in force from its ratification on March 15, 1941, were available to claimants who instituted a civil action alleging that the Industrial Commission had awarded them compensation in a stipulated sum on March 24, 1941, that defendant employer had failed and neglected to keep in effect a policy of compensation insurance and had failed to qualify as a self-insurer, that defendant was disposing of and removing all his property from the State, and praying that a warrant of attachment issue against defendant's property. The warrant of attachment was issued, and defendant's exception to the refusal of the court to vacate it was held without merit. Byrd v. Johnson, 220 N.C. 184, 16 S.E.2d 843 (1941).

§ 97-96. Certificate of compliance with law; revocation and new certificate.—Whenever an employer has complied with the provisions of G.S. 97-93, relating to self-insurance, the Industrial Commission shall issue to such employer a certificate, which shall remain in force for a period fixed by the Commission, but the Commission may upon at least 60 days' notice and a hearing to the employer, revoke the certificate upon satisfactory evidence for such revocation having been presented. At any time after such revocation the Commission may grant a new certificate to the employer upon his petition. (1929, c. 120, s. 69.)

§ 97-97. Insurance policies must contain clause that notice to employer is notice to insurer, etc.—All policies insuring the payment of compensation under this Article must contain a clause to the effect that, as between the employer and the insurer the notice to or acknowledgment of the occurrence of the injury on the part of the insured employer shall be deemed notice or knowledge as the case may be, on the part of the insurer; that jurisdiction of the insured for the purposes of this Article shall be jurisdiction of the insurer, that the insurer shall in all things be bound by and subject to the awards, judgments, or decrees rendered against such insured employer, and that insolvency or bankruptcy of the employer and/or discharge therein shall not relieve the insurer from the payment of compensation for disability or death sustained by an employee during the life of such policy or contract. (1929, c. 120, s. 70.)

§ 97-98. Policy must contain agreement promptly to pay benefits;

continuance of obligation of insurer in event of default.—No policy of insurance against liability arising under this Article shall be issued unless it contains the agreement of the insurer that it will promptly pay to the person entitled to same all benefits conferred by this Article, and all installments of the compensation that may be awarded or agreed upon, and that the obligation shall not be affected by any default of the insured after the injury or by any default in giving notice required by such policy or otherwise. Such agreement shall be construed to be a direct promise by the insurer to the person entitled to compensation enforceable in his name. (1929, c. 120, s. 71.)

Cross References. — As to cancellation of policies, see note to § 97-93. As to "The Stock Workmen's Compensation Security Fund," see § 97-107.

Under this section, an employee has the right to enforce the insurance contract made for his benefit. Hartsell v. Thermoid Co., 249 N.C. 527, 107 S.E.2d 115 (1959).

Ambiguous Provisions Resolved against Carrier. — Ambiguous provisions must be resolved against the carrier. Kenan v. Duplin Motor Co., 203 N.C. 108, 164 S.E. 729 (1932). See Williams v. Ornamental Stone Co., 232 N.C. 88, 59 S.E.2d 193 (1950).

Carrier Estopped to Deny Existence of Master-Servant Relationship. — Where defendant carrier, at the request of employer, attached a rider to its policy covering "S, logging contractor," it is estopped to deny that plaintiff, who was working for S, was an employee of defendant. Greenway v. Riverside Mfg. Co., 206 N.C. 599, 175 S.E. 112 (1934).

Provision Reducing Carrier's Liability Where Employee Paid in Part by State. — Claimant was paid for janitorial work partly by the local board of education and partly by the State School Commission. He was injured while doing extra, after-hours work solely for and at the expense of the board. A stipulation in the insurance contract with the board reduced the carrier's liability where part of the employee's wage was paid by the State. This clause was held inapplicable to the instant case, since pay for the job in which he was injured was not shared by the State, even though the award was figured on the basis of his regular weekly wage which the State did share. Casey v. Board of Educ., 219 N.C. 739, 14 S.E.2d 853 (1941).

A somewhat similar liability-limiting indorsement on an insurance policy (set out in the case) was held not applicable to relieve the carrier where a teacher of vocational education was paid in part with funds supplied by the State. Callihan v. Board of Educ., 222 N.C. 381, 23 S.E.2d 297 (1942).

Policy Covering "Operations Conducted from" Main Place of Business. — Where a policy covered a Charlotte employer inter alia on "operations . . . conducted . . . from " the main place of business, it was proper for the Commission to find that an employee going daily to lay tile nearby in South Carolina and expected to report back at headquarters each evening, who was killed in North Carolina on such return journey, was within the policy, even though the tile company had a policy in another company covering its operations in South Carolina and the North Carolina carrier did not receive any premium for the South Carolina job. Mion v. Atlantic Marble & Tile Co., 217 N.C. 743, 9 S.E.2d 501 (1940).

Injury at Quarry 40 Miles from Employer's Main Plant. — A policy designated the operations of the insured as "concrete products mfg.—shop or yard work only," and gave as the location the address of the main plant of the insured. The policy covered injuries sustained by reason of the business operations, which were stated to include ". . . all operations necessary, incident or appurtenant thereto . . . whether such operations are conducted at the work places defined . . . or elsewhere . . . ." The policy further provided that no other business operations were covered. An injury received at defendant's quarry, 40 miles from the main plant, was held to be covered by this policy; it was "one of the work places of the company." Williams v. Ornamental Stone Co., 232 N.C. 88, 59 S.E.2d 193 (1950).

Quarrying Operations Carried on in Connection with Trucking Business. — Defendant carrier's policy covered defendant trucker's employees, including specifically blacksmiths and service away from the business headquarters. The employer not only hauled stone for others but, without disclosure to the carrier, operated a quarry from which he sold and delivered stone. Deceased employee, a blacksmith, worked at the quarry only but repaired some shovels and other tools used in connection with the trucking as well as the quarry machinery. He was on the general payroll. The policy provided for adjustment of the premiums on a payroll check-over made at the end of the policy period. It was held that the Commission's finding that the quarrying operations were carried on in connection with the trucking business and that the employee was covered by the policy was supported by competent evidence and was binding on the court. An award against the carrier was upheld. Miller v. Caudle, 220 N.C. 308, 17 S.E.2d 487 (1941).

Truck Driver Engaged in Unloading Logs. — It was found that defendant motor company did log hauling as an incident to its regular

business. A policy in terms covering injuries to drivers was held to cover plaintiff, a regularly employed truck driver, who was engaged in unloading logs for the motor company. The carrier had contended that injuries in this type of work were outside the policy. Kenan v. Duplin Motor Co., 203 N.C. 108, 164 S.E. 729 (1932).

Notice of Cancellation of Policy. — Where policy provided for 10 days' notice of cancellation and plaintiff was injured within 10 days from the day the employer received notice of cancellation but more than 10 days after such notice was mailed, the carrier is liable as the 10 days date from the time of receipt of the notice. Pettit v. Wood-Owen Trailer Co., 214 N.C. 335, 199 S.E. 279 (1938).

§ 97-99. Law written into each insurance policy; form of policy to be approved by Commissioner of Insurance; cancellation; single catastrophe hazards.—(a) Every policy for the insurance of the compensation herein provided, or against liability therefor, shall be deemed to be made subject to the provisions of this Article. No corporation, association or organization shall enter into any such policy of insurance unless its form shall have been approved by the Commissioner of Insurance. No policy form shall be approved unless the same shall provide a 30-day prior notice of an intention to cancel same by the carrier to the insured by registered mail or certified mail. This shall not apply to the expiration date shown in the policy. The carrier may cancel the policy for nonpayment of premium on 10 days' written notice to the insured, and the insured may cancel the policy on 10 days' written notice by registered mail or certified mail to the carrier. Whenever notice of intention to cancel is required to be given by registered or certified mail, no cancellation by the insurer shall be effective unless and until such method is employed and completed.

(b) This Article shall not apply to policies of insurance against loss from explosion of boilers or flywheels or other similar single catastrophe hazards: Provided, that nothing herein contained shall be construed to relieve the employer from liability for injury or death of an employee as a result of such explosion or catastrophe. (1929, c. 120, s. 72; 1945, c. 381, s. 1; 1959, c. 863, s. 5; 1967, c. 1218.)

Editor's Note. — By virtue of Session Laws 1943, c. 170, "Commissioner of Insurance" has been substituted for "Insurance Commissioner" in subsection (a).

Purpose of Notice. — The statutory requirement of 30 days' notice of intent to cancel was intended to assure an employer sufficient opportunity to procure other insurance. Moore v. Adams Elec. Co., 264 N.C. 667, 142 S.E.2d 659 (1965).

This section applies to all workmen's compensation insurance. Moore v. Adams Elec. Co., 264 N.C. 667, 142 S.E.2d 659 (1965).

All relevant provisions of the Workmen's Compensation Act become a part of each policy of insurance procured pursuant to the act. Hartsell v. Thermoid Co., 249 N.C. 527, 107 S.E.2d 115 (1959).

Whether Such Insurance Be Evidenced by Binder or by Policy. — See Moore v. Adams Elec. Co., 264 N.C. 667, 142 S.E.2d 659 (1965).

A valid binder for workmen's compensation insurance cannot be terminated except by the giving to the insured of the 30 days' notice required by this section for cancellation of a formal policy. Wiles v. Mullinax, 270 N.C. 661, 155 S.E.2d 246 (1967).

Insurer is not obligated to notify insured of date specified in contract for termination. But where termination results from insurer's affirmative action, he must give notice of the date when cancellation will become effective. Moore v. Adams Elec. Co., 264 N.C. 667, 142 S.E.2d 659 (1965).

Applied in Moore v. Adams Elec. Co., 259 N.C. 735, 131 S.E.2d 356 (1963).

Cited in Wiles v. Mullinax, 275 N.C. 473, 168 S.E.2d 366 (1969).

§ 97-100. Rates for insurance; carrier to make reports for determination of solvency; tax upon premium; returned or canceled premiums; reports of premiums collected; wrongful or fraudulent representation of carrier punishable as misdemeanor; notices to carrier; employer who carries own risk shall make report on payroll.—(a) The rates charged by all carriers of insurance, including the parties to any mutual insurance association writing insurance against the liability for compensation under this Article, shall be fair, reasonable, and adequate, with due allowance for merit rating; and all risks of the same kind and degree of hazard shall be written at the same rate

by the same carrier. No policy of insurance against liability for compensation under this Article shall be valid until the rate thereof has been approved by the Commissioner of Insurance; nor shall any such carrier of insurance write any such policy or contract until its basic and merit rating schedules have been filed with, approved, and not subsequently disapproved by the Commissioner of Insurance.

(b) Each such insurance carrier shall report to the Commissioner of Insurance, in accordance with such reasonable rules as the Commissioner of Insurance may at any time prescribe, for the purpose of determining the solvency of the carrier and the adequacy of its rates; for such purpose the Commissioner of Insurance may inspect the books and records of such insurance carrier, and examine its agents, officers, and directors under oath.

(c) Every person, partnership, association, corporation, whether organized under the laws of this or any other state or country, every mutual company or association and every other insurance carrier insuring employers in this State against liability for personal injuries to their employees, or death caused thereby, under the provisions of this Article, shall, as hereinafter provided, pay a tax upon the premium received, whether in cash or notes, in this State, or on account of business done in this State, for such insurance in this State, at the rate provided in the Revenue Act then in force, which tax shall be in lieu of all other taxes on such premiums, which tax shall be assessed and collected as hereinafter provided; provided, however, that such insurance carriers shall be credited with all canceled or returned premiums actually refunded during the year on such insurance.

(d) Every such insurance carrier shall, for the six months ending December 31, 1929, and annually thereafter, make a return, verified by the affidavit of its president and secretary, or other chief officers or agents, to the Commissioner of Insurance, stating the amount of all such premiums and credits during the period covered by such return. Every insurance carrier required to make such return shall file the same with the Commissioner of Insurance on or before the first day of April after the close of the period covered thereby, and shall at the same time pay to the State Insurance Commissioner the tax provided in the Revenue Act then in force on such premium ascertained, as provided in subsection (c) hereof, less returned premium on canceled policies.

(e) If any such insurance carrier shall fail or refuse to make the return required by this Article, the said Commissioner of Insurance shall assess the tax against such insurance carrier at the rate herein provided for, on such amount of premium as he may deem just, and the proceedings thereon shall be the same as if the return had been made.

(f) If any such insurance carrier shall withdraw from business in this State before the tax shall fall due, as herein provided, or shall fail or neglect to pay such tax, the Commissioner of Insurance shall at once proceed to collect the same; and he is hereby empowered and authorized to employ such legal process as may be necessary for that purpose, and when so collected he shall pay the same into the State treasury. The suit may be brought by the Commissioner of Insurance, in his official capacity, in any court of this State having jurisdiction. Reasonable attorney's fees may be taxed as costs therein, and process may issue to any county of the State, and may be served as in civil actions, or in case of unincorporated associations, partnerships, interindemnity contracts, upon any agent of the parties thereto upon whom process may be served under the laws of this State.

(g) Any person or persons who shall in this State act or assume to act as agent for any such insurance carrier whose authority to do business in this State has been suspended, while such suspension remains in force, or shall neglect or refuse to comply with any of the provisions of this section obligatory upon such person or party or who shall willfully make a false or fraudulent statement of the business or condition of any such insurance carrier, or false or

fraudulent return as herein provided, shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than one hundred ($100.00) nor more than one thousand dollars ($1,000), or by imprisonment for not less than 10 nor more than 90 days, or both such fine and imprisonment in the discretion of the court.

(h) Whenever by this Article, or the terms of any policy contract, any officer is required to give any notice to an insurance carrier, the same may be given by delivery, or by mailing by registered letter properly addressed and stamped, to the principal office or general agent of such insurance carrier within this State, or to its home office, or to the secretary, general agent, or chief officer thereof in the United States, or the State Insurance Commissioner.

(i) Any insurance carrier liable to pay a tax upon premiums under this Article shall not be liable to pay any other or further tax upon such premiums, under any other law of this State.

(j) Every employer carrying his own risk under the provisions of G.S. 97-93 shall, under oath, report to the Commission his payroll, subject to the provisions of this Article. Such report shall be made in form prescribed by the Commission, and at the times herein provided for premium reports by insurer. The Commission shall assess against such payroll a maintenance fund tax computed by taking such percent of the basic premiums charged against the same or most similar industry or business taken from the manual insurance rate then in force in this State as is assessed in the Revenue Act against the insurance carriers for premiums collected on compensation insurance policies. Receipts collected under this subsection shall be deposited to the credit of the State Treasurer as general fund revenue. (1929, c. 120, s. 73; 1931, c. 274, s. 13; 1947, c. 574; 1961, c. 833, s. 13.)

Cross Reference. — See also the Compensation Rating and Inspection Bureau Act, § 97-102 et seq.

Clause Stating That Policy Is Subject to Rates Promulgated by Insurance Commissioner. — Where a clause in an insurance policy states that the policy is subject to the rates promulgated by the Insurance Commissioner, such clause will be enforced. Travelers' Ins. Co. v. Murdock, 208 N.C. 223, 179 S.E. 886 (1935).

Money Received Under Subsection (j). — For case decided prior to the 1961 amendment, which added the last sentence to subsection (j), see North Carolina Indus. Comm'n v. O'Berry, 197 N.C. 595, 150 S.E. 44 (1929).

§ 97-101. Collection of fines and penalties.—The Industrial Commission shall have the power by civil action brought in its own name to enforce the collection of any fines or penalties provided by this Article, and fines or penalties collected by the Commission shall become a part of the maintenance fund referred to in subsection (j) of G.S. 97-100. (1931, c. 274, s. 14.)

Article 2.

Compensation Rating and Inspection Bureau.

§ 97-102. Compensation Rating and Inspection Bureau created; objects, functions, etc.; hearings where rates changed.—There is hereby created a bureau to be known as the Compensation Rating and Inspection Bureau of North Carolina, with the following objects, functions and sources of income:

(1) To maintain rules and regulations and fix premium rates for workmen's compensation insurance and equitably adjust the same as far as practicable, in accordance with the hazards of individual risks by inspection by the Bureau.

(2) To furnish upon request of any employer in the State of North Carolina or to any member of the Compensation Rating and Inspection Bureau of North Carolina, upon whose risk a compensation rate has been promulgated, information as to the rating including the method of its compilation, and to encourage employers to reduce the number and severity of accidents by adjusting premiums and rates, through

the use of credits and debits or other proper factors, under such uniform system of experience or other form of merit rating as may be approved by the Commissioner of Insurance.

(3) The Bureau shall make a rating survey of each risk inspected which survey shall clearly show the location of all ratable items; Provided, however, that the Bureau shall not describe the items or make any recommendations for accident prevention, such service being reserved as a proper and essential field for the competitive enterprise of its individual members.

(4) The Bureau shall provide reasonable means to be approved by the Commissioner whereby any person affected by a rate made by it may be heard in person or by his authorized representative before the governing or rating committee or other proper executive of the Bureau. (1931, c. 279, s. 1; 1945, c. 381, s. 1; 1953, c. 674, s. 2.)

Cross References. — As to Automobile Rate Administrative Office established in the Bureau created by this section, see § 58-246 et seq. As to validation of experience rating plans for workmen's compensation insurance in use prior to April 7, 1953, see § 58-248.7.

§ 97-103. Membership in Bureau of carriers of insurance; acceptance of rejected risks; rules and regulations for maintenance; Insurance Commissioner or deputy ex officio chairman.—(a) Before the Insurance Commissioner shall grant permission to any mutual association, reciprocal or stock company, or any other insurance organization to write compensation or employers' liability insurance in this State, it shall be a requisite that they shall subscribe to and become members of the Compensation Rating and Inspection Bureau of North Carolina.

(b) It shall be the duty of all companies underwriting workmen's compensation insurance in this State and being members of the Compensation Rating and Inspection Bureau of North Carolina, as defined in this section, to insure and accept any workmen's compensation insurance risk which shall have been tendered to and rejected by any three members of said Bureau in the manner hereinafter provided. When any such rejected risk is called to the attention of the Compensation Rating and Inspection Bureau of North Carolina and it appearing that said risk is in good faith entitled to such coverage, the Bureau shall fix the initial premium therefor, (subject to the approval of the Insurance Commissioner), and upon its payment said Bureau shall designate a member whose duty it shall be to issue a standard workmen's compensation policy of insurance containing the usual and customary provisions found in such policies therefor. Upon receipt of the required premium at the office of the Bureau during regular working hours the Bureau shall instruct the designated carrier to issue its policy of insurance to become effective as of 12:01 A.M. the following day, and the carrier shall be so bound; provided, that the carrier may request of the Bureau a certificate of the Department of Labor that the insured is complying with the laws, rules and regulations of that Department. Said certificate shall be furnished within 30 days by the Department of Labor, unless extension of time is granted by agreement between the Bureau and the Department of Labor. The Bureau shall within 30 days after March 8, 1935, make and adopt such rules as may be necessary to carry this Article into effect, subject to final approval of the Insurance Commissioner. As a prerequisite to the transaction of workmen's compensation insurance in this State every member of said Bureau shall file with the Insurance Commissioner written authority permitting said Bureau to act in its behalf as provided in this section, and an agreement to accept such risks as are assigned to said insurance by said Bureau, as provided in this section.

(c) Each member of the Compensation Rating and Inspection Bureau writing compensation insurance in the State of North Carolina shall, as a requisite thereto, be represented in the aforesaid Bureau and shall be entitled

to one representative and one vote in the administration of the affairs of the Bureau. They shall, upon organization, elect a governing committee, which governing committee shall be composed of equal representation by participating and nonparticipating members.

(d) The Bureau, when created, shall adopt such rules and regulations for its procedure as may be necessary for its maintenance and operation.

No such rules or regulations shall discriminate against any type of insurer because of its plan of operation, nor shall any insurer be prevented from returning any unused or unabsorbed premium, deposit, savings or earnings to its policyholders or subscribers. The expense of such Bureau shall be borne by its members by quarterly contributions to be made in advance, such necessary expense to be advanced by prorating such expense among the members in accordance with the amount of gross workmen's compensation premiums written in North Carolina during the preceding year ending December 31, 1930, and members entering since that date to advance an amount to be fixed by the governing committee. After the first fiscal year of operation of the Bureau the necessary expenses of the Bureau shall be advanced by the members in accordance with rules and regulations to be established and adopted by the governing committee.

(e) The Insurance Commissioner of the State of North Carolina, or such deputy as he may appoint, shall be ex officio chairman of the Compensation Rating and Inspection Bureau of North Carolina, and the Insurance Commissioner or such deputy designated by him shall preside over all meetings of the governing committee or other meetings of the Bureau and it shall be his duty to determine any controversy that may arise by reason of a tie vote between the members of the governing committee. (1931, c. 279, s. 2; 1935, c. 76; 1945, c. 381, s. 1.)

Employers may obtain assigned risk insurance if necessary to meet the requirement of § 97-93. Moore v. Adams Elec. Co., 264 N.C. 667, 142 S.E.2d 659 (1965).

Cited in Allstate Ins. Co. v. Lanier, 242 F. Supp. 73 (E.D.N.C. 1965).

§ 97-104. Governing committee; production of books and records for compilation of appropriate statistics; rates subject to approval of Insurance Commissioner.—In order to carry into effect the objects of this Article the Bureau members shall immediately elect its governing committee who shall employ and fix the salaries of such personnel and assistance as is necessary, subject to the approval of the Insurance Commissioner, and the Insurance Commissioner is hereby authorized to compel the production of books, data, papers, and records relating to or bearing upon such data as is necessary to compile statistics for the purpose of determining the pure cost and expense loading of workmen's compensation insurance in North Carolina and this information shall be available and for the use of the Compensation Rating and Inspection Bureau, for the compilation and promulgation of rates on workmen's compensation insurance. All such rates compiled and promulgated by such Bureau shall be submitted to the Insurance Commissioner for approval as provided in G.S. 97-100. (1931, c. 279, s. 3.)

§ 97-104.1. Commissioner can order adjustment of rates and modification of procedure.—Whenever the Commissioner, upon his own motion or upon petition of any aggrieved party, shall determine, after notice and a hearing, that the rates charged or filed on any class of risks are excessive, inadequate, unreasonable, unfairly discriminatory, or otherwise not in the public interest, or that a classification or classification assignment is unwarranted, unreasonable, improper or unfairly discriminatory he shall issue an order to the Bureau directing that such rates, classifications or classification assignments be altered or revised in the manner and to the extent

stated in such order to produce rates, classifications or classification assignments which are reasonable, adequate, not unfairly discriminatory, and in the public interest. (1945, c. 381, s. 1.)

§ 97-104.2. General provisions.—No insurer subject to this Article shall enter into any agreement for the purpose of making or establishing rates except in accordance with the provisions hereof. No member of the Bureau shall charge or receive any rate which deviates from the rates, rating plans, classifications, schedules, rules and standards made and filed by the Bureau. No insurer and no agent or other representative of any insurer and no insurance broker shall knowingly charge, demand or receive a rate or premiums which deviate from the rates, rating plans, classifications, schedules, rules and standards, made and last filed by or on behalf of the insurer, or issue or make any policy or contract involving a violation of such rate filings. (1945, c. 381, s. 1.)

This section is intended to prevent rebating and an unlawful discrimination and favoritism by insurance companies. Where there is nothing in the record suggestive of an intent by either party to violate the cited statutes, an otherwise valid compromise will not be avoided solely on the ground that it is contrary to public policy. There must be some fact on which the asserted invalidity can rest. Fidelity & Cas. Co. v. Nello L. Teer Co., 179 F. Supp. 538 (M.D.N.C. 1960), quoting Fidelity & Cas. Co. v. Nello L. Teer Co., 250 N.C. 547, 109 S.E.2d 171 (1959).

Agreement as to Unearned Premiums Not Contrary to Section. — Where dispute between insurer and insured as to the amount of premiums due is not based upon controversy as to the rates but solely as to credits for unearned premiums and overpayment of premiums, a compromise settlement cannot be avoided on the ground that it was contrary to this section, since such compromise does not rest upon a charge of premiums at rates less than those prescribed by statute. Fidelity & Cas. Co. v. Nello L. Teer Co., 250 N.C. 547, 109 S.E.2d 171 (1959).

§ 97-104.3. Commissioner can revoke license for violations.—If the Commissioner shall find, after due notice and hearing that any insurer, officer, agent or representative thereof has violated any of the provisions of this Article, he may issue an order revoking or suspending the license of any such insurer, agent, broker or representative thereof. (1945, c. 381, s. 1.)

§ 97-104.4. Violation a misdemeanor.—Any insurer, officer, agent or representative thereof failing to comply with, or otherwise violating any of the provisions of this Article, shall be guilty of a misdemeanor and upon conviction be punished by a fine of not less than one hundred dollars ($100.00) nor more than five hundred dollars ($500.00). (1945, c. 381, s. 1.)

§ 97-104.5. Appeal from decision of Commissioner.—A review of any order made by the Commissioner in accordance with the provisions of this Article, shall be by appeal to the Superior Court of Wake County in accordance with the provisions of G.S. 58-9.3. (1945, c. 381, s. 1.)

§ 97-104.6. Appeals from Bureau to Commissioner.—Any member of the Bureau may appeal to the Commissioner from any decision of such Bureau and the Commissioner shall, after a hearing held on not less than 10 days' written notice to the appellant and the Bureau, issue an order approving the decision of the Bureau or directing it to give further consideration to such proposal. In the event the Bureau fails to take satisfactory action, the Commissioner shall make such order as he may see fit. (1945, c. 381, s. 1.)

Article 3.

Security Funds.

§ 97-105. Title of Article.—This Article shall be known as the Workmen's Compensation Security Fund Act. (1935, c. 228, s. 1.)

§ 97-106. Definitions.—As hereafter used in this Article, unless the context or subject matter otherwise requires:

"Carrier" means either a stock carrier or a mutual carrier, as the context may require.

"Commissioner" means the Insurance Commissioner of this State.

"Fund" means either the stock fund or the mutual fund as the context may require.

"Funds" mean the stock fund and the mutual fund.

"Fund year" means the calendar year.

"Insolvent stock carrier" or "insolvent mutual carrier" means a stock carrier or a mutual carrier, as the case may be, which has been determined to be insolvent, or for which or for the assets of which a receiver has been appointed by a court or public officer of competent jurisdiction and authority.

"Mutual carrier" means any mutual corporation or association and any reciprocal or interinsurance exchange authorized to transact the business of workmen's compensation insurance in this State, except an insolvent mutual carrier.

"Mutual fund" means the Mutual Workmen's Compensation Security Fund created by this Article.

"Stock carrier" means any stock corporation authorized to transact the business of workmen's compensation insurance in this State, except an insolvent stock carrier.

"Stock fund" means the Stock Workmen's Compensation Security Fund created by this Article.

"Workmen's Compensation Act" means the Workmen's Compensation Act of the State of North Carolina, being G.S. 97-1 to 97-101 as amended and supplemented. (1935, c. 228, s. 2; 1941, c. 298, s. 1.)

§ 97-107. Stock Workmen's Compensation Security Fund created.—There is hereby created a fund to be known as "The Stock Workmen's Compensation Security Fund," for the purpose of assuring to persons entitled thereto the compensation provided by the Workmen's Compensation Act for employments insured in insolvent stock carriers. Such fund shall be applicable to the payment of valid claims for compensation or death benefits heretofore or hereafter made pursuant to the Workmen's Compensation Act, and remaining unpaid, in whole or in part, by reason of the default, after the effective date of this Article, of an insolvent stock carrier. Expenses of administration also shall be paid from the fund as herein provided. Such fund shall consist of all contributions received and paid into the fund by stock carriers, as herein defined, all property and securities acquired by and through the use of moneys belonging to the fund, and of interest earned upon moneys deposited or invested as herein provided. The fund shall be administered by the Commissioner of this State in accordance with the provisions of this Article. (1935, c. 228, s. 3.)

§ 97-108. Verified report of premiums to be filed by stock carrier.—Every stock carrier shall, on or before the first day of September, 1935, file with the Treasurer of the State and with the Commissioner identical returns, under oath, on a form to be prescribed and furnished by the Commissioner, stating the amount of net written premiums for the six months' period ending June 30, 1935 on policies issued, renewed or extended by such carrier, to insure payment of compensation pursuant to the Workmen's Compensation Act. For the purposes of this Article "net written premiums" shall mean gross written premiums less return premiums on policies returned not taken, and on policies canceled. Thereafter, on or before the first day of March and September of each year, each such carrier shall file similar identical returns, stating the amount of such net written premiums for the six months' period ending, respectively,

on the preceding December 31 and June 30, on policies issued, renewed or extended by such carrier. (1935, c. 228, s. 4.)

§ 97-109. Contributions by stock carriers of 1% of net written premiums.—For the privilege of carrying on the business of workmen's compensation insurance in this State, every stock carrier shall pay into the stock fund on the first day of September, 1935, a sum equal to one per centum (1%) of its net written premiums as shown by the return hereinbefore prescribed for the period ending June 30, 1935, and thereafter each such stock carrier, upon filing each semiannual return, shall pay a sum equal to one per centum (1%) of its net written premiums for the period covered by such return. (1935, c. 228, s. 5.)

§ 97-110. Contributions to stop when stock fund equals 5% of loss reserves; resumption of contributions.—When the aggregate amount of all such payments into the stock fund, together with accumulated interest thereon, less all its expenditures and known liabilities, becomes equal to five per centum (5%) of the loss reserves of all stock carriers for the payment of benefits under the Workmen's Compensation Act as of December 31, next preceding, no further contributions to said fund shall be required to be made; provided, however, that whenever, thereafter, the amount of said fund shall be reduced below five per centum (5%) of such loss reserves as of said date by reason of payments from and known liabilities of said stock fund, then such contribution to said fund shall be resumed forthwith, and shall continue until said fund, over and above its known liabilities, shall be equal to five per centum (5%) of such reserves. (1935, c. 228, s. 6.)

§ 97-111. Rules and regulations for administration of stock fund; examination of books and records; penalty for failure to file report or pay assessment; revocation of license.—The Commissioner may adopt, amend and enforce rules and regulations necessary for the proper administration of said stock fund. In the event any stock carrier shall fail to file any return or make any payment required by this Article, or in case the Commissioner shall have cause to believe that any return or other statement filed is false or inaccurate in any particular, or that any payment made is incorrect, he shall have full authority to examine all the books and records of the carrier for the purpose of ascertaining the facts and shall determine the correct amount to be paid and may proceed in any court of competent jurisdiction to recover for the benefit of the fund any sums shown to be due upon such examination and determination. Any stock carrier which fails to make any statement as required by this Article, or to pay any contribution to the stock fund when due, shall thereby forfeit to said fund a penalty of five per centum (5%) of the amount of unpaid contribution determined to be due as provided by this Article plus one per centum (1%) of such amount for each month of delay, or fraction thereof, after the expiration of the first month of such delay, but the Commissioner may upon good cause shown extend the time for filing of such return or payment. The Commissioner shall revoke the certificate of authority to do business in this State of any carrier which shall fail to comply with the provisions of this Article or to pay any penalty imposed in accordance with this Article. (1935, c. 228, s. 7.)

§ 97-112. Separation of stock fund; disbursements; investment; sale of securities.—The stock fund created by this Article shall be separate and apart from any other funds so created and from all other State moneys. The State Treasurer shall be the custodian of said fund; and all disbursements from said fund shall be made by the State Treasurer upon vouchers signed by the Commissioner as hereinafter provided. The moneys of said fund may be invested by the State Treasurer only in the bonds or securities which are the direct obligations of or which are guaranteed as to principal and interest by the

United States or this State. The State Treasurer may sell any of the securities in which said fund is invested, if advisable for its proper administration or in the best interests of such fund, and all earnings from the investments of such fund shall be credited to such fund. (1935, c. 228, s. 8.)

§ 97-113. Payment of claim from stock fund when carrier insolvent; subrogation of employer paying claim; recovery against employer or receiver of insolvent carrier.—(a) A valid claim for benefits, or installments thereof, heretofore or hereafter made pursuant to the Workmen's Compensation Act, which has remained or shall remain due and unpaid for 60 days, by reason of default by an insolvent stock carrier, shall be paid from the stock fund in the manner provided in this section. Any person in interest may file with the Commissioner an application for payment of benefits from the stock fund on a form prescribed and furnished by the Commissioner. If there has been an award, final or otherwise, a certified copy thereof shall accompany the application. The Commissioner shall thereupon certify to the State Treasurer such award for payment according to the terms of the same, whereupon payment shall be made by the State Treasurer.

(b) Payment of benefits from the stock fund shall give the fund no right of recovery against the employer.

(c) An employer may pay such award or part thereof in advance of payment from the stock fund and shall thereupon be subrogated to the rights of the employee or other party in interest against such fund to the extent of the amount so paid.

(d) The State Treasurer as custodian of the stock fund shall be entitled to recover the sum of all liabilities of such insolvent carrier assumed by such fund from such carrier, its receiver, liquidator, rehabilitator or trustee in bankruptcy and may prosecute an action or other proceedings therefor. All moneys recovered in any such action or proceedings shall forthwith be placed to the credit of the stock fund by the State Treasurer to reimburse the stock fund to the extent of the moneys so recovered and paid. (1935, c. 228, s. 9; 1971, c. 548, ss. 1, 2.)

Editor's Note. — The 1971 amendment deleted "compensation or death" preceding "benefits" near the beginning of the first sentence and in the second sentence of subsection (a) and substituted "benefits" for "compensation" in subsection (b).

§ 97-114. Mutual Workmen's Compensation Security Fund created. —There is hereby created a fund to be known as "The Mutual Workmen's Compensation Security Fund," for the purpose of assuring to persons entitled thereto the benefits provided by the Workmen's Compensation Act for employments insured in insolvent mutual carriers. Such fund shall be applicable to the payment of valid claims for benefits heretofore or hereafter made pursuant to the Workmen's Compensation Act, and remaining unpaid, in whole or in part, by reason of the default, after the effective date of this Article, of an insolvent mutual carrier. Expenses of administration also shall be paid from the fund as herein provided. Such fund shall consist of all contributions received and paid into the fund by mutual carriers, as herein defined, of property and securities acquired by and through the use of moneys belonging to the fund and of interest earned upon moneys deposited or invested as herein provided. The fund shall be administered by the Commissioner in accordance with the provisions of this Article. (1935, c. 228, s. 10; 1971, c. 548, s. 3.)

Editor's Note. — The 1971 amendment substituted "benefits" for "compensation" in the first sentence and deleted "compensation or death" preceding "benefits" in the second sentence.

§ 97-115. Verified report of premiums to be filed by mutual carrier; equalization of payments by reciprocal or interinsurance

exchanges.—Every mutual carrier shall, on or before the first day of September, 1935, file with the Treasurer of the State and with the Commissioner identical returns, under oath, on a form to be prescribed and furnished by the Commissioner of Insurance, stating the amount of net written premiums for the six months' period ending June 30, 1935, on policies issued, renewed or extended by such carrier, to insure payment of compensation pursuant to the Workmen's Compensation Act during said period. For the purpose of this Article "net written premiums" shall mean gross written premiums less return premiums on policies returned not taken and on policies canceled. Thereafter, on or before the first day of March and September, of each year, each such carrier shall file similar identical returns, stating the amount of such net written premiums for the six months' periods ending, respectively, on the preceding December 31 and June 30, on such policies issued, renewed or extended by such carrier.

Any reciprocal or interinsurance exchange writing workmen's compensation insurance in North Carolina on September 1, 1935, and continuing to underwrite this class of insurance shall, upon the fund reaching its maximum contribution and the discontinuance of any collection thereof, continue to pay into said mutual fund as provided in this section for a period of six years after the other members of the mutual fund have discontinued said payments in order to equalize the contribution of all members of the mutual fund, and thereafter such reciprocal or interinsurance exchanges shall be subject to the provisions of this section. (1935, c. 228, s. 11; 1941, c. 298, s. 2.)

§ 97-116. Contributions by mutual carriers of 1% of net written premiums.—For the privilege of carrying on the business of workmen's compensation insurance in this State, every mutual carrier shall pay into the mutual fund on the first day of September, 1935, a sum equal to one per centum (1%) of its net written premiums, as shown by the return hereinbefore prescribed for the period ending June 30, 1935, and thereafter each such mutual carrier, upon filing each semiannual return, shall pay a sum equal to one per centum (1%) of its net written premiums, as shown for the period covered by such return. (1935, c. 228, s. 12.)

§ 97-117. Distribution of excess when mutual fund exceeds 5% of loss reserves; distribution of fund when liabilities liquidated.—Whenever the mutual fund, less all its known liabilities, shall exceed five per centum (5%) of the loss reserves of all mutual carriers for the payments of losses under the Workmen's Compensation Act, as of December 31 next preceding, distribution of such excess shall be made as repayments for successive fund years, commencing with the first fund year, to the mutual carriers in the proportion in which they respectively made contributions for such fund year: Provided, however, no such distribution shall reduce the fund, less all its known liabilities, below an amount equal to five per centum (5%) of such loss reserves as of said date. Such repayments shall be made from time to time until the mutual carriers for the first fund year shall have received their proportionate shares of the contributions for the first fund year including interest, if any. Such repayments for succeeding fund years in their order shall be made on the same basis. The insolvency of any mutual carrier shall automatically terminate its right to such repayments and the withdrawal of any mutual carrier from the transaction of workmen's compensation insurance business in this State shall automatically suspend its right to such repayments until all its liabilities for workmen's compensation losses in this State shall have been fully liquidated. If and when all liabilities of all mutual carriers for workmen's compensation losses in this State shall have been fully liquidated, distribution shall be made of the remaining balance of the mutual fund in the proportion in which each such mutual carrier made contributions to the mutual fund. (1935, c. 228, s. 13.)

§ 97-118. Administration, custody, etc., of mutual fund.—The provisions of G.S. 97-111, 97-112, and 97-113 shall apply to the administration, custody and investment of and payments from the mutual fund and to this end those sections shall be read with the necessary changes in detail to adopt their provisions to mutual funds. (1935, c. 228, s. 14.)

§ 97-119. Notice of insolvency; report of claims and unpaid awards.—Forthwith upon any carrier becoming an insolvent stock carrier, or an insolvent mutual carrier, as the case may be, the Commissioner shall so notify the North Carolina Industrial Commission, and the North Carolina Industrial Commission shall immediately advise the Commissioner

(1) Of all claims for compensation pending or thereafter made against an employer insured by such insolvent carrier, or against such insolvent carrier;

(2) Of all unpaid or continuing agreements, awards or decisions made upon claims prior to or after the date of such notice from the Commissioner; and

(3) Of all appeals from or applications for modifications or rescission or review of such agreements, awards or decisions. (1935, c. 228, s. 15.)

§ 97-120. Right of Commissioner to defend claims against insolvent carriers; arrangement with other carriers to pay claims.—The Commissioner or his duly authorized representative may investigate and may defend before the North Carolina Industrial Commission or any court any or all claims for compensation against an employer insured by an insolvent carrier or against such insolvent carrier and may prosecute any pending appeal or may appeal from or make application for modification for rescission or review of an agreement, award or decision against such employer or insolvent carrier. Until all such claims for compensation are closed and all such awards thereon are paid, the Commissioner, the administrator of the funds, shall be a party in interest in respect to all such claims, agreements and awards. For the purposes of this Article the Commissioner shall have exclusive power to select and employ such counsel, clerks and assistants as may be deemed necessary and to fix and determine their powers and duties, and he may also, in his discretion, arrange with any carrier or carriers to investigate and defend any or all such claims and to liquidate and pay such as are valid and the Commissioner may from time to time reimburse, from the appropriate fund, such carrier or carriers for compensation payments so made, together with reasonable allowance for the services so rendered. (1935, c. 228, s. 16.)

§ 97-121. Expenses of administering funds.—The expense of administering the stock fund shall be paid out of the stock fund and the expense of administering the mutual fund shall be paid out of the mutual fund. The Commissioner shall serve as administrator of each fund without additional compensation, but may be allowed and paid from either fund expenses incurred in the performance of his duties in connection with that fund. The compensation of those persons employed by the Commissioner shall be deemed administration expenses payable from the fund in the manner provided in G.S. 97-112. The Commissioner shall include in his regular report to the legislature a statement of the expense of administering each of such funds for the preceding year. (1935, c. 228, s. 17.)

§ 97-122. Contributions relieving carrier of posting bond or making special deposit.—Contributions made by any stock or mutual carrier to the funds created by this Article shall relieve such carriers from filing any surety bond or making any deposit of securities required under the provisions of any law of this State for the purpose of securing the payment of workmen's compensation benefits only. (1935, c. 228, s. 18.)

Chapter 98.

Burnt and Lost Records.

Sec.
98-1. Copy of destroyed record as evidence; may be recorded.
98-2. Originals may be again recorded.
98-3. Establishing boundaries and interest, where conveyance and copy lost.
98-4. Copy of lost will may be probated.
98-5. Copy of lost will as evidence; letters to issue.
98-6. Establishing contents of will, where original and copy destroyed.
98-7. Perpetuating destroyed judgments and proceedings.
98-8. Color of title under destroyed instrument.
98-9. Action on destroyed bond.
98-10. Destroyed witness tickets; duplicates may be filed.
98-11. Replacing lost official conveyances.
98-12. Court records as proof of destroyed instruments set out therein.
98-13. Copies contained in court records may be recorded.
98-14. Rules for petitions and motions.
98-15. Records allowed under this Chapter to have effect of original records.
98-16. Destroyed court records proved prima facie by recitals in conveyances executed before their destruction.
98-17. Conveyances reciting court records prima facie evidence thereof.
98-18. Court records and conveyances to which Chapter extends.
98-19, 98-20. [Repealed.]

§ 98-1. Copy of destroyed record as evidence; may be recorded.—When the office of any registry is destroyed by fire or other accident, and the records and other papers thereof are burnt or destroyed, the copies of all such proceedings, instruments and papers as are of record or registry, certified by the proper officer, though without the seal of office, shall be received in evidence whenever the original or duly certified exemplifications would be. Such copies, when the court is satisfied of their genuineness, may be ordered to be recorded or registered. (1865-6, c. 41, ss. 1, 2; Code, s. 55; Rev., s 327; C. S., s. 365.)

Admissibility of Parol Evidence. — Chapter 11 of the Revisal (§§ 98-1 through 98-18) is an enabling act and does not exclude oral evidence, admissible at common law, to prove the contents of a lost deed or record. Hughes v. Pritchard, 153 N.C. 23, 63 S.E. 906 (1910). See Mobley v. Watts, 98 N.C. 284, 3 S.E. 677 (1887); Varner v. Johnston, 112 N.C. 570, 17 S.E. 483 (1893).

When a deed is lost or destroyed a copy must be produced if there be one, but if there is none, parol evidence may be admitted to prove its contents. Baker v. Webb, 2 N.C. 43 (1794); Dumas v. Powell, 14 N.C. 103 (1831); Cowles v. Hardin, 91 N.C. 233 (1884).

Parol Evidence Not Admissible to Change Certified Copy. — This section does not permit parol evidence to be introduced to show that the lost or destroyed original had a different description and thus correct a recorded certified copy of a deed. Hopper v. Justice, 111 N.C. 418, 16 S.E. 626 (1892).

§ 98-2. Originals may be again recorded.—All original papers, once admitted to record or registry, whereof the record or registry is destroyed, may, on motion, be again recorded or registered, on such proof as the court shall require. (1865-6, c. 41, s. 3; Code, s. 56; Rev., s. 328; C. S., s. 366.)

Action to Establish Lost Deed Lies as Section Is Not Exclusive. — In an action to establish a lost deed, the record of which was also destroyed, a motion to dismiss upon the ground that the action should have been brought under § 56 of the Code (now this section) was properly refused, as the section is an enabling act giving an additional, but not an exclusive, remedy. Jones v. Ballou, 139 N.C. 526, 52 S.E. 254 (1905).

Jurisdiction in the superior court was sustained in McCormick v. Jernigan, 110 N.C. 406, 14 S.E. 971 (1892), and was tacitly recognized in Tuttle v. Rainey, 98 N.C. 513, 4 S.E. 475 (1887). In Cowles v. Hardin, 91 N.C. 231 (1884); Mobley v. Watts, 98 N.C. 284, 3 S.E. 677 (1887), and Hopper v. Justice, 111 N.C. 418, 16 S.E. 626 (1892), it was held that a party whose deed with its registration had been destroyed instead of having it set up and recorded could depend upon the rules of the common law to establish its contents whenever an occasion might arise, as in the course of a trial. Cowles v. Hardin, 79 N.C. 577 (1878), simply holds that

when the proceeding is brought by virtue of § 56 of the Code (now this section), its requirements must be complied with. Jones v. Ballou, 139 N.C. 526, 52 S.E. 254 (1950).

Original Recorded by Clerk upon Sufficient Evidence. — Where the registry of partition is destroyed and a paper purporting to be the original is presented to the clerk, it is his duty, after satisfying himself upon evidence that the paper is the original one, to record it. Hill v. Lane, 149 N.C. 267, 62 S.E. 1067 (1908).

Effect of Failure to Again Register. — "This statutory provision, at least, admonished all persons having such original papers to prove and register them anew in the way prescribed, and good faith required that they should do so. It, moreover, gave the public reason to expect that it would be faithfully observed by persons interested." Waters v. Crabtree, 105 N.C. 394, 11 S.E. 240 (1890), holding that where the plaintiff has been negligent in again registering or recording an original deed, such reregistration will not defeat the rights of bona fide purchasers.

§ 98-3. Establishing boundaries and interest, where conveyance and copy lost.—When any conveyance of real estate, or of any right or interest therein, is lost, the registry thereof being also destroyed, any person claiming under the same may cause the boundaries thereof to be established in the manner provided in the Chapter entitled Boundaries, or he may proceed in the following manner to establish both the boundaries and the nature of his estate:

He shall file his petition before the clerk of the superior court, setting forth the whole substance of the conveyance as truly and specifically as he can, the location and boundaries of his land, whose land it adjoins, the estate claimed therein, and a prayer to have his own boundaries established and the nature of his estate declared.

All persons claiming any estate in the premises, and those whose lands adjoin, shall be notified of the proceedings. Unless they or some of them, by answer on oath, deny the truth of all or some of the matters alleged, the clerk shall order a surveyor to run and designate the boundaries of the petitioner's land, and return his survey, with a plot thereof, to the court. This, when confirmed, shall, with the declaration of the court as to the nature of the estate of the petitioner, be registered and have, as to the persons notified, the effect of a deed for the same, executed by the person possessed of the same next before the petitioner. But in all cases, however, wherein the process of surveying is disputed, and the surveyor is forbidden to proceed by any person interested, the same proceedings shall be had as under the Chapter entitled Boundaries.

If any of the persons notified deny by answer the truth of the conveyance, the clerk shall transfer the issues of fact to the superior court at term, to be tried as other issues of fact are required by law to be tried; and on the verdict and the pleadings the judge shall adjudge the rights of the parties, and declare the contents of the deed, if any deed is found by the jury, and allow the registration of such judgment and declaration, which shall have the force and effect of a deed. (1865-6, c. 41, s. 3; Code, s. 56; Rev., s. 328; C. S., s. 367.)

Cross Reference. — As to boundaries, see Chapter 38.

Remedy Additional and Not Exclusive. — This section is an enabling statute providing, not an exclusive remedy, but merely an additional one. Mobley v. Watts, 98 N.C. 284, 3 S.E. 677 (1887); Jones v. Ballou, 139 N.C. 526, 52 S.E. 254 (1905).

It does not repeal but aids the common-law rules for establishing deeds, and a party may choose either mode. Cowles v. Hardin, 91 N.C. 231 (1884).

Evidence Must Show Existence, Nature and Loss. — Before the deed can be made, the plaintiff must clearly prove that a deed did exist, its legal operation, and the loss thereof. Plummer v. Baskerville, 36 N.C. 252 (1840); Loftin v. Loftin, 96 N.C. 94, 1 S.E. 837 (1887).

Judgment Has Only Force of Original. — A judgment under this section has only such force as the original conveyance would have as evidence had it not been destroyed. McNeely v. Laxton, 149 N.C. 327, 63 S.E. 278 (1908).

Private Acts. — In a special proceeding under a private act, similar to this section, to restore certain records lost by fire or other casualty, it is necessary to conform exactly to all the terms prescribed by the statute. Cowles v. Hardin, 79 N.C. 577 (1878).

§ 98-4. Copy of lost will may be probated.—In counties where the original

wills on file in the office of the clerk of superior court, and will books containing copies, are lost or destroyed, if the executor or any other person has preserved a copy of a will (the original being so lost or destroyed) with a certificate appended, signed by a clerk of the court in whose office the will was, or is required to be filed, stating that said copy is a correct one, this copy may be admitted to probate, under the same rules and in the same manner as now prescribed by law for proving wills. The proceedings in such cases shall be the same as though such copy was the original offered for the first time for probate, except that the clerk who signed such certificate shall, on oath, acknowledge his signature, or in case it appears that he has died or left the State, then his signature shall be proved by a competent witness; and the witness or witnesses to the original, who may be examined, shall be required to swear that he or they signed in the presence of the testator and by his direction a paper-writing purporting to be his last will and testament. (1868-69, c. 160, s. 1; Code, s. 57; Rev., s. 329; C. S., s. 368.)

Cross Reference. — As to probate of wills generally, see § 31-12 et seq.

Probate before Clerk. — The probate of a lost will must be made before the clerk of the superior court, he alone having jurisdiction. McCormick v. Jernigan, 110 N.C. 406, 14 S.E. 971 (1892).

Statute of Limitation Does Not Apply. — The statute of limitation does not apply to the simple taking probate of a will, hence it has no application to proceedings under this section. McCormick v. Jernigan, 110 N.C. 406, 14 S.E. 971 (1892).

§ 98-5. Copy of lost will as evidence; letters to issue.—In any action or proceeding at law, where it becomes necessary to introduce such will to establish title, or for any other purpose, a copy of the will and of the record of the probate, with a certificate signed by the clerk of the superior court for the county where the will may be recorded, stating that said record and copy are full and correct, shall be admitted as competent evidence; and when a copy of a will is admitted to probate, the clerk shall thereupon issue letters testamentary. (1868-69, c. 160, s. 2; Code, s. 58; Rev., s. 330; C. S., s. 369.)

§ 98-6. Establishing contents of will, where original and copy destroyed.—Any person desirous of establishing the contents of a will destroyed as aforesaid, there being no copy thereof, may file his petition in the office of the clerk of the superior court, setting forth the entire contents thereof, according to the best of his knowledge, information and belief. All persons having an interest under the same shall be made parties, and if the truth of such petition is denied, the issues of fact shall be transferred to the superior court at term for trial by a jury, whether the will was recorded, and if so recorded, the contents thereof, and the declarations of the judge shall be recorded as the will of the testator. Any devisee or legatee is a competent witness as to the contents of every part of said will, except such as may concern his own interest in the same. (1865-6, c. 41, s. 4; Code, s. 59; Rev., s. 331; C. S., s. 370.)

Parol Evidence. — Parol evidence may be introduced to show the contents of a will which has been lost or destroyed. Cox v. Beaufort County Lumber Co., 124 N.C. 78, 32 S.E. 381 (1899). See Varner v. Johnston, 112 N.C. 570, 17 S.E. 483 (1893).

And such evidence is also admissible to show existence of such a will, its probate and registration. Cox v. Beaufort County Lumber Co., 124 N.C. 78, 32 S.E. 381 (1899).

§ 98-7. Perpetuating destroyed judgments and proceedings.—Every person desirous of perpetuating the contents of destroyed judgments, orders or proceedings of court, or any paper admitted to record or registration, or directed to be filed for safekeeping, other than wills or conveyances of real estate, or some right or interest therein, or any deed or other instrument of writing, required to be recorded or registered, but not having been recorded or registered, it being competent to register or record said deed or other

instrument at the time of its loss or destruction, may file his petition in the court having jurisdiction of like matters with the original proceeding, setting forth the substance of the whole record, deed, proceeding, or paper, which he desires to perpetuate. If, on the hearing, the court shall declare the existence of such record, deed, or proceeding, or paper at the time of the burning of the office wherein the same was lodged or kept, or other destruction thereof, and that the same was there destroyed, and shall declare the contents thereof, such declaration shall be recorded or registered, or filed, according to the nature of the paper destroyed. (1865-6, c. 41, s. 5; Code, s. 60; Rev., s. 332; C. S., s. 371.)

Restored Record Free from Collateral Attack. — Where the destroyed record has been restored, the record so restored cannot be collaterally attacked. Branch v. Griffin, 99 N.C. 173, 5 S.E. 393 (1888).

§ 98-8. Color of title under destroyed instrument.—Every person who has been in the continual, peaceable and quiet possession of land, tenements, or hereditaments, situated in the county, claiming, using and occupying them as his own, for the space of seven years, under known boundaries, the title thereto being out of the State, is deemed to have been lawfully possessed, under color of title, of such estate therein as has been claimed by him during his possession, although he may exhibit no conveyance therefor: Provided, that such possession commenced before the destruction of the registry office, or other destruction as aforesaid, and also that any such person, or any person claiming by, through or under him, makes affidavit and produces such proof as is satisfactory to the court that the possession was rightfully taken; and if taken under a written conveyance, that the registry thereof was destroyed by fire or other means, or was destroyed before registry as aforesaid, and that neither the original nor any copy thereof is in existence: Provided further, that such presumption shall not arise against infants, persons of nonsane memory, and persons residing out of the State, who were such at the time of possession taken, and were not therefore barred, nor were so barred at the time of the burning of the office or other destruction. (1865-6, c. 41, s. 6; Code, s. 61; Rev., s. 333; C. S., s. 372.)

Cross Reference. — As to title by adverse possession generally, see § 1-35 et seq.

Adverse Possession — Presumption of Grant. — In an action to recover land under this section, the plaintiff showed title out of the State by a 30 years' possession. It was held that this statute did not make it necessary to show seven years' adverse possession in addition to the 30 years. The lapse of seven years' adverse possession concurrently with the 30 years is sufficient. Hill v. Overton, 81 N.C. 393 (1879).

§ 98-9. Action on destroyed bond.—Actions on official or other bonds lodged in any office which are destroyed with the registry thereof may be prosecuted by petition against the principal and sureties thereto, and the proceedings shall be as in the former courts of equity. (1865-6, c. 41, s. 7; Code, s. 62; Rev., s. 334; C. S., s. 373.)

Nature of Proceedings Is Equitable. — The nature of the proceedings under this section is equitable. McCormick v. Jernigan, 110 N.C. 406, 14 S.E. 971 (1892).

§ 98-10. Destroyed witness tickets; duplicates may be filed.—The court having jurisdiction of the action may allow other witness tickets to be filed in place of such as may be destroyed, upon the oath of the witness or other satisfactory proof. (1865-6, c. 41, s. 8; Code, s. 63; Rev., s. 335; C. S., s. 374.)

§ 98-11. Replacing lost official conveyances.—Where any conveyance executed by any person, sheriff, clerk and master, or commissioner of court has been lost, and registry thereof destroyed as aforesaid, and there is no copy thereof, such persons, whether in or out of office, may execute another of like tenor and date, reciting therein that the same is a duplicate, and such deed shall be evidence of the facts therein recited, in all cases wherein the parties

thereto are dead, or are incompetent witnesses to prove the same, to the extent as if it was the original conveyance. (1865-6, c. 41, s. 9; Code, s. 64; Rev., s. 336; C. S., s. 375.)

§ 98-12. Court records as proof of destroyed instruments set out therein.—The records of any court in or out of the State, and all transcripts of such records, and the exhibits filed therewith in any case, are admissible to prove the existence and contents of all deeds, wills, conveyances, depositions and other papers, copies whereof are therein set forth or exhibited, in all cases where the records and registry of such as were or ought to have been recorded and registered, or the originals of such as were not proper to be recorded or registered, have been destroyed as aforesaid, although such transcripts or exhibits have been informally certified; and when offered in evidence have the like effect as though the transcript or record was the record of the court whose records are destroyed, and the deeds, wills and conveyances, depositions and other papers therein copied or therewith exhibited were original. (1865-6, c. 41, s. 10; Code, s. 65; Rev., s. 337; C. S., s. 376.)

Evidence of Court Records as Proof. — When papers have been lost and, under competent evidence and instructions, the jury has found their contents to be as contended by the plaintiff, the plaintiff prevails. Fain v. Gaddis, 144 N.C. 765, 57 S.E. 1111 (1907).

§ 98-13. Copies contained in court records may be recorded.—The copies aforesaid of all such deeds, wills, conveyances and other instruments proper to be recorded or registered, as are mentioned in G.S. 98-12, may be recorded or registered on application to the clerk of the superior court and due proof that the original thereof was genuine. (1865-6, c. 41, s. 11; Code, s. 66; Rev., s. 338; C. S., s. 377.)

§ 98-14. Rules for petitions and motions.—The following rules shall be observed in petitions and motions under this Chapter:

(1) The facts stated in every petition or motion shall be verified by affidavit of the petitioner that they are true according to the best of his knowledge, information, and belief.

(2) The instrument or paper sought to be established by any petition shall be fully set forth in its substance, and its precise language shall be stated when the same is remembered.

(3) All persons interested in the prayers of the petition or decree shall be made parties.

(4) Petitions to establish a record of any court shall be filed at term in the superior court of the county where the record is sought to be established. Other petitions may be filed in the office of the clerk.

(5) The costs shall be paid as the court may decree.

(6) Appeals shall be allowed as in all other cases, and where the error alleged shall be a finding by the superior court at term, of a matter of fact, the same may be removed on appeal to the appellate division, and the proper judgments directed to be entered below.

(7) It shall be presumed that any order or record of the court of pleas and quarter sessions, which was made and has been lost or destroyed, was made by a legally constituted court, and the requisite number of justices, without naming said justices. (1865-6, c. 41, s. 12; 1874-5, c. 51; c. 254, s. 3; Code, s. 67; 1893, c. 295; Rev., s. 339; C. S., s. 378; 1969, c. 44, s. 64.)

Editor's Note. — The 1969 amendment substituted "appellate division" for "Supreme Court" in subdivision (6).

Affidavit by Agent Not Sufficient. — In a proceeding under this section an affidavit by the agent of the petitioner that the facts set forth in the complaint "are true to the best of his knowledge, information and belief," is an insufficient verification. Cowles v. Hardin, 79 N.C. 577 (1878).

Waiver of Verification. — The requirement that when one pleading in a court of record is verified, every subsequent pleading in the same proceeding, except a demurrer, must be verified

also, is one which may be waived, except in those cases where the form and substance of the verification is made an essential part of the pleading; as in an action for divorce in which a special form of affidavit is required, § 50-8, in a proceeding to restore a lost record, § 98-14, and in an action against a county or municipal corporation, § 153-64. Calaway v. Harris, 229 N.C. 117, 47 S.E.2d 796 (1948).

Parties. — It seems that all persons whose estates may be affected by a proceeding to restore lost records should be made parties. Cowles v. Hardin, 79 N.C. 577 (1878).

§ 98-15. Records allowed under this Chapter to have effect of original records.—The records and registries allowed by the court in pursuance of this Chapter shall have the same force and effect as original records and registries. (1865-6, c. 41, s. 14; Code, s. 68; Rev., s. 340; C. S., s. 379.)

Copies Have Only Effect of Originals. — The copies have only the same force and effect as the lost or destroyed deeds would have had, if produced. McNeely v. Laxton, 149 N.C. 327, 63 S.E. 278 (1908).

Negligently Delayed Registration Not Affecting Rights of Bona Fide Purchasers. — When a deed, absolute on its face, but intended as a mortgage, was executed in 1859, and a defeasance was executed in pursuance of the intention of the parties in 1861, and recorded in 1862, and in 1864 the records were destroyed, subsequent purchasers for value, without actual notice, whose deeds were duly recorded, were not affected with notice of such registration. Nor can reregistration of the defeasance in 1886, after the registration of the mesne conveyances to the innocent purchasers, avail to defeat their rights. Waters v. Crabtree, 105 N.C. 394, 11 S.E. 240 (1890).

§ 98-16. Destroyed court records proved prima facie by recitals in conveyances executed before their destruction.—The recitals, reference to, or mention of any decree, order, judgment or other record of any court of record of any county in which the courthouse, or records of said courts, or both, have been destroyed by fire or otherwise, contained, recited or set forth in any deed of conveyance, paper-writing, or other bona fide written evidence of title, executed prior to the destruction of the courthouse and records of said county, by any executor or administrator with a will annexed, or by any clerk and master, superior court clerk, clerk of the court of pleas and quarter sessions, sheriff, or other officer, or commissioners appointed by either of said courts, and authorized by law to execute said deed or other paper-writing, are deemed, taken and recognized as true in fact, and are prima facie evidence of the existence, validity and binding force of said decree, order, judgment or other record so referred to or recited in said deed or paper-writing, and are to all intents and purposes binding and valid against all persons mentioned or described in said instrument of writing, deed, etc., as purporting to be parties thereto, and against all persons who were parties to said decree, judgment, order or other record so referred to or recited, and against all persons claiming by, through or under them or either of them. (1870-1, c. 86, s. 1; 1871-2, c. 64, s. 1; Code, s. 69; Rev., s. 341; C. S., s. 380.)

Constitutionality. — This section, making recitals in deeds, etc., of judgments, records, etc., evidence, etc., upon condition that the courthouse, records, etc., have been destroyed by fire, etc., is constitutional. Barefoot v. Musselwhite, 153 N.C. 208, 69 S.E. 71 (1910).

Evidence Must Show Destruction of Records. — The fact of the destruction by fire or otherwise of the records must be shown before the recitals, reference to, or mention of any decree, judgment, or other record recited in a deed of conveyance, etc., shall have the effect of evidence under this section. Barefoot v. Musselwhite, 153 N.C. 208, 69 S.E. 71 (1910). See Dail v. Suggs, 85 N.C. 104 (1881).

Application of Section. — This section was applied where a deed made in compliance to a decree of court was destroyed, the recitals in the decree being taken as prima facie evidence of facts and authority. Irvin v. Clark, 98 N.C. 444, 4 S.E. 30 (1887). See Isler v. Isler, 88 N.C. 576 (1883).

Conversely, the recitals in a deed, which refer to the decree, so as to identify it, are of themselves prima facie evidence of its binding force and validity as against all persons who were parties to said decree. Pinnell v. Burroughs, 172 N.C. 182, 90 S.E. 218 (1916). See Hare v. Hollomon, 94 N.C. 14 (1886); Everett v. Newton, 118 N.C. 925, 23 S.E. 961 (1896); Pinnell v. Burroughs, 168 N.C. 315, 84 S.E. 364 (1915).

Where the original papers of the judgment roll have been lost, the minute docket of the court may be introduced to prove the contents thereof. Hare v. Hollomon, 94 N.C. 14 (1886); Everett v. Newton, 118 N.C. 925, 23 S.E. 961 (1896).

Cited in Henderson County v. Johnson, 230 N.C. 723, 55 S.E.2d 502 (1949).

§ 98-17. Conveyances reciting court records prima facie evidence thereof.—Such deed of conveyance, or other paper-writing, executed as aforesaid, and registered according to law, may be read in any suit now pending or which may hereafter be instituted in any court of this State, as prima facie evidence of the existence and validity of the decree, judgment, order, or other record upon which the same purports to be founded, without any other or further restoration or reinstatement of said decree, order, judgment, or record than is contained in this Chapter. (1870-1, c. 86, s. 2; Code, s. 70; Rev., s. 342; C. S., s. 381.)

Constitutionality. — The constitutionality and validity of this section cannot now be open to dispute. Barefoot v. Musselwhite, 153 N.C. 208, 69 S.E. 71 (1910).

§ 98-18. Court records and conveyances to which Chapter extends.—This Chapter shall extend to records of any court which have been or may be destroyed by fire or otherwise, and to any deed of conveyance, paper-writing, or other bona fide evidence of title executed before the destruction of said records. (1871-2, c. 64, s. 2; 1874-5, c. 254, s. 2; Code, s. 71; Rev., s. 343; C. S., s. 382.)

Local Modification. — Cherokee, Graham, Haywood and Madison: C.S., § 384; 1935, c. 25; Moore: C.S., § 383.

§§ 98-19, 98-20: Repealed by Session Laws 1971, c. 780, s. 37, effective July 1, 1973.

Cross References. — See the note catchlined "Revision of Chapter" following the analysis to Chapter 159. For present provisions covering the subject matter of the repealed sections, see §§ 142-15.1, 159-137.

Chapter 99.
Libel and Slander.

Sec.
99-1. Libel against newspaper; defamation by or through radio or television station; notice before action.
99-2. Effect of publication or broadcast in good faith and retraction.
99-3. Anonymous communications.
99-4. Charging innocent woman with incontinency.
99-5. Negligence in permitting defamatory statements by others essential to liability of operator, etc., of broadcasting station.

§ 99-1. Libel against newspaper; defamation by or through radio or television station; notice before action.—(a) Before any action, either civil or criminal, is brought for the publication, in a newspaper or periodical, of a libel, the plaintiff or prosecutor shall at least five days before instituting such action serve notice in writing on the defendant, specifying the article and the statements therein which he alleges to be false and defamatory.

(b) Before any action, either civil or criminal, is brought for the publishing, speaking, uttering, or conveying by words, acts or in any other manner of a libel or slander by or through any radio or television station, the plaintiff or prosecutor shall at least five days before instituting such action serve notice in writing on the defendant, specifying the time of and the words or acts which he or they allege to be false and defamatory. (1901, c. 557; Rev., s. 2012; C. S., s. 2429; 1943, c. 238, s. 1.)

Cross References. — As to criminal statutes on libel and slander, see §§ 14-47 and 14-48. As to the making of derogatory reports concerning banks, see § 53-128; concerning building and loan associations, see § 54-44. As to pleadings in libel and slander, see § 1A-1, Rule 9(i). As to statute of limitations for libel and slander, see § 1-54. As to allowance of costs in an action for libel and slander, see § 6-18.

Editor's Note. — For an article entitled "Restrictions on a Free Press," wherein various phases of rights arising out of libel are discussed, see 4 N.C.L. Rev. 24. For note on misstatement of fact about public figure, see 44 N.C.L. Rev. 442 (1966). For note on requirements for collection of substantial damages in actionable per se defamation, see 46 N.C.L. Rev. 160 (1967).

Constitutionality. — Session Laws 1901, c. 557, known as the "London Libel Law" and subsequently appearing as §§ 2429, 2430 and 2431 of the Consolidated Statutes (now §§ 99-1, subsection (a), 99-2, subsection (a), and 99-3, respectively), was held constitutional in Osborn v. Leach, 135 N.C. 628, 47 S.E. 811 (1904), cited in Pentuff v. Park, 194 N.C. 146, 138 S.E. 616, 53 A.L.R. 626 (1927). See note to § 99-2.

Complaint Must Allege Notice. — Under this section a complaint in an action for libel must allege the giving of five days' notice to the defendant in writing, specifying the article and the statements herein alleged to be false. Williams v. Smith, 134 N.C. 249, 46 S.E. 502 (1904).

And Demurrer Lies for Failure to Allege Notice. — In an action against a newspaper for libel, the failure of the complaint to allege the five days' notice renders it demurrable. Osborn v. Leach, 135 N.C. 628, 47 S.E. 811 (1904).

Amendment Showing Notice. — Where a demurrer was sustained to a complaint for libel against a newspaper because it failed to appear that notice of the action had been given, the trial court may permit an amendment showing that fact. Osborn v. Leach, 135 N.C. 628, 47 S.E. 811 (1904).

Letter as Sufficient Notice. — A letter written by plaintiff and received by defendant, in which demand is made for a retraction and apology for a clearly specified article, in which the alleged false and defamatory statements are plainly indicated, is a sufficient notice in writing as required by this section, the provisions of former § 1-585 [see now § 1A-1, Rule 5] relating to notice in judicial proceedings after suit has been instituted, not being applicable. Roth v. Greensboro News Co., 214 N.C. 23, 197 S.E. 569 (1938).

When Notice Unnecessary. — In an action for libel, where the newspaper publishes a retraction, no notice need be given. Osborn v. Leach, 135 N.C. 628, 47 S.E. 811 (1904).

As to whether the provisions of this Chapter as to notice to the defendant in an action for libel, looking to retraction and apology, apply to individuals having no connection with a newspaper publishing the libel, was questioned in Paul v. National Auction Co., 181 N.C. 1, 105 S.E. 881 (1921).

Failure of Notice. — In an action for libel against a newspaper the failure to give notice of the action as required only relieves the paper of punitive damages. Osborn v. Leach, 135 N.C. 628, 47 S.E. 811 (1904).

Compensatory Damages. — This section and § 99-2, relating to notice looking to a retraction and apology, having significance only on the question of punitive damages, do not include compensatory damages for "pecuniary loss, physical pain, mental suffering, and injury to reputation." In Osborn v. Leach, 135 N.C. 628, 47 S.E. 811 (1904), it was held that an action for libel may proceed for the recovery of compensatory damages, whether the notice has been given or otherwise. Paul v. National Auction Co., 181 N.C. 1, 105 S.E. 881 (1921). See Kindley v. Privette, 241 N.C. 140, 84 S.E.2d 660 (1954).

Service of Notice under Former § 1-585 Distinguished. — See Roth v. Greensboro News Co., 214 N.C. 23, 197 S.E. 569 (1938).

For present provisions as to service and filing of pleadings after an action is instituted, see § 1A-1, Rule 5.

Applied in Harrell v. Goerch, 209 N.C. 741, 184 S.E. 489 (1936).

Cited in Woody v. Catawba Valley Broadcasting Co., 272 N.C. 459, 158 S.E.2d 578 (1968).

§ 99-2. Effect of publication or broadcast in good faith and retraction.—(a) If it appears upon the trial that said article was published in good faith, that its falsity was due to an honest mistake of the facts, and that there were reasonable grounds for believing that the statements in said article were true, and that within 10 days after the service of said notice a full and fair correction, apology and retraction was published in the same editions or corresponding issues of the newspaper or periodical in which said article appeared, and in as conspicuous place and type as was said original article, then the plaintiff in such case, if a civil action, shall recover only actual damages, and if, in a criminal proceeding, a verdict of "guilty" is rendered on such a state of facts, the defendant shall be fined a penny and the costs, and no more.

(b) If it appears upon the trial that such words or acts were conveyed and broadcast in good faith, that their falsity was due to an honest mistake of the facts, or without prior knowledge or approval of such station, and if with prior knowledge or approval that there were reasonable grounds for believing that the words or acts were true, and that within 10 days after the service of said notice a full and fair correction, apology and retraction was conveyed or broadcast by or over such radio or television station at approximately the same time of day and by the same sending power so as to be as visible and audible as the original acts or words complained of, then the plaintiff in such case, if a civil action, shall recover only actual damages, and if, in a criminal proceeding, a verdict of "guilty" is rendered on such state of facts, the defendant shall be fined a penny and costs, and no more. (1901, c. 557; Rev., s. 2013; C. S., s. 2430; 1943, c. 238, s. 2.)

Constitutionality. — Subsection (a) of this section, providing that a newspaper publishing a libel may avoid, under certain conditions, the payment of punitive damages is not discriminatory, but a constitutional enactment. Pentuff v. Park, 194 N.C. 146, 138 S.E. 616, 53 A.L.R. 626 (1927). See Osborn v. Leach, 135 N.C. 628, 47 S.E. 811 (1904).

A recovery of actual damages does not abridge the freedom of the press, as inhibited by N.C. Const., Art. I, § 14. Pentuff v. Park, 194 N.C. 146, 138 S.E. 616, 53 A.L.R. 626 (1927).

Equal Application to All Newspapers. — Where a statute for libel applies equally to all newspapers and periodicals, it does not amount to unconstitutional discrimination. Osborn v. Leach, 135 N.C. 628, 47 S.E. 811 (1904).

Form of Retraction. — While this section does not prescribe any particular form of retraction, it does require a categorical retraction and apology, and the mere statement that defendant had come into possession of information contrary to that theretofore published is insufficient to meet the requirements of this section, nor was it incumbent on plaintiff to approve or disapprove thereof, and his failure to do so does not exculpate defendant or preclude the submission of an issue of punitive damages. Roth v. Greensboro News Co., 217 N.C. 13, 6 S.E.2d 882 (1940).

"Actual Damages". — The "actual damages" recoverable in a suit for libelous publication by a newspaper in the event of a retraction, allowed by the statute, is for pecuniary loss, direct or indirect, or for physical pain and inconvenience. Pentuff v. Park, 194 N.C. 146, 138 S.E. 616, 53 A.L.R. 626 (1927). Actual damages also include mental suffering and injury to reputation. Osborn v. Leach, 135 N.C. 628, 47 S.E. 811 (1904).

Damages When Defendants Do Not Comply. — Where the defendants did not avail themselves of the privilege given then under this section, the damages that may be awarded would include punitive as well as actual

damages. Pentuff v. Park, 194 N.C. 146, 138 S.E. 616, 53 A.L.R. 626 (1927).

Damages as "Property". — The right to have punitive damages assessed is not property, but the right to recover actual or compensatory damages is property. Osborn v. Leach, 135 N.C. 628, 47 S.E. 811 (1904).

Only Actual Damages Where Publication in Good Faith Is Followed by Correction. — Where plaintiff's evidence establishes a false publication, and defendant's evidence shows that the publication was made in good faith through error, and that a correction and retraction was published upon defendant ascertaining the facts, plaintiff is entitled to recover the actual damage sustained by him. Lay v. Gazette Pub. Co., 209 N.C. 134, 183 S.E. 416 (1936).

And No Punitive Damages in the Absence of Malice, or Wantonness and Recklessness. —See Lay v. Gazette Pub. Co., 209 N.C. 134, 183 S.E. 416 (1936).

When Malice May Not Be Inferred by Jury. — Malice may not be inferred by the jury from a false publication when defendant's uncontradicted evidence rebuts the presumption by showing that the publication was made in good faith through error, and that a correction and retraction was published upon defendant ascertaining the facts. Lay v. Gazette Pub. Co., 209 N.C. 134, 183 S.E. 416 (1936).

Defendant's Pleading. — In an action for libel against a newspaper, the paper having pleaded a retraction of the publication, it is necessary for the defendant to show that the publication was made in good faith, and with reasonable ground to believe it to be true, in order to relieve the paper from punitive damages. Osborn v. Leach, 135 N.C. 628, 47 S.E. 811 (1904).

§ 99-3. Anonymous communications.—The two preceding sections [G.S. 99-1 and 99-2] shall not apply to anonymous communications and publications. (1901, c. 557, s. 3; Rev., s. 2014; C. S., s. 2431.)

An article signed "Smith" is not an anonymous publication under this section. Williams v. Smith, 134 N.C. 249, 46 S.E. 502 (1904).

§ 99-4. Charging innocent woman with incontinency.—Whereas doubts have arisen whether actions of slander can be maintained against persons who may attempt, in a wanton and malicious manner, to destroy the reputation of innocent and unprotected women, whose very existence in society depends upon the unsullied purity of their character, therefore any words written or spoken of a woman, which may amount to a charge of incontinency, shall be actionable. (1808, c. 478; R. C., c. 106; Code, s. 3763; Rev., s. 2015; C. S., s. 2432.)

Cross Reference. — As to criminal liability for slandering innocent women, see § 14-48.

Editor's Note. — See 12 N.C.L. Rev. 120. For note on extrinsic-fact test in the law of slander, see 48 N.C.L. Rev. 405 (1970).

This section is explicit and positive in its operative part. Bowden v. Bailes, 101 N.C. 612, 8 S.E. 342 (1888).

Meaning of "Innocent Woman". — The words "an innocent woman" in § 14-48, and "innocent and unprotected woman" in this section, should be construed to mean innocent of illicit sexual intercourse, as affecting a woman's reputation when the slanderous words are spoken. The purpose of these sections is to protect women who, however imprudent they may have been in other respects, have not so far "stooped to folly" as to surrender their chastity and become incontinent, or who have regained their characters if a "slip has been made," from "the wanton and malicious slander" of persons who may attempt to destroy their reputations and blast and ruin their characters. State v. Ferguson, 107 N.C. 841, 12 S.E. 574 (1890); State v. Johnson, 182 N.C. 883, 109 S.E. 786 (1921).

Words Must Charge Adultery or Fornication. — Words which impute to a female a wanton and lascivious disposition only are not actionable. Lucas v. Nichols, 52 N.C. 32 (1859).

The words, which amount to a charge of incontinency, must import not merely a lascivious disposition, but the criminal act of adultery or fornication. McBrayer v. Hill, 26 N.C. 136 (1843).

Where a telegraph company transmits a message containing a charge of incontinency against a woman, demurrer to the evidence, as in case of nonsuit, is properly denied. Parker v. Edwards, 222 N.C. 75, 21 S.E.2d 876 (1942).

Complaint. — It is not necessary that the complaint, in an action under this section, should allege that the words were "wantonly and maliciously" uttered. Bowden v. Bailes, 101 N.C. 612, 8 S.E. 342 (1888).

Action by Husband. — An action by a husband for slander of his wife, the wife not being a party and the complaint alleging no special damage to the husband, will be dismissed on motion of the defendant, or ex mero motu, for failure of the complaint to state a cause of action. Harper v. Pinkston, 112 N.C. 293, 17 S.E. 161 (1893).

Evidence. — Testimony by witnesses of statements made by defendant charging in effect that plaintiff had been guilty of illicit sexual intercourse, is competent although not in the exact words alleged in the bill of particulars, it being sufficient if the testimony is confined in substance to the bill of particulars. Bryant v. Reedy, 214 N.C. 748, 200 S.E. 896 (1939).

Damages. — In an action by a woman for slander, for words alleged to have been spoken, amounting to a charge of incontinency, the plaintiff may, in the absence of proof of actual special damages recover compensatory damages; and upon proof that the words were spoken with malice, or that the conduct of the defendant was marked by gross and willful wrong, or was oppressive, vindictive damages may be awarded. Bowden v. Bailes, 101 N.C. 612, 8 S.E. 342 (1888).

Words Charging Incontinency Actionable Per Se. — Words charging an innocent woman with conduct amounting to incontinency are actionable per se, under this section, and the law will presume damages in such cases which naturally, proximately and necessarily result therefrom, including mental suffering, humiliation and embarrassment, and testimony of such mental suffering, humiliation and embarrassment is competent without specific allegation thereof. Bryant v. Reedy, 214 N.C. 748, 200 S.E. 896 (1939).

Statements charging incontinency to a woman are actionable per se. Williams v. Rutherford Freight Lines, 10 N.C. App. 384, 179 S.E.2d 319 (1971).

As under this section the charge of incontinency made against an innocent woman, in whatever words written or spoken, conveyed to the hearer, is per se actionable, their utterance must be followed by the same consequence as to damages as the publishing of other defamatory imputations. Bowden v. Bailes, 101 N.C. 612, 8 S.E. 342 (1888).

Injurious Words Are Actionable Per Se. — Where the injurious character of words appear on their face as a matter of general acceptance they are actionable per se. Williams v. Rutherford Freight Lines, 10 N.C. App. 384, 179 S.E.2d 319 (1971).

And Malice and Damage Are Conclusively Presumed. — If defamatory words are actionable per se, malice and damage are conclusively presumed and do not have to be alleged or proved. Williams v. Rutherford Freight Lines, 10 N.C. App. 384, 179 S.E.2d 319 (1971).

Instances of Charging Incontinency. — The words: "If the plaintiff (an unmarried woman) did not give birth to a child, she missed a good chance of having it," themselves imply an illicit sexual intercourse. Sowers v. Sowers, 87 N.C. 303 (1882).

To say of a woman, that "she was kept by a man" is actionable as a slander under the act of assembly. McBrayer v. Hill, 26 N.C. 136 (1843).

Charging Incontinency under Criminal Statute. — Section 14-48 makes it a misdemeanor to charge an innocent woman with incontinency. The wording is similar to this section and the following expressions which were held to amount to charges of incontinency, though decided in criminal cases, would seem to apply here.

Charging a woman with having had sexual intercourse with a male dog amounts to a charge of incontinency. State v. Hewlin, 128 N.C. 571, 37 S.E. 952 (1901).

Calling an innocent woman "a d—d whore," in a loud and angry manner in the hearing alone of the wife of the speaker, is a charge of incontinency within the meaning of the statute. State v. Shoemaker, 101 N.C. 690, 8 S.E. 332 (1888).

Words Held Not Sufficient. — The words that a woman "looked like a woman who had miscarried," do not per se imply a charge of incontinence. State v. Benton, 117 N.C. 788, 23 S.E. 432 (1895).

Calling a woman a "damned bitch" held not a charge of incontinency. State v. Harwell, 129 N.C. 550, 40 S.E. 48 (1901).

Question for Jury. — When the words are ambiguous and admit of a slanderous interpretation, it becomes a question for the jury to determine whether they amounted to the slanderous charge in the reasonable apprehension of the hearers. State v. Howard, 169 N.C. 312, 84 S.E. 807 (1915).

Stated in Harshaw v. Harshaw, 220 N.C. 145, 16 S.E.2d 666, 136 A.L.R. 1411 (1941).

§ 99-5. Negligence in permitting defamatory statements by others essential to liability of operator, etc., of broadcasting station.—The owner, licensee or operator of a visual or sound radio broadcasting station or network of stations, and the agents or employees of any such owner, licensee or operator, shall not be liable for any damage for any defamatory statement published or uttered in or as a part of a visual or sound radio broadcast, by one other than such owner, licensee or operator, or agent or employee thereof, unless such owner, licensee or operator shall be guilty of negligence in permitting any such defamatory statement. (1949, c. 262.)

Editor's Note. — For brief comment on this section, see 27 N.C.L. Rev. 488.

Chapter 100.

Monuments, Memorials and Parks.

Article 1.

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Article 1.

Memorials Commission.

§ 100-1. Memorials Commission created; members; officers; quorum, etc.—A Memorials Commission in and for the State of North Carolina is hereby created, to consist of the following officials, ex officio: the Governor of North Carolina, the Secretary of the North Carolina Historical Commission, the head of the art department of the University of North Carolina at Chapel Hill, the head of the history department of the University of North Carolina at Chapel Hill, and the head of the department of architecture of the North Carolina State College of Agriculture and Engineering. The Memorials Commission shall have the power to adopt its own rules and to elect such officers from its own members as may be deemed proper. Three commissioners shall constitute a quorum. The members shall serve without compensation. (1941, c. 341, s. 1.)

Editor's Note. — The North Carolina State College of Agriculture and Engineering is now the North Carolina State University at Raleigh. See Session Laws 1963, c. 448, s. 6, and Session Laws 1965, c. 213. And see § 116-2.

State Government Reorganization. — The Memorials Commission was transferred to the Department of Arts, Culture and History by § 143A-205, enacted by Session Laws 1971, c. 864.

§ 100-2. Approval of memorials before acceptance by State; regulation of existing memorials, etc.; "work of art" defined; highway markers.—No memorial or work of art shall hereafter become the property of the State by purchase, gift or otherwise, unless such memorial or work of art or a design of

the same, together with the proposed location of the same, shall first have been submitted to and approved by said Memorials Commission; nor shall any memorial or work of art, until so submitted and approved, be contracted for, placed in or upon or allowed to extend over any property belonging to the State. No existing memorial or work of art owned by the State shall be removed, relocated, or altered in any way without approval of the Memorials Commission. The term "work of art" as used in this section shall include any painting, portrait, mural decoration, stained glass, statue, bas-relief, sculpture, monument, tablet, fountain, or other article or structure of a permanent character intended for decoration or commemoration. This section, however, shall not apply to markers set up by the State Highway Commission in cooperation with the Department of Conservation and Development and the State Department of Archives and History as provided by Chapter 197 of the Public Laws of 1935. (1941, c. 341, s. 2; 1957, c. 65, s. 11.)

Editor's Note. — By virtue of Session Laws 1943, c. 237, "State Department of Archives and History" has been substituted for "State Historical Commission."

§ 100-3. Approval of design, etc., of certain bridges and other structures.—No bridge, arch, gate, fence or other structure intended primarily for ornamental or memorial purposes and which is paid for either wholly or in part by appropriation from the State treasury, or which is to be placed on or allowed to extend over any property belonging to the State, shall be begun unless the design and proposed location thereof shall have been submitted to said Memorials Commission and approved by it. Furthermore, no existing structures of the kind named and described in the preceding part of this section owned by the State, shall be removed or remodeled without submission of the plans therefor to the Commission and approval of said plans by the Commission. This section shall not be construed as amending or repealing Chapter 197 of the Public Laws of 1935. (1941, c. 341, s. 3.)

§ 100-4. Governor to accept works of art approved by Commission.—The Governor of North Carolina is hereby authorized to accept, in the name of the State of North Carolina, gifts to the State of works of art as defined in G.S. 100-2. But no work of art shall be so accepted unless and until the same shall have been first submitted to said Memorials Commission and by it judged worthy of acceptance. (1941, c. 341, s. 4.)

§ 100-5. Duties as to buildings erected or remodeled by State.— Upon request of the Governor and the Board of Public Buildings and Grounds, said Memorials Commission shall act in an advisory capacity relative to the artistic character of any building constructed, erected, or remodeled by the State. The term "building" as used in this section shall include structures intended for human occupation, and also bridges, arches, gates, walls, or other permanent structures of any character not intended primarily for purposes of decoration or commemoration. (1941, c. 341, s. 5.)

§ 100-6. Disqualification to vote on work of art, etc.; vacancy.—Any member of said Memorials Commission who shall be employed by the State to execute a work of art or structure of any kind requiring submission to the Commission, or who shall take part in a competition for such work of art or structure, shall be disqualified from voting thereon, and the temporary vacancy thereby created may be filled by appointment by the Governor. (1941, c. 341, s. 6.)

§ 100-7. Construction.—The provisions of this Article shall not be construed to include exhibits of an educational nature arranged by museums or art galleries administered by the State or any of its agencies or institutions, or to prevent the placing of portraits of officials, officers, or employees of the State in the offices or buildings of the departments, agencies, or institutions

with which such officials, officers, or employees are or have been connected. But upon request of such museums or agencies, said Memorials Commission shall act in an advisory capacity as to the artistic qualities and appropriations of memorial exhibits or works of art submitted to it. (1941, c. 341, s. 7.)

§ 100-8. Memorials to persons within 25 years of death; acceptance of commemorative funds for useful work.—No monument, statue, tablet, painting, or other article or structure of a permanent nature intended primarily to commemorate any person or persons shall be purchased from State funds or shall be placed in or upon or allowed to extend over State property within 25 years after the death of the person or persons so commemorated: Provided, nevertheless, that nothing in this Article shall be interpreted as prohibiting the acceptance of funds by State agencies or institutions from individuals or societies who wish to commemorate some person or persons by providing funds for educational, health, charitable, or other useful work. The agency or institution to which such funds are offered for memorial enterprises shall exercise its discretion as to the acceptance and expenditure of such funds. Nothing in this Article shall be interpreted as prohibiting the erection on the lands of the Cliffs of the Neuse State Park an appropriate tablet or plaque honoring the life and memory of the late Lionel Weil of Wayne County. Nothing in this Article shall be interpreted as prohibiting the erection on the lands of the Morrow Mountain State Park an appropriate tablet or plaque honoring the life and memory of the late James McKnight Morrow of Stanly County. Nothing in this Article shall be interpreted as prohibiting the erection on the lands of the Cliffs of the Neuse State Park an appropriate tablet or plaque, of such size and containing such language, as may be agreed upon by the donors and Director of State Parks, honoring the Whitfield heirs for their contributions to the establishment of the said park. (1941, c. 341, s. 8; 1957, c. 181; 1961, c. 976; 1963, c. 1128.)

Article 2.

Memorials Financed by Counties and Cities.

§ 100-9. County commissioners may protect monuments.—When any monument has been or shall hereafter be erected to the memory of our Confederate dead or to perpetuate the memory and virtues of our distinguished dead, if such monument is erected by the voluntary subscription of the people and is placed on the courthouse square, the board of county commissioners of such county are permitted to expend from the public funds of the county an amount sufficient to erect a substantial iron fence around such monument in order that the same may be protected. (1905, c. 457; Rev., s. 3928; C. S., s. 6934.)

Cross Reference. — As to criminal liability for defacing or removing monuments, see § 14-148.

§ 100-10. Counties, cities, and towns may contribute toward erection of memorials.—Any county, city or town by resolution first adopted by its governing body may become a member of any memorial association or organization for perpetuating the memory of the soldiers and sailors of North Carolina who served the United States in the great World War, or in the global war known as World War II, or who fought in the War Between the States, and may subscribe and pay toward the cost of the erection of any memorial to the memory of such soldiers and sailors such sums of money as its governing body may determine, and may be represented in such association or organization by such persons as its governing body may select. Any contribution so made shall be paid out of the general fund of such county, city, or town making same, on such terms as may be agreed upon by its governing body, and the officers having the control and management of the association or organization to which

subscription and contribution are made. (1919, c. 21, ss. 1, 2, 3; C. S., s. 6938; 1923, c. 200; 1945, c. 117.)

ARTICLE 3.

Mount Mitchell Park.

§ **100-11. Duties.**—The Board of Conservation and Development shall have complete control, care, protection and charge of that part of Mitchell's Park acquired by the State. (1915, c. 76; 1919, c. 316, s. 3; C. S., s. 6940; 1921, c. 222, s. 1; 1925, c. 122, s. 23.)

§ **100-12. Roads, trails, and fences authorized; protection of property.**—The Board of Conservation and Development is authorized and empowered to enter upon the land hereinbefore referred to, and to build a fence or fences around the same, also roads, paths, and trails and protect the property against trespass and fire and injury of any and all kinds whatsoever; cut wood and timber upon the same, but only for the purpose of protecting the other timber thereon and improving the property generally. (1919, c. 316, s. 5; C. S., s. 6942; 1921, c. 222, s. 1; 1925, c. 122, s. 23.)

§ **100-13. Fees for use of improvements; fees for other privileges; leases; rules and regulations.**—The Board of Conservation and Development is further authorized and empowered to charge and collect fees for the use of such improvements as have already been constructed, or may hereafter be constructed, on the park, and for other privileges connected with the full use of the park by the public; to lease sites for camps, houses, hotels, and places of amusement and business; and to make and enforce such necessary rules and regulations as may best tend to protect, preserve and increase the value and attractiveness of the park. (1921, c. 222, s. 2; C. S., s. 6942(a); 1925, c. 122, s. 23.)

§ **100-14. Use of fees and other collections.**—All fees and other money collected and received by the Board of Conservation and Development in connection with its proper administration of Mount Mitchell State Park shall be used by said Board for the administration, protection, improvement, and maintenance of said park. (1921, c. 222, s. 3; C. S., s. 6942(b); 1925, c. 122, s. 23.)

§ **100-15. Annual reports.**—The Board of Conservation and Development shall make an annual report to the Governor of all money received and expended by it in the administration of Mount Mitchell State Park, and of such other items as may be called for by him or by the General Assembly. (1921, c. 222, s. 4; C. S., s. 6942(c); 1925, c. 122, s. 23.)

ARTICLE 4.

Toll Roads or Bridges in Public Parks.

§ **100-16. Private operation of toll roads or bridges in public parks prohibited.**—No person, firm or corporation shall have the right or privilege to privately operate any toll road or toll bridge in this State upon lands belonging to the State, set apart or designated as a public park.

In the event any such toll road or bridge is on March 17, 1939 being privately operated under any real or assumed right, privilege, or lease, the State institution or department having such state-owned property in charge or under its supervision shall immediately give notice to such person, firm or corporation so operating such toll road or toll bridge to discontinue the operation of the same.

Any person, firm or corporation who sustains any legal damage by reason of the exercise of the authority hereinbefore granted shall be entitled to just compensation therefor, and, in the event satisfactory settlement cannot be made with the department or State agency exercising the authority herein contained, the amount of just compensation may be determined by a special

proceeding instituted by the claimant against the department or agency having such property in custody under the provisions of the Chapter on Eminent Domain, insofar as the same may be applicable hereto: Provided, such proceedings shall be instituted within six months from the time such notice is given. Any compensation awarded shall be a valid claim against the State of North Carolina, payable out of the funds of the department or State agency having such property in charge. (1939, c. 127.)

ARTICLE 5.

Flagpoles and Display of Flags in State Parks.

§ 100-17. Flagpole to be erected in each State park.—At each of the State parks of North Carolina an adequate flagpole shall be erected, in keeping with the construction of other structures thereupon, upon which flags of the United States of America and the State of North Carolina may be flown. (1963, c. 317, s. 1.)

§ 100-18. Display of flags.—Where personnel are available upon the State parks, the flags of the United States and of the State of North Carolina shall be flown on every Saturday and Sunday and on every State holiday from May 1 to October 1 of each year, in conformity with appropriate national and State policy and procedures concerning the display of the State and federal flag. (1963, c. 317, s. 2.)

§ 100-19. Donation of flagpoles.—Flagpoles at State parks may be donated by donors of the lands upon which State parks are situated, and if such donors express a desire to donate flagpoles, such donations shall be accepted in preference to that of any other individual or group. In the event that the donors of the lands upon which the State parks are situated shall not indicate a desire to donate flagpoles therefor within six months of the date of the passage of this Article, donations for flagpoles shall be accepted from individuals or groups who may desire to make such donations and erect the said flagpoles in keeping with State park regulations. (1963, c. 317, s. 3.)

Editor's Note. — The act inserting this Article became effective May 1, 1963.

Chapter 101.

Names of Persons.

Sec.
101-1. Legislature may regulate change by general but not private law.
101-2. Procedure for changing name; petition; notice.
101-3. Contents of petition.
101-4. Proof of good character to accompany petition.
101-5. Clerk to order change; certificate and record.
101-6. Effect of change; only one change.
101-7. Recording name change.

§ 101-1. Legislature may regulate change by general but not private law.—The General Assembly shall not have power to pass any private law to alter the name of any person, but shall have power to pass general laws regulating the same. (Const., Art. II, s. 11; Rev., s. 2146; C. S., s. 2970.)

Cross References. — As to changing name of minor child upon adoption, see § 48-14. As to resumption of maiden name by a woman after divorce, see § 50-12. As to duty to disclose real name when trading as "company" or "agent," see § 66-72. As to trademarks, etc., see Chapter 80.

§ 101-2. Procedure for changing name; petition; notice.—A person who wishes, for good cause shown, to change his name must file his application before the clerk of the superior court of the county in which he lives, having first given 10 days' notice of the application by publication at the courthouse door.

Applications to change the name of minor children may be filed by their parent or parents or guardian or next friend of such minor children, and such applications may be joined in the application for a change of name filed by their parent or parents: Provided nothing herein shall be construed to permit one parent to make such application on behalf of a minor child without the consent of the other parent of such minor child if both parents be living, except that a minor who has reached the age of 16 years, upon proper application to the clerk may change his or her name, with the consent of the parent who has custody of the minor and has supported the minor, without the necessity of obtaining the consent of the other parent, when the clerk of court is satisfied that the other parent has abandoned the minor. Provided, further, that a change of parentage or the addition of information relating to parentage on the birth certificate of any person shall be made pursuant to G.S. 130-60.

Notwithstanding any other provisions of this section, the consent of a parent who has abandoned a minor child shall not be required if there is filed with the clerk a copy of an order of a court of competent jurisdiction adjudicating that such parent has abandoned such minor child. In the event that a court of competent jurisdiction has not therefore declared the minor child to be an abandoned child, then on written notice of not less than 10 days to the parent alleged to have abandoned the child, by registered or certified mail directed to such parent's last known address, the clerk of superior court is hereby authorized to determine whether an abandonment has taken place. If said parent denies that an abandonment has taken place, this issue of fact shall be determined as provided in G.S. 1-273, and if abandonment is determined, then the consent of said parent shall not be required. Upon final determination of this issue of fact the proceeding shall be transferred back to the special proceedings docket for further action by the clerk. (1891, c. 145; Rev., s. 2147; C. S., s. 2971; 1947, c. 115; 1953, c. 678; 1955, c. 951, s. 3; 1957, c. 1442; 1959, c. 1161, s. 7; 1971, c. 444, s. 1.)

Local Modification. — Chowan: 1945, c. 455; Mitchell: 1945, c. 389.

Editor's Note. — The 1971 amendment substituted "G.S. 130-60" for "G.S. 130-64.1" at the end of the last sentence in the second paragraph.

§ 101-3. Contents of petition.—The applicant shall state in the application his true name, county of birth, date of birth, the full name of parents as shown on birth certificate, the name he desires to adopt, his reasons for desiring such change, and whether his name has ever before been changed by law, and, if so, the facts with respect thereto. (1891, c. 145; Rev., s. 2147; C. S., s. 2972; 1945, c. 37, s. 1; 1957, c. 1233, s. 1.)

§ 101-4. Proof of good character to accompany petition.—The applicant shall also file with said petition proof of his good character, which proof must be made by at least two citizens of the county who know his standing: Provided, however, proof of good character shall not be required when the application is for the change of name of a child under 16 years of age. (1891, c. 145; Rev., s. 2148; C. S., s. 2973; 1963, c. 206.)

§ 101-5. Clerk to order change; certificate and record.—If the clerk thinks that good and sufficient reason exists for the change of name, it shall be his duty to issue an order changing the name of the applicant from his true name to the name sought to be adopted. Such order shall contain the true name, the county of birth, the date of birth, the full name of parents as shown on birth certificate, and the name sought to be adopted. He shall issue to the applicant a certificate under his hand and seal of office, stating the change made in the applicant's name, and shall also record said application and order on the docket of special proceedings in his court. He shall forward the order to the State Registrar of Vital Statistics on a form provided by him. If the applicant was born in North Carolina, the State Registrar shall note the change of name of the individual or individuals specified in the order on the birth certificate of that individual or those individuals and shall notify the register of deeds in the county of birth. If the applicant was born in another state of the United States, the State Registrar shall forward the notice of change of name to the registration office of the state of birth. (1891, c. 145; Rev., ss. 2149, 2150; C. S., s. 2974; 1955, c. 951, s. 4; 1957, c. 1233, s. 2; 1971, c. 444, s. 2.)

Editor's Note. — The 1971 amendment substituted "the order to the State Registrar of Vital Statistics on a form provided by him" for "a copy of the change of name order to the State Registrar of Vital Statistics if the applicant was born in North Carolina" in the fourth sentence, substituted "If the applicant was born in North Carolina" for "Upon receipt of the order" in the fifth sentence, and added the last sentence.

§ 101-6. Effect of change; only one change.—When the order is made and the applicant's name changed, he is entitled to all the privileges and protection under his new name as he would have been under the old name. No person shall be allowed to change his name under this Chapter but once, except that he shall be permitted to resume his former name upon compliance with the requirements and procedure set forth in this Chapter for change of name. (1891, c. 145; Rev., ss. 2147, 2149; C. S., s. 2975; 1945, c. 37, s. 2.)

§ 101-7. Recording name change.—When the name of any individual, corporation, partnership, or association has been changed in a manner provided by law, any attorney licensed to practice law in this State may file an affidavit with the clerk of superior court stating facts concerning the change of name. The clerk shall cause the affidavit to be filed and indexed among the records of his office, pursuant to G.S. 7A-180(3) and G.S. 7A-343(3). The clerk shall also forward a copy of the affidavit under the seal of his office to the clerk of superior court of any other county named in the affidavit where it shall also be filed and indexed in accordance with this section. Affidavits filed and indexed under this section are for informational purposes only and neither the affidavit nor the manner of its filing and indexing shall in any manner affect the rights or liabilities of any person. (1971, c. 592, s. 1.)

Chapter 102.

Official Survey Base.

Sec.		Sec.	
102-1.	Name and description.	102-8.	Administrative agency.
102-2.	Physical control.	102-9.	Duties and powers of the agency.
102-3.	Use of name.	102-10.	Prior work.
102-4.	Damaging, defacing, or destroying monuments.	102-11.	Vertical control.
		102-12.	Control system map.
102-5.	[Repealed.]	102-13.	Recording tax.
102-6.	Legality of use in descriptions.	102-14.	Initial operating funds.
102-7.	Use not compulsory.		

§ **102-1. Name and description.**—The official survey base for the State of North Carolina shall be a system of plane coordinates to be known as the "North Carolina Coordinate System," said system being defined as a Lambert conformal projection of Clarke's spheroid of 1866, having a central meridian of 79°—00' west from Greenwich and standard parallels of latitude of 34°—20' and 36°—10' north of the equator, along which parallels the scale shall be exact. All coordinates of the system are expressed in feet, the x coordinate being measured easterly along the grid and the y coordinate being measured northerly along the grid. The origin of the coordinates is hereby established on the meridian 79°—00' west from Greenwich at the intersection of the parallels 33°—45' north latitude, such origin being given the coordinates x=2,000,000 feet, y=0 feet. The precise position of said system shall be as marked on the ground by triangulation or traverse stations or monuments established in conformity with the standards adopted by the United States Coast and Geodetic Survey for first- and second-order work, whose geodetic positions have been rigidly on the North American datum of 1927, and whose plane coordinates have been computed on the system defined. (1939, c. 163, s. 1.)

§ **102-2. Physical control.**—Any triangulation or traverse station or monument established as described in G.S. 102-1 may be used in establishing a connection between any survey and the above-mentioned system of rectangular coordinates. (1939, c. 163, s. 2.)

§ **102-3. Use of name.**—The use of the term "North Carolina Coordinate System" on any map, report, or survey, or other document, shall be limited to coordinates based on the North Carolina Coordinate System as defined in this Chapter. (1939, c. 163, s. 3.)

§ **102-4. Damaging, defacing, or destroying monuments.**—If any person shall willfully damage, deface, destroy, or otherwise injure a station, monument or permanent mark of the North Carolina Coordinate System, or shall oppose any obstacles to the proper, reasonable, and legal use of any such station or monument, such person shall be guilty of a misdemeanor, and shall be liable to fine or imprisonment at the discretion of the court. (1939, c. 163, s. 4.)

§ **102-5:** Repealed by Session Laws 1963, c. 783.

§ **102-6. Legality of use in descriptions.**—For the purpose of describing the location of any survey station or land boundary corner in the State of North Carolina, it shall be considered a complete, legal, and satisfactory description to define the location of such point or points by means of coordinates of the North Carolina Coordinate System as described herein. (1963, c. 163, s. 6; c. 783.)

§ **102-7. Use not compulsory.**—Nothing contained in this Chapter shall be interpreted as requiring any purchaser or mortgagee to rely wholly on a description based upon the North Carolina Coordinate System. (1939, c. 163, s. 7.)

§ 102-8. Administrative agency.—The administrative agency of the North Carolina Coordinate System shall be the North Carolina Department of Conservation and Development, through its appropriate division hereinafter called the "agency." (1939, c. 163, s. 8.)

§ 102-9. Duties and powers of the agency.—It shall be the duty of the agency to make or cause to be made from time to time such surveys and computations as are necessary to further or complete the North Carolina Coordinate System. The agency shall endeavor to carry to completion as soon as practicable the field monumentation and office computations of the coordinate system. For the purpose of this work the agency shall have the power to accept grants for the specific purpose of carrying on the work; to coordinate, organize, and direct any federal or other assistance which may be offered to further the work; to cooperate with any individual, firm, company, public or private agency, State or federal agencies, in the prosecution of the work; to enter into contracts or cooperative agreements with other state or federal agencies in promoting the work of the coordinating system. The agency shall further have the power to adopt necessary rules, regulations, and specifications relating to the establishment and use of the coordinate system as defined in this Chapter, consistent with the standards and practice of the United States Coast and Geodetic Survey. (1939, c. 163, s. 9.)

State Government Reorganization. — The Geodetic Survey Division was transferred to the Department of Natural and Economic Resources by § 143A-111, enacted by Session Laws 1971, c. 864.

§ 102-10. Prior work. — The system of stations, monuments, traverses, computations, and other work which has been done or is under way in North Carolina by the so-called North Carolina Geodetic Survey, under the supervision of the United States Coast and Geodetic Survey, is, where consistent with the provisions of this Chapter, hereby made a part of the North Carolina Coordinate System. The surveys, notes, computations, monuments, stations, and all other work relating to the coordinate system, which has been done by said North Carolina Geodetic Survey, under the supervision of and in cooperation with the United States Coast and Geodetic Survey and federal relief agencies, hereby are placed under the direction of, and shall become the property of, the administrative agency. All persons or agencies having in their possession any surveys, notes, computations, or other data pertaining to the aforementioned coordinate system, shall turn over to the Department of Conservation and Development such data upon request. (1939, c. 163, s. 10; 1959, c. 1315, s. 1.)

§ 102-11. Vertical control. — Whereas the foregoing provisions of this Chapter heretofore are related to horizontal control only, the administrative agency may adopt standards for vertical control or levying surveys consistent with those recommended by and used by the United States Coast and Geodetic Survey, and make or cause to be made such surveys as are necessary to complete the vertical control of North Carolina, in accordance with the provisions for horizontal control surveys as defined in this Chapter. (1939, c. 163, s. 11.)

§ 102-12. Control system map. — The agency shall prepare for publication and cause to be published before July 1, 1962, a map or maps setting forth the location of monuments for both horizontal and vertical control, together with such other pertinent data as the agency may direct for implementation of the North Carolina Coordinate System. The agency shall furnish such map or maps to any person or may make such charge as will defray the expense of printing and distribution. It shall be the responsibility of the agency to maintain this map, make revisions as often as necessary to provide up-to-date

information and furnish up-to-date copies to the register of deeds of each county in the State. (1959, c. 1315, s. 2.)

§ **102-13. Recording tax.** — There shall be applied to each transaction in the transfer of ownership of land, except cemetery lots, and on the execution of rights-of-way, easements, or leases of land recorded in any county of North Carolina, a recording tax of fifty cents (50¢), such tax to be collected at the time of registration of the instrument by the registrar of deeds from the selling party to the instrument. The county shall retain ten cents (10¢) from each transaction to offset collection cost and shall pay forty cents (40¢) from each transaction into the general fund of the State. Counties shall maintain daily record of such taxable transactions and shall make payment to the Commissioner of Revenue not later than the fifteenth of the month following that for which payment is made. (1959, c. 1315, s. 3.)

§ **102-14. Initial operating funds.** — There is hereby appropriated the sum of eighty-five thousand two hundred and fifty dollars ($85,250) for the fiscal year 1959-60 and seventy-five thousand dollars ($75,000) for the fiscal year 1960-61 to the Department of Conservation and Development for organization and operation of the Official Survey Base Division for the biennium 1959-61. Thereafter, operating funds shall be provided from the general fund in accordance with applicable budgetary procedures. (1959, c. 1315, s. 3.)

Chapter 103.

Sundays, Holidays and Special Days.

Sec.
103-1. [Repealed.]
103-2. Hunting on Sunday.
103-3. Execution of process on Sunday.
103-4. Dates of public holidays.
103-5. Acts to be done on Sunday or holidays.
103-6. Arbor Week.

§ 103-1: Repealed by Session Laws 1951, c. 73.

§ 103-2. Hunting on Sunday. — If any person shall, except in defense of his own property, hunt on Sunday, having with him a shotgun, rifle, or pistol, he shall be guilty of a misdemeanor and pay a fine not exceeding fifty dollars ($50.00) or imprisoned not exceeding 30 days. Provided, that the provisions hereof shall not be applicable to military reservations, the jurisdiction of which is exclusively in the federal government. (1868-9, c. 18, ss. 1, 2; Code, s. 3783; Rev., s. 3842; C. S., s. 3956; 1945, c. 1047; 1967, c. 1003.)

Local Modification.—Perquimans: 1935, c. 145.

Sufficiency of Indictment.—Under the former reading of the section, a conviction was sustainable under an indictment charging the defendant with being "found off his premises on the Sabbath day, having with him a shotgun, contrary to the form of the statute," etc. State v. Howard, 67 N.C. 24 (1872).

"Sabbath" Used in Indictment. — It is immaterial that the indictment used the expression "the Sabbath" instead of "Sunday." State v. Drake, 64 N. C. 589 (1870).

Indictment Must State Act Committed on Sunday.—An indictment for an act which is criminal when committed on Sunday, must state that the act in question was committed on Sunday; but if it does so, no exception can be taken to it for reference to the same day by a wrong day of the month. State v. Drake, 64 N.C. 589 (1870).

§ 103-3. Execution of process on Sunday. — It shall be lawful for any sheriff, constable or other lawful officer to execute any summons, capias, or other process on Sunday. (1957, c. 1052.)

Sunday is not a judicial day, hence an adjournment of the court from Saturday night to Monday morning during the progress of a trial for murder is not violative of the act requiring the adjournment to be "from day to day." State v. Howard, 82 N.C. 623 (1880).

When Court May Sit on Sunday.—There have been some instances in the judicial proceedings in this State where the courts have held their sessions on Sunday, but the cases are rare, and whenever it has been done, exception has generally been taken to the course of the court, upon the ground that it could not legally sit on that day. But the Supreme Court has held that in special cases ex necessitate the court might sit on Sunday. State v. Ricketts, 74 N.C. 187 (1876); State v. McGimsey, 80 N.C. 377 (1879); State v. Howard, 82 N.C. 623 (1880).

Term of Court Embraces Sunday.—When a term of court is set by statute to begin on a certain Monday, and to last for "one week" (or two or three weeks, as the case may be), it embraces the Sunday of each week (unless sooner adjourned), and the term expires by limitation at midnight of that day. Taylor v. Ervin, 119 N.C. 274, 25 S.E. 875 (1896).

Verdict of Jury and Judgment.—The rendition by the jury of a verdict on Sunday is not invalid for that cause. Tuttle v. Tuttle, 146 N.C. 484, 59 S.E. 1008 (1907).

A verdict entered on Sunday of a week set for the duration of a court, in the absence of an earlier adjournment, is legally entered. Taylor v. Ervin, 119 N.C. 274, 26 S.E. 875 (1896).

There being no inhibition of a verdict rendered on Sunday, either at common law or by statute, a judgment entered on that day (by virtue of the statute, that it shall be entered up at once on the verdict) is valid. Taylor v. Ervin, 119 N.C. 274, 25 S.E. 875 (1896).

§ 103-4. Dates of public holidays.—(a) The following are declared to be legal public holidays:

(1) New Year's Day, January 1.
(2) Robert E. Lee's Birthday, January 19.
(3) Washington's Birthday, the third Monday in February.
(4) Anniversary of signing of Halifax Resolves, April 12.

(5) Confederate Memorial Day, May 10.
(6) Anniversary of Mecklenburg Declaration of Independence, May 20.
(7) Memorial Day, the last Monday in May.
(8) Easter Monday.
(9) Independence Day, July 4.
(10) Labor Day, the first Monday in September.
(11) Columbus Day, the second Monday in October.
(12) Veterans Day, the fourth Monday in October.
(13) Tuesday after the first Monday in November in years in which a general election is to be held.
(14) Thanksgiving Day, the fourth Thursday in November.
(15) Christmas Day, December 25.

Provided that Easter Monday and Memorial Day, the last Monday in May, shall be a holiday for all State and national banks only.

(b) Whenever any public holiday shall fall upon Sunday, the Monday following shall be a public holiday. (1881, c. 294; Code, s. 3784; 1891, c. 58; 1899, c. 410; 1901, c. 25; Rev., s. 2838; 1907, c. 996; 1909, c. 888; 1919, c. 287; C. S., s. 3959; 1935, c. 212; 1959, c. 1011; 1969, c. 521.)

Editor's Note. — The 1969 amendment rewrote this section.

This section relates to statewide public holidays. Hardbarger v. Deal, 258 N.C. 31, 127 S.E.2d 771 (1962).

Closing of County Clerk's Office on Easter Monday.—Where a county clerk's office was closed on Easter Monday, pursuant to resolution by the board of county commissioners in which Easter Monday was designated a holiday, a plaintiff, if otherwise entitled to commence an action on Easter Monday was entitled to commence the action on the next day the courthouse was open for business. Hardbarger v. Deal, 258 N.C. 31, 127 S.E.2d 771 (1962).

Effect of Legal Holiday Generally.—The statute declaring certain days public holidays does not prohibit the pursuit of the usual avocations of citizens, nor public officers or the courts from exercising their respective functions on those days. While it might be that the attendance of jurors, witnesses and suitors will not be enforced, and the courts will not sue out or enforce process on such days, yet the courts may lawfully proceed with the business before them. State v. Moore, 104 N.C. 743, 10 S.E. 183 (1889).

The section simply declares that certain days therein specified, in each year, shall be public holidays, and the following section prescribes when papers coming due on such days, or on Sunday, shall be payable. It does not purport, in terms or effect, to prohibit persons from pursuing their usual avocations on such days, nor is there any inhibition upon public officers to exercise their offices, respectively; nor is there any inhibition upon the courts to sit on such days and exercise their functions and authority. There is no such statutory inhibition; nor, indeed, is there any, except such as may arise in the application of general principles of law. It has never been understood to be the law in this State that a public holiday is dies non juridicus, except perhaps to a limited extent; it is very certainly not wholly so. The courts, particularly the superior courts, very frequently sit on such days and hear and try causes and dispatch the business that ordinarily comes before them, especially when there is no objection. State v. Moore, 104 N.C. 743, 10 S.E. 183 (1889).

Judicial Notice That Certain Days Were Sundays or Public Holidays.—The court would take judicial notice of the fact that September 2, 1962, the last day of the two-year period beginning with the death of the plaintiff's intestate, was Sunday and that the following day was the first Monday in September, a public holiday. The action was instituted on September 4, 1962, by the issuance of summons and, therefore, was instituted within the time allowed by § 1-53. Kinlaw v. Norfolk S. Ry., 269 N.C. 110, 152 S.E.2d 329 (1967).

Deposition Opened on Holiday.—A legal holiday has not the same status in respect to legal proceedings as Sunday; and while depositions opened on the latter day are void, they are not so when they are opened on a legal holiday. Latta v. Catawba Elec. Co., 146 N.C. 285, 59 S.E. 1028 (1907).

Stated in Robbins v. Bowman, 9 N.C. App. 416, 176 S.E.2d 346 (1970).

§ 103-5. Acts to be done on Sunday or holidays. — Where the day or the last day for doing an act required or permitted by law to be done falls on Sunday or a holiday the act may be done on the next succeeding secular or business day and where the courthouse in any county is closed on Saturday or any other day by order of the board of county commissioners of said county

and the day or the last day required for filing an advance bid or the filing of any pleading or written instrument of any kind with any officer having an office in the courthouse, or the performance of any act required or permitted to be done in said courthouse falls on Saturday or other day during which said courthouse is closed as aforesaid, then said Saturday or other day during which said courthouse is closed as aforesaid shall be deemed a holiday; and said advance bid, pleading or other written instrument may be filed, and any act required or permitted to be done in the courthouse may be done on the next day during which the courthouse is open for business. (Code, ss. 3784, 3785, 3786; 1899, c. 733, s. 194; Rev., s. 2839; C. S., s. 3960; 1951, c. 1176, s. 1.)

Cross References.—As to computing time when last day falls on Sunday, see § 1-593. As to closing county clerk's office on Easter Monday, see note to § 103-4.

The institution of a suit is an act "required or permitted to be done in the courthouse," within the meaning of this section. Hardbarger v. Deal, 258 N.C. 31, 127 S.E.2d 771 (1962).

Quoted in Asheville Showcase & Fixture Co. v. Restaurant Associates, 3 N.C. App. 74, 164 S.E.2d 63 (1968).

§ **103-6. Arbor Week.** — The week in March of each year containing March 15 is hereby designated as Arbor Week in North Carolina. (1967, c. 39.)

Chapter 104.

United States Lands.

Article 1.

Authority for Acquisition.

Sec.
104-1. Acquisition of lands for specified purposes authorized; concurrent jurisdiction reserved.
104-2. Unused lands to revert to State.
104-3. Exemption of such lands from taxation.
104-4. Conveyances of such lands to be recorded.
104-5. Forest reserve in North Carolina authorized; powers conferred.
104-6. Acquisition of lands for river and harbor improvement; reservation of right to serve process.
104-7. Acquisition of lands for public buildings; cession of jurisdiction; exemption from taxation.
104-8. Further authorization of acquisition of land.
104-9. Condition of consent granted in preceding section.
104-10. Migratory bird sanctuaries or other wild life refuges.
104-11. Utilities Commission to secure rights-of-way, etc., for waterway improvements by use of federal funds.
104-11.1. Governor may accept a retrocession of jurisdiction over federal areas.

Article 2.

Inland Waterways.

Sec.
104-12. Acquisition of land for inland waterway from Cape Fear River; grant of State lands.
104-13. Utilities Commission to secure right-of-way over private lands; condemnation by United States.
104-14. Use declared paramount public purpose.
104-15. Method of payment of expenses and awards.
104-16. State and United States may enter upon lands for survey, etc.
104-17. Construction, maintenance, etc., of bridges over waterway.
104-18. Concurrent jurisdiction over waterway.
104-19. Acquisition of land for inland waterway from Beaufort Inlet; grant of State lands.
104-20. Utilities Commission to secure right-of-way; condemnation by United States.
104-21. Use declared paramount public purpose.
104-22. Method of payment of expenses and awards.
104-23. Maintenance and operation of bridges over waterway.
104-24. Concurrent jurisdiction over waterway.
104-25. Lands conveyed to United States for inland waterway.

Article 1.

Authority for Acquisition.

§ 104-1. Acquisition of lands for specified purposes authorized; concurrent jurisdiction reserved.—The United States is authorized, by purchase or otherwise, to acquire title to any tract or parcel of land in the State of North Carolina, not exceeding 25 acres, for the purpose of erecting thereon any customhouse, courthouse, post office, or other building, including lighthouses, lightkeepers' dwellings, lifesaving stations, buoys and local depots and buildings connected therewith, or for the establishment of a fish-cultural station and the erection thereon of such buildings and improvements as may be necessary for the successful operations of such fish-cultural station. The consent to acquisition by the United States is upon the express condition that the State of North Carolina shall so far retain a concurrent jurisdiction with the United States over such lands as that all civil and criminal process issued from the courts of the State of North Carolina may be executed thereon in like manner as if this authority had not been given, and that the State of North Carolina also retains authority to punish all violations of its criminal laws

committed on any such tract of land. (1870-1, c. 44, s. 5; Code, ss. 3080, 3083; 1887, c. 136; 1899, c. 10; Rev., s. 5426; C. S., s. 8053.)

Editor's Note. — As to note on jurisdiction relative to lands acquired by federal government, see 23 N.C.L. Rev. 258.

Exclusive Jurisdiction. — Jurisdiction of the United States is exclusive over property in this State acquired in 1899 with the State's legislative consent, and such exclusive jurisdiction is not affected by the restrictive provisions of this section and § 104-7 subsequently enacted, which are prospective only. State v. DeBerry, 224 N.C. 834, 32 S.E.2d 617 (1945).

Cited in State v. Burell, 256 N.C. 288, 123 S.E.2d 795 (1962).

§ 104-2. Unused lands to revert to State.—The consent given in G.S. 104-1 is upon consideration of the United States building lighthouses, lighthouse keepers' dwellings, lifesaving stations, buoys, coal depots, fish stations, post offices, customhouses, and other buildings connected therewith, on the tracts or parcels of land so purchased, or that may be purchased; and that the title to land so conveyed to the United States shall revert to the State unless the construction of the aforementioned buildings be completed thereon within 10 years from the date of the conveyance from the grantor. (1870-1, c. 44, s. 5; Code, ss. 3080, 3083; 1887, c. 136; 1899, c. 10; Rev., s. 5426; C. S., s. 8054.)

§ 104-3. Exemption of such lands from taxation.—The lots, parcels, or tracts of land acquired under this Chapter, together with the tenements and appurtenances for the purpose mentioned in this Chapter, shall be exempt from taxation. (1870-1, c. 44, s. 3; Code, s. 3082; Rev., s. 5428; C. S., s. 8055.)

When Exemption Begins. — A contract to convey lands to the United States government reservation, under the federal statute, does not vest the title in the government until survey made, acreage determined, purchase price paid, or conveyance made and title approved by the Attorney General, and until then the land is subject to State taxes under the State statutes. Caldwell Land & Lumber Co. v. Commissioners of Caldwell County, 174 N.C. 634, 94 S.E. 406 (1917).

§ 104-4. Conveyances of such lands to be recorded.—All deeds, conveyances, or other title papers for the same shall be recorded, as in other cases, in the office of the register of deeds of the county in which the lands so conveyed may lie, in the same manner and under the same regulations as other deeds and conveyances are now recorded, and in like manner may be recorded a sufficient description by metes and bounds, courses and distances, of any tract or legal division of any public land belonging to the United States, which may be set apart by the general government for the purpose before mentioned, by an order, patent, or other official document or paper so describing such land. (1870-1, c. 44, s. 2; 1872-3, c. 201; Code, s. 3081; Rev., s. 5429; C. S., s. 8056.)

§ 104-5. Forest reserve in North Carolina authorized; powers conferred.—The United States is authorized to acquire by purchase, or by condemnation with adequate compensation, except as hereinafter provided, such lands in North Carolina as in the opinion of the federal government may be needed for the establishment of a national forest reserve in that region. This consent is given upon condition that the State of North Carolina shall retain a concurrent jurisdiction with the United States in and over such lands so far that civil process in all cases, and such criminal process as may issue under the authority of the State of North Carolina against any person charged with the commission of any crime without or within said jurisdiction, may be executed thereon in like manner as if this consent had not been given. Power is hereby conferred upon the Congress of the United States to pass such laws as it may deem necessary to the acquisition as hereinbefore provided, for incorporation in such national forest reserve such forest-covered lands lying in North Carolina as in the opinion of the federal government may be needed for this purpose, but as much as 200 acres of any tract of land occupied as a home by

bona fide residents in this State on the eighteenth day of January, 1901, shall be exempt from the provisions of this section. Power is hereby conferred upon Congress to pass such laws and to make or provide for the making of such rules and regulations, of both civil and criminal nature, and to provide punishment therefor, as in its judgment may be necessary for the management, control, and protection of such lands as may be from time to time acquired by the United States under the provisions of this section. (1901, c. 17; Rev., s. 5430; C. S., s. 8057; 1929, c. 67, s. 1.)

§ 104-6. Acquisition of lands for river and harbor improvement; reservation of right to serve process.—The consent of the legislature of the State is hereby given to the acquisition by the United States of any tracts, pieces, or parcels of land within the limits of the State, by purchase or condemnation, for use as sites for locks and dams, or for any other purpose in connection with the improvement of rivers and harbors within and on the borders of the State. The consent hereby given is in accordance with the seventeenth clause of the eighth section of the first article of the Constitution of the United States, and with the acts of Congress in such cases made and provided; and this State retains concurrent jurisdiction with the United States over any lands acquired and held in pursuance of the provisions of this section, so far as that all civil and criminal process issued under authority of any law of this State may be executed in any part of the premises so acquired, or the buildings or structures thereon erected. (1907, c. 681; C. S., s. 8058.)

§ 104-7. Acquisition of lands for public buildings; cession of jurisdiction; exemption from taxation.—The consent of the State is hereby given, in accordance with the seventeenth clause, eighth section, of the first article of the Constitution of the United States, to the acquisition by the United States, by purchase, condemnation, or otherwise, of any land in the State required for the sites for customhouses, courthouses, post offices, arsenals, or other public buildings whatever, or for any other purposes of the government.

Exclusive jurisdiction in and over any land so acquired by the United States shall be and the same is hereby ceded to the United States for all purposes except the service upon such sites of all civil and criminal process of the courts of this State; but the jurisdiction so ceded shall continue no longer than the said United States shall own such lands. The jurisdiction ceded shall not vest until the United States shall have acquired title to said lands by purchase, condemnation, or otherwise.

So long as the said lands shall remain the property of the United States when acquired as aforesaid, and no longer, the same shall be and continue exempt and exonerated from all State, county, and municipal taxation, assessment, or other charges which may be levied or imposed under the authority of this State. (1907, c. 25; C. S., s. 8059.)

Cross Reference. — See note to § 104-1.

Editor's Note. — As to note on jurisdiction relative to lands acquired by federal government, see 23 N.C.L. Rev. 258. For case law survey on jurisdiction over federal enclave, see 41 N.C.L. Rev. 451 (1963).

Necessity for Acceptance of Jurisdiction by United States. — This section cedes exclusive jurisdiction to the United States over the land acquired, but this section and the State of North Carolina cannot compel the United States to accept such jurisdiction over an area. State v. Burell, 256 N.C. 288, 123 S.E.2d 795, cert. denied, 370 U.S. 961, 82 S. Ct. 1621, 8 L. Ed. 2d 827 (1962).

When the United States government has not accepted the exclusive jurisdiction over the area ceded by the section, this section is not applicable and the State retains its territorial jurisdiction over the area in question so far as its exercise involves no interference with the carrying out of the federal project, and the trial, conviction and judgment imposed upon a defendant by the State court for the felony of assault with intent to commit rape committed in the ceded area is no such interference. State v. Burell, 256 N.C. 288, 123 S.E.2d 795, cert. denied, 370 U.S. 961, 82 S. Ct. 1621, 8 L. Ed. 2d 827 (1962).

Fixtures and improvements placed upon lands in a military reservation leased from the federal government, as well as the value of

the leasehold estate, are subject to taxation in this State, Congress having waived any immunity of such property from taxation. Bragg Inv. Co. v. Cumberland County, 245 N.C. 492, 96 S.E.2d 341 (1957).

§ 104-8. Further authorization of acquisition of land.—The United States is hereby authorized to acquire lands by condemnation or otherwise in this State for the purpose of preserving the navigability of navigable streams and for holding and administering such lands for national park purposes: Provided, that this section and G.S. 104-9 shall in nowise affect the authority conferred upon the United States and reserved to the State in G.S. 104-5 and 104-6. (1925, c. 152, s. 1.)

§ 104-9. Condition of consent granted in preceding section.—This consent is given upon condition that the State of North Carolina shall retain a concurrent jurisdiction with the United States in and over such lands so far that civil process in all cases, and such criminal process as may issue under the authority of the State of North Carolina against any person charged with the commission of any crime, without or within said jurisdiction, may be executed thereon in like manner as if this consent had not been given. (1925, c. 152, s. 2.)

§ 104-10. Migratory bird sanctuaries or other wild life refuges.—The United States is authorized to acquire by purchase, or by condemnation with adequate compensation, such lands in North Carolina as in the opinion of the federal government may be needed for the establishment of one or more migratory bird sanctuaries or other wild life refuges. This consent is given upon condition that the State of North Carolina shall retain a concurrent jurisdiction with the United States in and over such lands so far that civil process in all cases, and such criminal process as may issue under the authority of the State of North Carolina against any person charged with the commission of any crime without or within said jurisdiction, may be executed therein in like manner as if this consent had not been given. Power is hereby conferred upon the Congress of the United States to pass such laws as it may deem necessary to the acquisition as hereinbefore provided, for incorporation in such sanctuaries or refuges such lands lying in North Carolina as in the opinion of the federal government may be suitable and needed for this purpose. Power is hereby conferred upon Congress to pass such laws and to make or provide for the making of such rules and regulations, of both civil and criminal nature, and to provide punishment therefor, as in its judgment may be necessary for the management, control and protection of such lands as may be from time to time acquired by the United States under the provisions of this section. (1929, c. 163, s. 1.)

§ 104-11. Utilities Commission to secure rights-of-way, etc., for waterway improvements by use of federal funds.—Hereafter whenever any waterway improvement in North Carolina by the use of federal funds is provided for upon condition that the State or locality shall furnish rights-of-way, permits for the dumping of dredged material, or furnish or do any other thing in connection with the proposed waterway improvement, the Utilities Commission is authorized and empowered to represent the State or locality in such matter of securing the rights-of-way, permits for the dumping of dredged material, or other things so required in connection with such waterway improvement; and in prosecuting such undertaking, the Utilities Commission may follow the same procedure provided in Article 2 for the acquisition of rights-of-way for the intercoastal waterway from the Cape Fear River to the South Carolina line: Provided, however, that said Utilities Commission is not hereby authorized to enter into obligation or contract for the payment of any money or proceeds through condemnation or otherwise without the express approval of the Governor and Council of State. (1935, c. 240; 1937, c. 434.)

§ 104-11.1. Governor may accept a retrocession of jurisdiction over federal areas.—Whenever a duly authorized official or agent of the United States, acting pursuant to authority conferred by the Congress, notifies the Governor or any other State official, department or agency, that the United States desires or is willing to relinquish to the State the jurisdiction, or a portion thereof, held by the United States over the lands designated in such notice, the Governor may, in his discretion, accept such relinquishment. Such acceptance may be made by sending a notice of acceptance to the official or agent designated by the United States to receive such notice of acceptance. The Governor shall send a signed copy of the notice of acceptance, together with the notice of relinquishment received from the United States, to the Secretary of State, who shall maintain a permanent file of said notices.

Upon the sending of said notice of acceptance to the designated official or agent of the United States, the State shall immediately have such jurisdiction over the lands designated in the notice of relinquishment as said notice shall specify.

The provisions of this section shall apply to the relinquishment of jurisdiction acquired by the United States under the provisions of this Chapter or any other provision of law. (1957, c. 1202.)

Article 2.

Inland Waterways.

§ 104-12. Acquisition of land for inland waterway from Cape Fear River; grant of State lands.—For the purpose of aiding in the construction of the proposed inland waterway by the United States from the Cape Fear River at Southport to the North Carolina-South Carolina State line, the Secretary of State is hereby authorized to issue to the United States of America a grant to the land located within said inland waterway, right-of-way, which is to be 1,000 feet to 1,750 feet wide insofar as such land is subject to grant by the State of North Carolina, the said grant to issue upon a certificate furnished to the Secretary of State by the Secretary of War, or by any authorized officer of the corps of engineers of the United States army, or by any other authorized official, exercising control over the construction of the said waterway. Whenever in the construction of such inland waterway within this State, lands theretofore submerged shall be raised above the water by the deposit of excavated material, the land so formed shall become the property of the United States if within the limits of said inland waterway, right-of-way, herein set out 1,000 feet to 1,750 feet and the Secretary of State is hereby authorized to issue to the United States a grant to the land so formed within the limits above specified, the grant to issue upon a certificate furnished to the Secretary of State by some authorized official of the United States, as above provided. If said lands so required for the inland waterway right-of-way shall be marshlands, or sound lands, the title to which has heretofore been vested in the State Board of Education, the Governor of the State, as President thereof, and the Superintendent of Public Instruction as Secretary, are hereby authorized and required to execute proper conveyance to the United States of America for said marshlands or sound lands, free of cost, both to the State and to the United States government, upon a certificate furnished to said Board of Education by the Secretary of War, or by any authorized officer of the corps of engineers of the United States army, or by any other authorized official exercising control over the construction of the said inland waterway. (1931, c. 2, s. 1.)

§ 104-13. Utilities Commission to secure right-of-way over private lands; condemnation by United States.—If the title to any part of the lands acquired by the United States government for the construction of such inland waterway from the Cape Fear River at Southport to the North Carolina-South Carolina State line shall be in any private person, company or cor-

poration, railroad company, street railway company, telephone or telegraph company, or other public service corporation or shall have been donated or condemned for any public use by any political subdivision of the State, or if it may be necessary, for the purpose of obtaining the proper title to any lands, the title to which has heretofore been vested in the State Board of Education, then the Utilities Commission, in the name of the State of North Carolina, is hereby authorized and empowered, acting for and in behalf of the State of North Carolina, to secure a right-of-way 1,000 to 1,750 feet wide for said inland waterway across and through such lands or any part thereof, by purchase, donation or otherwise, through agreement with the owner or owners where possible, and when any such property is thus acquired, the Governor and Secretary of State shall execute a deed for the same to the United States; and if for any reason the said Commission shall be unable to secure such right-of-way across any such property by voluntary donation by and/or with the owner or owners, the said Commission acting for and in behalf of the State of North Carolina is hereby vested with the power to condemn the same, and in so doing, the ways, means, methods and procedure of the Chapter of the General Statutes of North Carolina, entitled "Eminent Domain," shall be used by it as near as the same is suitable for the purposes of this Article, and in all instances, the general and special benefits to the owner thereof shall be assessed as offsets against the damages to such property or lands.

As such condemnation proceedings might result in delay in the acquiring of title to all parts of the right-of-way and in the construction of the said inland waterway by the United States, said Utilities Commission is authorized to enter any of said lands and property and take possession of the same at the time hereinafter provided as needed for this use in behalf of the State or the United States government for the purposes herein set out, prior to the bringing of the proceeding for condemnation and prior to the payment of the money for such land or property under any judgment in condemnation. In the event the owner or owners shall appeal from the report of the commissioners appointed in any condemnation proceeding hereunder, it shall not be necessary for said Commission, acting in behalf of the State of North Carolina, or the United States government, to deposit the money assessed by said commissioners with the clerk.

Whenever proceedings in condemnation are instituted in pursuance of the provisions of this section, the said Commission upon the filing of the petition or petitions in such proceedings, shall have the right to take immediate possession, on behalf of the State, of such lands or property to the extent of the interest to be acquired and the order of the clerk of the superior court of the county where the action is instituted, shall be sufficient to vest the title and possession in the State through the Utilities Commission. The Governor and Secretary of State shall, upon vesting of the title and possession, execute a deed to the United States and said lands or property may then be appropriated and used by the United States for the purposes aforesaid: Provided, that in every case the proceedings in condemnation shall be diligently prosecuted to final judgment in order that the just compensation, if any, to which the owners of the property are entitled may be ascertained and when so ascertained and determined, such compensation, if any, shall be promptly paid as hereinafter in this Article provided.

If the United States government shall so determine, it is hereby authorized to condemn and use all lands and property which may be needed for the purposes herein set out and which is specifically described and set out in the paragraph next preceding, under the authority of said United States government, and according to the provisions existing in the federal statutes for condemning lands and property for the use of the United States government. In case the United States government shall so condemn said land and property,

the said Utilities Commission is hereby authorized to pay all expenses of the condemnation proceedings and any award that may be made thereunder, out of the money which may be appropriated for said purposes.

All sums which may be agreed upon between the said Utilities Commission and the owner of any property needed by the United States government for said inland waterway and all sums which may be assessed in favor of the owner of any property condemned hereunder, shall constitute and remain a fixed and valid claim against the State of North Carolina until paid and satisfied in full, but the order of the clerk when entered in any condemnation proceeding shall divest the owner of the land condemned of all right, title, interest and possession in and to such land and property. (1931, c. 2, s. 2; 1937, c. 434.)

Editor's Note. — For an article urging revision and recodification of North Carolina's eminent domain laws, see 45 N.C.L. Rev. 587 (1967).

§ 104-14. Use declared paramount public purpose.—In such condemnation proceedings the uses for which such land or property is condemned are hereby declared to be for a purpose paramount to all other public uses, and the fact that any portion of it has heretofore been condemned by a railroad company, a street railway company, telephone or telegraph company, or other public service corporation, or by any political subdivision of the State of North Carolina, for public uses, or has been conveyed by any person or corporation for any such public uses, or vested in the State Board of Education, or by any other act dedicated to any public use, shall in no way affect the right of the State of North Carolina, or the United States government, to proceed and condemn such land and property as hereinbefore provided. (1931, c. 2, s. 3.)

§ 104-15. Method of payment of expenses and awards.—Whenever said Commission has agreed with the owner of any such land or property as to the purchase price thereof, or the damage for the construction of the inland waterway has finally been determined in any condemnation proceeding necessary to secure such land or property, the said Commission is hereby authorized and directed to pay all of said sums and other expenses incident thereto by proper warrant upon the sum which may be appropriated for said purpose, and all such sums shall constitute and remain a fixed and valid claim against the State of North Carolina until paid and satisfied in full. (1931, c. 2, s. 4.)

§ 104-16. State and United States may enter upon lands for survey, etc.—For the purpose of determining the lands necessary for the uses herein set out, the Utilities Commission or the United States government, or the agents of either, shall have the right to enter upon any lands along the general line of the right-of-way in this Article specified, and make such surveys, and do such other acts as in their judgment may be necessary for the purpose of definitely locating the specific lines of said right-of-way and the lands required for said purposes, and there shall be no claim against the State of North Carolina or the United States for such acts as may be done in making said surveys. (1931, c. 2, s. 5; 1937, c. 434.)

§ 104-17. Construction, maintenance, etc., of bridges over waterway.—The State Highway Commission or the road governing body of any political subdivision of the State of North Carolina is hereby authorized and directed to construct, maintain and operate in perpetuity, all bridges over the waterway without cost to the United States. (1931, c. 2, s. 7; 1933, c. 172, s. 17; 1957, c. 65, s. 11.)

§ 104-18. Concurrent jurisdiction over waterway.—The State of North Carolina retains concurrent jurisdiction with the United States over any lands

acquired and held in pursuance of the provisions of this Chapter, so far as that all civil and criminal process issued under authority of any law of this State may be executed in any part of the premises so acquired for such inland waterway, or for the buildings or constructions thereon erected for the purposes of such inland waterway. (1931, c. 2, s. 8.)

§ 104-19. Acquisition of land for inland waterway from Beaufort Inlet; grant of State lands.—For the purpose of aiding in the construction of the proposed inland waterway by the United States from Beaufort Inlet in the State of North Carolina to the Cape Fear River, the Secretary of State is hereby authorized to issue to the United States of America a grant to the land located within said inland waterway, right-of-way, which is to be 1,000 feet wide, insofar as such land is subject to grant by the State of North Carolina, the said grant to issue upon a certificate furnished to the Secretary of State by the Secretary of War, or by any authorized officer of the corps of engineers of the United States army, or by any other authorized official, exercising control over the construction of the said waterway. Whenever in the construction of such inland waterway within this State, lands theretofore submerged shall be raised above the water by the deposit of excavated material, the land so formed shall become the property of the United States if within the limits of said inland waterway, right-of-way, herein set out 1,000 feet, and the Secretary of State is hereby authorized to issue to the United States a grant to the land so formed within the limits above specified, the grant to issue upon a certificate furnished to the Secretary of State by some authorized official of the United States, as above provided. If said lands so required for the inland waterway right-of-way shall be marshlands, the title to which has heretofore been vested in the State Board of Education, the Governor of the State, as President thereof, and the Superintendent of Public Instruction as Secretary, are hereby authorized and required to execute a proper conveyance to the United States of America for said marshlands, free of cost, both to the State and to the United States government, upon a certificate furnished, to said Board of Education by the Secretary of War, or by any authorized officer of the corps of engineers of the United States army, or by any other authorized official exercising control over the construction of the said inland waterway. (1927, c. 44, s. 1.)

§ 104-20. Utilities Commission to secure right-of-way; condemnation by United States.—If the title to any part of the lands required by the United States government for the construction of such inland waterway from Beaufort Inlet to the Cape Fear River shall be in any private person, company or corporation, railroad company, street railway company, telephone or telegraph company, or other public service corporation, or shall have been donated or condemned for any public use by any political subdivision of the State or if it may be necessary, for the purpose of obtaining the proper title to any lands, the title to which has heretofore been vested in the State Board of Education, then the Utilities Commission in the name of the State of North Carolina, is hereby authorized and empowered, acting for and in behalf of the State of North Carolina, to secure a right-of-way 1,000 feet wide for said inland waterway across and through such lands or any part thereof, if possible by purchase, donation or otherwise, through agreement with the owner or owners, and when any such property is thus acquired, the Governor and Secretary of State shall execute a deed for the same to the United States; and if for any reason the said Commission shall be unable to secure such right-of-way across any such property by voluntary agreement with the owner or owners as aforesaid, the said Commission acting for and in behalf of the State of North Carolina, is hereby vested with the power to condemn the same, and in so doing, the ways, means, methods and procedure of Chapter 40 of the General Statutes of North Carolina, entitled "Eminent Domain," shall be used by it as near as the same is suitable for the purposes of this law, and in all instances,

the general and the special benefits to the owner thereof shall be assessed as offsets against the damages to such property or lands.

As such condemnation proceedings might result in delay in the acquiring of title to all parts of the right-of-way and in the construction of the said inland waterway by the United States, said Utilities Commission is authorized to enter any of said lands and property and take possession of the same at the time hereinafter provided as needed for this use in behalf of the State or the United States government for the purposes herein set out prior to the bringing of the proceeding for condemnation and prior to the payment of the money for such land or property under any judgment in condemnation. In the event the owner or owners shall appeal from the report of the commissioners appointed in the condemnation proceeding it shall not be necessary for said Commission acting in behalf of the State of North Carolina, the State of North Carolina, or the United States government, to deposit the money assessed by said commissioners with the clerk.

Whenever proceedings in condemnation are instituted in pursuance of the provisions of this section, the said Commission upon the filing of the petition or petitions in such proceedings, shall have the right to take immediate possession on behalf of the State of such lands or property to the extent of the interest to be acquired and the Governor and Secretary of State shall thereupon execute a deed to the United States and said lands or property may then be appropriated and used by the United States for the purposes aforesaid. Provided, that in every case the proceedings in condemnation shall be diligently prosecuted to final judgment in order that the just compensation to which the owners of the property are entitled may be ascertained and when so ascertained and determined such compensation shall be promptly paid as hereinafter in this law provided.

If the United States government shall so determine, it is hereby authorized to condemn and use all lands and property which may be needed for the purposes herein set out and which is specifically described and set out in the preceding paragraphs, under the authority of said United States government, and according to the provisions existing in the federal statutes for condemning lands and property for the use of the United States government. In case the United States government shall so condemn said land and property, the said Utilities Commission is hereby authorized to pay all expenses of the condemnation proceedings and any award that may be made thereunder, out of the money which may be appropriated for said purposes. (1927, c. 44, s. 2; 1929, c. 4; c. 7, s. 1; 1937, c. 434.)

§ 104-21. Use declared paramount public purpose.—In such condemnation proceedings the uses for which such land or property is condemned are hereby declared to be for a purpose paramount to all other public uses, and the fact that any portion of it has heretofore been condemned by a railroad company, street railway company, telephone or telegraph company, or other public service corporation, or by any political subdivision of the State of North Carolina, for public uses, or has been conveyed by any person or corporation for any such public uses, or vested in the State Board of Education, shall in no way affect the right of the State of North Carolina, or the United States government, to proceed and condemn such land and property as hereinbefore provided. (1927, c. 44, s. 3.)

§ 104-22. Method of payment of expenses and awards.—Whenever said Commission has agreed with the owner of any such land or property as to the purchase price thereof, or the damage for the construction of the inland waterway has finally been determined in any condemnation proceeding necessary to secure such land or property, the said Commission is hereby authorized and directed to pay all of said sum and other expenses incident thereto by proper warrant upon the sum which may be appropriated for said

purpose, and all such sums shall constitute and remain a fixed and valid claim against the State of North Carolina until paid and satisfied in full. (1927, c. 44, s. 4.)

§ 104-23. Maintenance and operation of bridges over waterway.—The State Highway Commission or the road governing body of any political subdivision of the State of North Carolina is hereby authorized and directed to take over and maintain and operate in perpetuity, by contract with the United States government, if necessary, or otherwise, any bridge or bridges which may be subject to their respective control and which the United States government may construct across said inland waterway. (1927, c. 44, s. 6; 1929, c. 4; c. 7, s. 2; 1957, c. 65, s. 11.)

§ 104-24. Concurrent jurisdiction over waterway.—The State of North Carolina retains concurrent jurisdiction with the United States over any lands acquired and held in pursuance of the provisions of this Chapter, so far as that all civil and criminal process issued under authority of any law of this State may be executed in any part of the premises so acquired for such inland waterway, or for the buildings or constructions thereon erected for the purposes of such inland waterway. (1927, c. 44, s. 7.)

§ 104-25. Lands conveyed to United States for inland waterway.—For the purpose of aiding in the construction of a proposed inland waterway by the United States from the City of Norfolk, in the State of Virginia, to Beaufort Inlet, in the State of North Carolina, the Secretary of State is hereby authorized to issue to the United States of America a grant to the land located within a distance of 1,000 feet on either side of the center of the said inland waterway, insofar as such land is subject to grant by the State of North Carolina, the said grant to issue upon a certificate furnished to the Secretary of State by the Secretary of War, or by any authorized officer of the corps of engineers of the United States army, or by any other authorized official, exercising control of the construction of the said waterway.

Wherever, in the construction of the said inland waterway, lands theretofore submerged shall be raised above the water by deposit of excavated material, the lands so formed shall become the property of the United States for a distance of 1,000 feet on either side of the center of such canal or channel, and the Secretary of State is hereby authorized to issue to the United States a grant to the land so formed within the distance above mentioned, the grant to issue upon a certificate furnished to the Secretary of State by some authorized official of the United States as above provided. (1913, c. 197; C. S., s. 7583; 1937, c. 445.)

Chapter 104A.

Degrees of Kinship.

Sec.
104A-1. Degrees of kinship; how computed.

§ 104A-1. Degrees of kinship; how computed.—In all cases where degrees of kinship are to be computed, the same shall be computed in accordance with the civil law rule, as follows:

(1) The degree of lineal kinship of two persons is computed by counting one degree for each person in the line of ascent or descent, exclusive of the person from whom the computing begins; and

(2) The degree of collateral kinship of two persons is computed by commencing with one of the persons and ascending from him to a common ancestor, descending from that ancestor to the other person, and counting one degree for each person in the line of ascent and in the line of descent, exclusive of the person from whom the computation begins, the total to represent the degree of such kinship. (1951, c. 315; 1953, c. 1077, s. 2.)

Editor's Note. — For comment on this Chapter, see 29 N.C.L. Rev. 351.

For brief comment on the 1953 amendment to this section, see 31 N.C.L. Rev. 375 (1953).

The words "next of kin" have a well-defined legal significance. Unless the terms of the instrument show a contrary intent, in the construction of deeds and wills "next of kin" means nearest of kin—the nearest blood relations of the person designated. Without more, the term does not permit a representation. In re Will of Cobb, 271 N.C. 307, 156 S.E.2d 285 (1967).

Under a will bequeathing property to "my next of kin" as provided by the General Statutes of North Carolina, testator's brother was his nearest blood kin at the time of his death, and took to the exclusion of testator's niece and nephews, since the instrument itself contained no suggestion that the words were used in other than the technical sense. In re Will of Cobb, 271 N.C. 307, 156 S.E.2d 285 (1967).

Second cousins are related in the sixth degree of kinship. State v. Allred, 275 N.C. 554, 169 S.E.2d 833 (1969).

Chapter 104B.

Hurricanes or Other Acts of Nature.

Article 1.

In General.

Sec.
104B-1. Removal of property deposited by hurricane or other act of nature.

Article 2.

Zoning of Potential Flood Areas.

104B-2. [Repealed.]

Article 3.

Protection of Sand Dunes along Outer Banks.

104B-3. Legislative findings.
104B-4. Damaging or removing without permit; establishment of shore protection line.
104B-5. Findings prerequisite to issuance of permit; requiring restoration of protection.
104B-6. Appointment or designation of shoreline protection officers; compensation; joint shoreline protection department.
104B-7. Duties of shoreline protection officer.
104B-8. Inspection and enforcement powers of shoreline protection officers.
104B-9. Regulations by board of county commissioners; taxes authorized.
104B-10. Appeal from decision of shoreline protection officer; review of decision of county commissioners.
104B-11. Establishment of project protection line; prohibited acts on ocean side of line; permit for construction of structure.
104B-12. Violations of Article or regulations.
104B-13. Definitions.
104B-14. Map or description of shore protection line or project protection line.
104B-15. Powers of Board of Water Resources.
104B-16. Regulation and enforcement powers of Board of Water and Air Resources.

Article 1.

In General.

§ 104B-1. Removal of property deposited by hurricane or other act of nature.—Whenever the house, garage, building, or any part thereof, or other property of a person, firm or corporation shall be deposited on the land of another by any hurricane, tornado, tidal wave, flood or other act of nature and is not removed from said land within 30 days after the deposit, the owner of such land may notify in writing the owner of the house, garage, building, or other property of such deposit and may require the owner to remove the property so deposited within 60 days after receipt of the notice. If the owner of the deposited property fails to remove it within 60 days after receipt of the notice, the owner of the land may remove the deposited property and destroy it or may use it as he sees fit without incurring liability to the owner of the deposited property, or may sell it and retain the proceeds for his own use; provided, the amount by which the proceeds of any such sale exceed the cost of removal and sale shall be paid to the owner of the deposited property or held for his account.

If the owner of the land is unable to notify the owner of the deposited property and, after diligent search, the owner of the deposited property cannot be located and notified, the owner of the land may, at any time after the expiration of 120 days from the date of the deposit of the property on his land, remove, use, or sell the deposited property in the same manner and under the same restrictions as provided above for removal, use, or sale after notice.

Sales made under this section may be either public or private sales. (1955, c. 643.)

ARTICLE 2.

Zoning of Potential Flood Areas.

§ 104B-2: Repealed by Session Laws 1965, c. 431, s. 1.

ARTICLE 3.

Protection of Sand Dunes along Outer Banks.

§ 104B-3. Legislative findings.—It is hereby determined and declared as a matter of legislative finding that the area of the State of North Carolina lying along the Atlantic Ocean front, and in particular the outer banks of this State as hereinafter defined, is a major asset to the economy of the entire State and as such should be protected and preserved. This area is wholly or in part protected from actions of the Atlantic Ocean and storms thereon by a system of natural or constructed dunes providing a protective barrier for adjacent lands and inland waters and land against the actions of sand, wind, and water. Certain persons, firms, and corporations have from time to time modified or destroyed the effectiveness of such protective barriers in the process of developing the waterfront for various purposes. These practices constitute serious threats to the safety of adjacent properties and to public highways, as well as to the value and taxable basis of such adjacent properties, and they constitute a real danger to the health, safety, and welfare of persons living, visiting, or sojourning in such area. It is therefore deemed necessary to protect that area and especially the system of protective barrier dunes as hereinafter provided. (1965, c. 237.)

Cross Reference. — As to prohibition of stock running at large along outer banks of State, see §§ 68-42 through 68-46.

Editor's Note. — Chapter 237, Session Laws 1965, rewrote this Article, which formerly consisted of five short sections codified from c. 995, Session Laws 1957. Where the subject matter of the present section is the same as that of a former section, the 1957 act is included in the historical citation, but no comparison of the old and new provisions has been attempted.

§ 104B-4. Damaging or removing without permit; establishment of shore protection line.—(a) Except as otherwise provided in subsection (b) of this section, it shall be unlawful for any person, firm, or corporation in any manner to damage, destroy, or remove any sand dune, or part thereof, lying along the outer banks of this State as hereinafter defined, or to kill, destroy, or remove any trees, shrubbery, grass, or other vegetation growing on said dunes, without first having obtained a permit as specified herein authorizing such proposed damage, destruction, or removal.

(b) Any board of county commissioners whose county includes a portion of the outer banks of this State may establish a shore protection line, for the purpose of limiting the territorial application of the provisions of subsection (a) of this section to those dunes within the county which in the judgment of said board serve as protective barriers. In any county which so elects to establish a shore protection line, the provisions of subsection (a) of this section shall apply only with respect to sand dunes (or parts thereof and vegetation growing thereon) located on the ocean side of said shore protection line. In establishing any such shore protection line the board of county commissioners may hold such hearings as it deems desirable, and may consult with the Department of Water Resources and others. (1957, c. 995, s. 1; 1965, c. 237.)

Cross Reference. — See Editor's note to § 104B-3.

§ 104B-5. Findings prerequisite to issuance of permit; requiring restoration of protection.—No such permit shall be granted by any officer, agency, or board charged with the issuance of permits hereunder unless such

officer, agency, or board shall first have found as a fact that the particular action, damage, destruction, or removal proposed will not materially weaken the dune or reduce its effectiveness as a means of protection from the effects of high wind and water, taking into consideration the height, width, and slope of the dune or dunes and the amount and type of vegetation thereon. Permits so issued will require the restoration of protection so affected by construction as well as the restoration of vegetation. (1957, c. 995, s. 3; 1965, c. 237.)

Cross Reference. — See Editor's note to § 104B-3.

§ 104B-6. Appointment or designation of shoreline protection officers; compensation; joint shoreline protection department.—(a) Any board of county commissioners whose county includes a portion of the area subject to this Article may appoint and empower with police authority one or more shoreline protection officers, to serve at the will of the board. In the alternative the board of county commissioners may designate to perform the powers, duties and functions of a shoreline protection officer:

(1) A shoreline protection officer of any other county or counties, with the approval of the board of county commissioners of such other county or counties;

(2) A municipal employee or official of any municipality or municipalities within the county, with the approval of the municipal governing body; or

(3) Any employee or official of the county.

In the absence of such appointment or designation, the board of county commissioners shall itself have the powers, duties and functions of the shoreline protection officer as specified herein.

(b) The board of county commissioners may pay a shoreline protection officer a fixed salary or compensation in such other measure as it deems appropriate. The board of county commissioners may also accept and disburse any funds which may be made available by the State or federal governments as contributions towards the salary or expenses of a shoreline protection officer. The board of county commissioners may make necessary appropriations for the special purpose of paying the salary or salaries of shoreline protection officers and any expenses pertaining to shoreline protection and may levy annually taxes for the payment of such appropriation as a special purpose, in addition to any allowed by the Constitution.

(c) The board of county commissioners may enter into and carry out contracts with any other county or counties under which the parties agree to support a joint shoreline protection department. The board of county commissioners may make any necessary appropriations for such a purpose. (1965, c. 237.)

Cross Reference. — See Editor's note to § 104B-3.

§ 104B-7. Duties of shoreline protection officer.—It shall be the duty of the shoreline protection officer to receive applications for permits under this Article, to check each application for compliance with this Article and any regulations adopted by the board of county commissioners, to make the findings called for under this Article, to issue the permit where no fact appears which would make such issuance a violation of this Article or of regulations adopted hereunder, to collect such fees as may be specified by the board of county commissioners and to deliver same to the county treasurer, to make such reports as may be required by the board of county commissioners, to furnish a surety bond for the faithful performance of his duties and the safeguarding of any public funds coming into his hands (which bond shall be approved as to amount, form, and solvency of sureties by the board of county

commissioners), and to carry out such related duties as may be specified by the board of county commissioners. (1965, c. 237.)

Cross Reference. — See Editor's note to § 104B-3.

§ 104B-8. Inspection and enforcement powers of shoreline protection officers.—(a) A shoreline protection officer is authorized at any reasonable hour to enter upon any lands and structures upon lands to inspect the property, as may be necessary in performing his duties under this Article and the rules and regulations adopted pursuant to this Article; and such entry shall not be deemed a trespass, provided that the county shall make reimbursement for any damages resulting to such property as a result of such activities.

(b) A shoreline protection officer shall have within the county or counties where he holds his appointment the powers of peace officers vested in the sheriffs and constables, for the purpose of enforcing the provisions of this Article and the rules and regulations adopted pursuant to this Article, and for the purpose of initiating prosecutions under this Article. (1965, c. 237.)

Cross Reference. — See Editor's note to § 104B-3.

§ 104B-9. Regulations by board of county commissioners; taxes authorized.—(a) The board of county commissioners is hereby empowered to adopt and enforce such regulations as it may deem necessary, to enforce the provisions of this Article, and also to matters concerning the form, time, and manner of submission of any application for a permit under this Article. It may also fix any reasonable fees to cover part or all of the cost of necessary inspections or other administrative procedures under this Article.

(b) The board of county commissioners of any county which includes a portion of the area subject to this Article is hereby authorized to levy annually on all taxable property in the county a special tax for the special purpose of paying any expenses incurred in carrying out the provisions of this Article and the General Assembly does hereby give its special approval for the levy of such taxes. (1965, c. 237.)

Cross Reference. — See Editor's note to § 104B-3.

§ 104B-10. Appeal from decision of shoreline protection officer; review of decision of county commissioners.—(a) In the event that a shoreline protection officer denies a permit under this Article, the applicant may within 30 days file an appeal with the board of county commissioners. In the event that a shoreline protection officer grants a permit under this Article, any property owner whose property may be damaged by action taken under the permit or any interested State agency may within 30 days file an appeal with the board of county commissioners. In the event that a shoreline protection officer grants a permit under this Article, any property owner whose property may be damaged by action taken under the permit or any interested State agency may within 30 days file an appeal with the board of county commissioners. On receipt of any appeal, the board of county commissioners shall be entitled to consider the matter ab initio and may take any action which the shoreline protection officer could have taken under this Article.

(b) Every decision of the board of county commissioners on such an appeal as well as every decision granting or denying a permit by a board of county commissioners performing the functions of shoreline protection officer, shall be subject to review by the superior court of the county by proceedings in the nature of certiorari. Pending the final disposition of such appeal, no action shall be taken which would be unlawful in the absence of a permit issued under this Article. (1965, c. 237; 1971, c. 1159, s. 5.)

Cross Reference. — See Editor's note to § 104B-3.

Editor's Note. — The 1971 amendment in the second sentence in subsection (a)

substituted "may be" for "is," and inserted "or any interested State agency." The amendment also added the third sentence, which is identical to the second.

§ 104B-11. Establishment of project protection line; prohibited acts on ocean side of line; permit for construction of structure.—(a) The Department of Water Resources shall establish a project protection line prior to the start of construction of each beach restoration or hurricane protection project. Said project protection line will identify the line along which said beach restoration and hurricane protection works will be constructed along the ocean front. The construction of said beach restoration and hurricane protection works will be located on the ocean side of said project protection line.

(b) Subsequent to the establishment of such a project protection line, it shall be unlawful for any person, firm or corporation to construct any building or part thereof, open any new road or street or remove sand, seashells and similar materials on the ocean side of said project protection line. It shall also be unlawful for any person, firm or corporation to alter in any manner the sand dune or beach or in any manner to injure, destroy, interfere with, or reduce the operation of any then existing groins, jetties or any other erosion control works on the ocean side of the project protection line. Groins, jetties, piers or any other such structure will not be constructed on the ocean side of the project protection line without first obtaining a permit from the Department of Water Resources. It shall be further unlawful to drive or operate vehicles of any type or nature on or along the sand dunes or beaches on the ocean side of said project protection line except at such places as may be designated. (1965, c. 237; c. 623, s. 1.)

Cross Reference. — See Editor's note to § 104B-3.

§ 104B-12. Violations of Article or regulations.—(a) Any violation of this Article or of regulations promulgated by a board of county commissioners under the authority of this Article shall constitute a misdemeanor, and upon conviction thereof, any person, firm or corporation committing such violation shall be fined not less than fifty dollars ($50.00) nor more than five hundred dollars ($500.00); provided that the provisions of this Article shall not be construed to apply to the removal of sand, seashells or similar materials for souvenir value in such amounts as may be carried upon the person. Failure to restore any sand dune or part thereof which has unlawfully been damaged, destroyed, or removed, or to restore or replace any trees, shrubbery, grass, or other vegetation which has unlawfully been killed, destroyed, or removed from said dunes shall constitute a separate violation of this Article for each 10 days that such failure continues after written notice from the shoreline protection officer or the board of county commissioners.

(b) In addition to other remedies, the board of county commissioners may institute any appropriate action or proceedings

(1) To restrain or prevent any violation of this Article or

(2) To require any person, firm, or corporation which has committed a violation to restore any sand dune or part thereof which has unlawfully been damaged, destroyed, or removed, or to restore or replace any trees, shrubbery, grass, or other vegetation which has unlawfully been killed, destroyed, or removed from said dunes in violation of this Article. (1965, c. 237.)

Cross Reference. — See Editor's note to § 104B-3.

§ 104B-13. Definitions.—As used in this Article:

(1) The term "Outer Banks of this State" shall be construed to mean all of that part of North Carolina which is separated from the mainland by a body of water, such as an inlet or sound, and which is in part

bounded by the Atlantic Ocean and in Brunswick, New Hanover and Onslow Counties this shall include the land areas lying between the Intra-Coastal Waterway and the Atlantic Ocean.

(2) The term "shoreline protection officer" includes any person designated by a board of county commissioners to perform the functions of shoreline protection officer, as well as a shoreline protection officer duly appointed by a board of county commissioners. (1957, c. 995, s. 4; 1965, c. 237.)

Cross Reference. — See Editor's note to § 104B-3.

§ 104B-14. Map or description of shore protection line or project protection line.—(a) The board of county commissioners in establishing a shore protection line pursuant to G.S. 104B-4, and the Board of Water Resources in establishing a project protection line pursuant to G.S. 104B-11, may define said line by showing it on a map or drawing, by a written description, or any combination thereof, to be designated appropriately and filed permanently with the clerk of superior court and with the register of deeds in the county where the land lies (in the case of a shore protection line) or the Director of Water Resources (in the case of a project protection line). Alterations in these lines shall be indicated by appropriate entries upon or additions to such map or description. Such entries or additions shall be made by or under the direction of the clerk of superior court or Director of Water Resources, as the case may be. Photographic, typed or other copies of such map or description, certified by the clerk of superior court (in the case of a shore protection line) or the Director of Water Resources (in the case of a project protection line), shall be admitted in evidence in all courts and shall have the same force and effect as would the original map or description. The board of county commissioners or Department of Water Resources, as the case may be, may provide for the redrawing of any such map. A redrawn map shall supersede for all purposes the earlier map or maps which it is designated to replace upon the filing thereof at those places designated above.

(b) The Department of Water Resources shall file with the Secretary of State and with the clerk of superior court and the register of deeds of every county in which a beach erosion or hurricane protection project or any part thereof is located:

(1) A certified copy of the map, drawing, description or combination thereof showing the project protection line for said project; and

(2) A certified copy of any redrawn or altered map or drawing, and of any amendments or additions to written descriptions, showing alterations to said project protection line.

The filings required by this subsection shall constitute compliance with the requirements of Article 18 of Chapter 143 of the General Statutes. (1965, c. 237; c. 623, s. 2.)

Cross Reference. — See Editor's note to § 104B-3.

§ 104B-15. Powers of Board of Water Resources.—In addition to its other powers under this Article, the Board of Water Resources shall be empowered to render advice and assistance to any shoreline protection officer or officers, board of county commissioners, or other office, agency, or board having responsibilities under this Article. In exercising this function it shall specifically be authorized to furnish manuals, suggested standards, plans, and other technical data; to conduct training programs; and to give advice and assistance with respect to handling of particular applications; but it shall not be limited to such activities. (1965, c. 237.)

Cross Reference. — See Editor's note to § 104B-3.

§ 104B-16. Regulation and enforcement powers of Board of Water and Air Resources.—The power and authority vested by this Article in the boards of county commissioners of any county to adopt regulations, establish a shore protection line, appoint or designate a shoreline protection officer, fix inspection fees and charges, institute proceedings, and take other actions for the protection of sand dunes along the outer banks of North Carolina may also be exercised by the North Carolina Board of Water and Air Resources in any county that has not adopted regulations and appointed a shoreline protection officer under the authority of this Article by December 31, 1971. In exercising the powers and authority of this Article the Board of Water and Air Resources shall have all the powers (except the power to levy a special tax), and shall be subject to all the requirements and limitations, imposed on boards of county commissioners by this Article. If the Board of Water and Air Resources elects to designate a county or municipal employee or official as a shoreline protection officer, it may do so only with the approval of such county or municipal governing body. Appeals to the Board of Water and Air Resources from actions of a shoreline protection officer may be heard by the Board, or by its designated members, employees, or a committee in Wake County or in any county containing land affected by the denied permit.

If the Board of Water and Air Resources decides to exercise the powers and authority of this Article in any county as authorized by this section, it shall do so by first adopting a resolution stating its intent. From and after the adoption of the resolution of intent, the Board of Water and Air Resources shall have exclusive jurisdiction in any county named in the resolution in the exercise of the powers and authority of this Article. The board of county commissioners of any county named in the resolution of intent shall not be authorized to exercise any of the powers and authority of this Article thereafter unless and until the said commissioners request that the Board of Water and Air Resources rescind its resolution of intent. The Board of Water and Air Resources shall rescind its resolution and vacate its jurisdiction within 60 days after receipt of the resolution from the board of county commissioners; provided the resolution from the said commissioners includes a plan for carrying out the duties, responsibilities, and provisions of this Article. In the event that the county fails to carry out the duties, responsibilities, and provisions of this Article, the Board may reassume the powers and responsibilities of this Article. (1971, c. 1159, s. 4.)

Chapter 104C.

Atomic Energy, Radioactivity and Ionizing Radiation.

Sec.
104C-1 to 104C-3. [Repealed.]
104C-4. Authority and duty of State Board of Health; rules and regulations; licenses; impounding source of radiation; registration, educational and protection programs; right of entry; inspection and advisory service.
104C-5. Governor may enter into agreements with federal government; effect on federal licenses.

§§ 104C-1 to 104C-3: Repealed by Session Laws 1971, c. 882, s. 6, effective July 1, 1971.

§ 104C-4. Authority and duty of State Board of Health; rules and regulations; licenses; impounding source of radiation; registration, educational and protection programs; right of entry; inspection and advisory service.—The State Board of Health is specifically authorized to adopt reasonable rules and regulations relating to the use, storage, transportation and disposal of radiation, radiation machines, and radioactive materials so as to provide protection against hazard from radioactivity and ionizing radiation, and so as to insure safety to all persons at, or in the vicinity of, the place of use, storage, transportation or disposal thereof. To this end, the State Board of Health is authorized to require registration of all persons, firms, corporations, associations or institutions who possess or use such machines or materials, such registration program to be of such scope and in such form as the Board deems necessary to provide an adequate protection and supervision program.

As used in this Chapter, the word "person" means any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, agency, political subdivision of this State, any other state or political subdivision or agency thereof, and any legal successor, representative, agent, or agency of the foregoing, other than the United States Atomic Energy Commission, or any successor thereto, and other than federal government agencies licensed by the United States Atomic Energy Commission, or any successor thereto.

The State Board of Health shall provide by rule or regulation for general or specific licensing of by-product, source, special nuclear materials, or devices or equipment utilizing such materials. Such rule or regulation shall provide for amendment, suspension or revocation of licenses.

Said State Board is authorized to adopt reasonable rules and regulations necessary to carry out an effective licensing program designed to protect the public health or safety in this field. Provision shall be made for applications for licenses, conditions for issuance of licenses, and suspension and revocation of licenses. Said State Board is authorized to exempt certain sources of ionizing radiation or kinds of uses or users from the licensing or registration requirements set forth in this section when the said State Board makes a finding that the exemption of such sources of ionizing radiation or kinds of uses or users will not constitute a significant risk to the health and safety of the public. Rules and regulations promulgated pursuant to this Chapter may provide for recognition of other state or federal licenses as the said State Board may deem desirable, subject to such registration requirements as the said State Board may prescribe.

The State Board shall have authority to impose a right to inspect premises as a condition of issuance of a license. Neither local boards of health nor counties nor cities shall adopt regulations inconsistent with those adopted by the State Board of Health pursuant to this Chapter.

Authorized representatives of the State Board of Health shall have the authority in the event of an emergency to impound or order the impounding of sources of ionizing radiation, in the possession of any person who is not equipped to observe or fails to observe the provisions of this Chapter or any rules or regulations issued thereunder.

Insofar as practicable, all the provisions of Chapter 150 of the General Statutes shall be applicable with respect to licenses and the licensing procedure herein provided for.

Authorized representatives of the State Board of Health shall have authority to enter any premises, other than a private dwelling, where any activities or conditions therein or thereon are the subject of regulations adopted pursuant to this section, for the purpose of determining whether applicable laws and regulations are being properly observed.

The Board is authorized but not required to provide an inspection service and an advisory service, to make surveys, to sponsor educational programs on approved radiation protection practices, and to do any and all other acts deemed desirable in providing an effective protection program. In the performance of these duties, to the end that an environment favorable to the development of the peaceful uses of nuclear energy will be maintained, consistent with public health and safety, the State Board of Health shall not impose standards any more restrictive than the radiation standards established by the Atomic Energy Act of 1954 and amendments, or successor acts, and regulations issued thereunder; in those situations where no such standards are imposed under said Atomic Energy Act, said Board shall be authorized to impose reasonable standards.

No rules or regulations shall be adopted by the State Board of Health pursuant to this section except with the approval of the Governor.

Recognizing the rapid pace of discovery in the atomic field, the State Board of Health shall keep itself informed regarding the regulatory activities of other states and of the government of the United States and shall endeavor to maintain maximum coordination pending the establishment from time to time of clear lines of regulatory authority between the State and the federal governments. All regulations adopted shall be subject to the provisions of G.S. 130-9(a) and the provisions of Article 18 of Chapter 143 of the General Statutes. Any violation of any rule or regulation adopted pursuant to this section is hereby declared to be a misdemeanor.

Whenever the State Board of Health has reasonable cause to believe that any person, firm, corporation, association or institution is violating or threatening to violate any regulation adopted pursuant to this section, the Board may enter an order requiring such violator to desist or refrain from such violation; and an action may be brought in the name of the Board on the relation of the State of North Carolina to enjoin such violator from engaging in or continuing such violation or from doing any act or acts in furtherance thereof. In any such action an order or judgment may be entered awarding such preliminary or final injunction as may be deemed proper. (1959, c. 481, s. 4; 1963, c. 1211, s. 1.)

Cross Reference. — As to exemption of X-ray facilities in licensed hospitals from the provisions of this Chapter, see § 131-126.3.

§ 104C-5. Governor may enter into agreements with federal government; effect on federal licenses.—(a) The Governor, on behalf of this State, is authorized to enter into agreements with the federal government providing for discontinuance of certain of the federal government's responsibilities with respect to sources of ionizing radiation and the assumption thereof by this State.

(b) Any person who, on the effective date of an agreement under subsection (a) above, possesses a license issued by the federal government shall be deemed

to possess the same pursuant to a license issued under this Chapter, which shall expire 90 days after receipt from the State Board of Health, of a notice of expiration of such license, or on the date of expiration specified in the federal license, whichever is earlier. (1963, c. 1211, s. 2.)

Chapter 104D.

Southern Interstate Nuclear Compact.

Sec.
104D-1. Compact entered into; form of compact.
104D-2. Appointment of North Carolina member and alternate member of Southern Interstate Nuclear Board.
104D-3. Submission of budgets of Board.
104D-4. Supplementary agreements ineffective until funds appropriated.
104D-5. Cooperation with Board.
104D-6. Provision of North Carolina's share of funds; limitation.

§ 104D-1. Compact entered into; form of compact.—The Southern Interstate Nuclear Compact is hereby enacted into law and entered into with all other jurisdictions legally joining therein in the form substantially as follows:

SOUTHERN INTERSTATE NUCLEAR COMPACT

ARTICLE I. Policy and purpose

The party states recognize that the proper employment of nuclear energy, facilities, materials, and products can assist substantially in the industrialization of the South and the development of a balanced economy for the region. They also recognize that optimum benefit from and acquisition of nuclear resources and facilities require systematic encouragements, guidance, and assistance from the party states on a cooperative basis. It is the policy of the party states to undertake such cooperation on a continuing basis; it is the purpose of this compact to provide the instruments and framework for such a cooperative effort to improve the economy of the South and contribute to the individual and community well-being of the region's people.

ARTICLE II. The Board

(a) There is hereby created an agency of the party states to be known as the "Southern Interstate Nuclear Board" (hereinafter called the Board). The Board shall be composed of one member from each party state designated or appointed in accordance with the law of the state which he represents and serving and subject to removal in accordance with such law. Any member of the Board may provide for the discharge of his duties and the performance of his functions thereon (either for the duration of his membership or for any lesser period of time) by a deputy or assistant, if the laws of his state make specific provision therefor. The federal government may be represented without vote if provision is made by federal law for such representation.

(b) The Board members of the party states shall each be entitled to one vote on the Board. No action of the Board shall be binding unless taken at a meeting at which a majority of all members representing the party states are present and unless a majority of the total number of votes on the Board are cast in favor thereof.

(c) The Board shall have a seal.

(d) The Board shall elect annually, from among its members, a chairman, a vice-chairman, and a treasurer. The Board shall appoint an Executive Director who shall serve at its pleasure and who shall also act as secretary, and who, together with the treasurer, shall be bonded in such amounts as the Board may require.

(e) The Executive Director, with the approval of the Board, shall appoint and remove or discharge such personnel as may be necessary for the performance of the Board's functions irrespective of the civil service, personnel or other merit system laws of any of the party states.

(f) The Board may establish and maintain, independently or in conjunction with any one or more of the party states, a suitable retirement system for its

full-time employees. Employees of the Board shall be eligible for social security coverage in respect of old age and survivors insurance provided that the Board takes such steps as may be necessary pursuant to federal law to participate in such program of insurance as a governmental agency or unit. The Board may establish and maintain or participate in such additional programs of employee benefits as may be appropriate.

(g) The Board may borrow, accept or contract for the services of personnel from any state or the United States or any subdivision or agency thereof, from any interstate agency, or from any institution, person, firm or corporation.

(h) The Board may accept for any of its purposes and functions under this compact any and all donations, and grants of money, equipment, supplies, materials, and services (conditional or otherwise) from any state or the United States or any subdivision or agency thereof, or interstate agency, or from any institution, person, firm or corporation, and may receive, utilize, and dispose of the same.

(i) The Board may establish and maintain such facilities as may be necessary for the transaction of its business. The Board may acquire, hold, and convey real and personal property and any interest therein.

(j) The Board shall adopt bylaws, rules and regulations for the conduct of its business, and shall have the power to amend and rescind these bylaws, rules, and regulations. The Board shall publish its bylaws, rules, and regulations in convenient form and shall file a copy thereof, and shall also file a copy of any amendment thereto, with the appropriate agency or officer in each of the party states.

(k) The Board annually shall make to the governor of each party state, a report covering the activities of the Board for the preceding year, and embodying such recommendations as may have been adopted by the Board, which report shall be transmitted to the legislature of said state. The Board may issue such additional reports as it may deem desirable.

ARTICLE III. Finances

(a) The Board shall submit to the executive head or designated officer or officers of each party state a budget of its estimated expenditures for such period as may be required by the laws of that jurisdiction for presentation to the legislature thereof.

(b) Each of the Board's budgets of estimated expenditures shall contain specific recommendations of the amount or amounts to be appropriated by each of the party states. One half of the total amount of each budget of estimated expenditures shall be apportioned among the party states in equal shares; one quarter of each such budget shall be apportioned among the party states in accordance with the ratio of their populations to the total population of the entire group of party states based on the last decennial federal census; and one quarter of each such budget shall be apportioned among the party states on the basis of the relative average per capita income of the inhabitants in each of the party states based on the latest computations published by the federal census-taking agency. Subject to appropriation by their respective legislatures, the Board shall be provided with such funds by each of the party states as are necessary to provide the means of establishing and maintaining facilities, a staff of personnel, and such activities as may be necessary to fulfill the powers and duties imposed upon and entrusted to the Board.

(c) The Board may meet any of its obligations in whole or in part with funds available to it under Article II(h) of this compact, provided that the Board takes specific action setting aside such funds prior to the incurring of any obligation to be met in whole or in part in this manner. Except where the Board makes use of funds available to it under Article II(h) hereof, the Board shall not incur any obligation prior to the allotment of funds by the party jurisdictions adequate to meet the same.

(d) Any expenses and any other costs for each member of the Board in attending Board meetings shall be met by the Board.

(e) The Board shall keep accurate accounts of all receipts and disbursements. The receipts and disbursements of the Board shall be subject to the audit and accounting procedures established under its bylaws. However, all receipts and disbursements of funds handled by the Board shall be audited yearly by a qualified public accountant and the report of the audit shall be included in and become part of the annual report of the Board.

(f) The accounts of the Board shall be open at any reasonable time for inspection.

ARTICLE IV. Advisory Committees

The Board may establish such advisory and technical committees as it may deem necessary, membership on which to include but not be limited to private citizens, expert and lay personnel, representatives of industry, labor, commerce, agriculture, civic associations, medicine, education, voluntary health agencies, and officials of local, state and federal government, and may cooperate with and use the services of any such committees and the organizations which they represent in furthering any of its activities under this compact.

ARTICLE V. Powers

The Board shall have power to:

(a) Ascertain and analyze on a continuing basis the position of the South with respect to nuclear and related industries.

(b) Encourage the development and use of nuclear energy, facilities, installations, and products as part of a balanced economy.

(c) Collect, correlate, and disseminate information relating to civilian uses of nuclear energy, materials, and products.

(d) Conduct, or cooperate in conducting, programs of training for state and local personnel engaged in any aspect of

(1) Nuclear industry, medicine, or education or the promotion or regulation thereof.

(2) The formulation or administration of measures designed to promote safety in any matter related to the development, use or disposal of nuclear energy, materials, products, installations, or wastes.

(e) Organize and conduct, or assist and cooperate in organizing and conducting, demonstrations of nuclear product, material, or equipment use and disposal and of proper techniques or processes for the application of nuclear resources to the civilian economy or general welfare.

(f) Undertake such nonregulatory functions with respect to nonnuclear sources of radiation as may promote the economic development and general welfare of the region.

(g) Study industrial, health, safety, and other standards, laws, codes, rules, regulations, and administrative practices in or related to nuclear fields.

(h) Recommend such changes in, or amendments or additions to the laws, codes, rules, regulations, administrative procedures and practices or ordinances of the party states in any of the fields of its interest and competence as in its judgment may be appropriate. Any such recommendation shall be made through the appropriate state agency with due consideration of the desirability of uniformity but shall also give appropriate weight to any special circumstances which may justify variations to meet local conditions.

(i) Prepare, publish, and distribute (with or without charge) such reports, bulletins, newsletters or other material as it deems appropriate.

(j) Cooperate with the Atomic Energy Commission or any agency successor thereto, any other officer or agency of the United States, and any other governmental unit or agency or officer thereof, and with any private persons or agencies in any of the fields of its interests.

(k) Act as licensee of the United States government or any party state with respect to the conduct of any research activity requiring such license and operate such research facility or undertake any program pursuant thereto.

(l) Ascertain from time to time such methods, practices, circumstances, and conditions as may bring about the prevention and control of nuclear incidents in the area comprising the party states, to coordinate the nuclear incident prevention and control plans and the work relating thereto of the appropriate agencies of the party states and to facilitate the rendering of aid by the party states to each other in coping with nuclear incidents. The Board may formulate and, in accordance with need from time to time, revise a regional plan or regional plans for coping with nuclear incidents within the territory of the party states as whole or within any subregion or subregions of the geographic area covered by this compact.

ARTICLE VI. Supplementary Agreements

(a) To the extent that the Board has not undertaken an activity or project which would be within its power under the provisions of Article V of this compact, any two or more of the party states (acting by their duly constituted administrative officials) may enter into supplementary agreements for the undertaking and continuance of such an activity or project. Any such agreement shall specify its purpose or purposes; its duration and the procedure for termination thereof or withdrawal therefrom; the method of financing and allocating the costs of the activity or project; and such other matters as may be necessary or appropriate. No such supplementary agreement entered into pursuant to this article shall become effective prior to its submission to and approval by the Board. The Board shall give such approval unless it finds that the supplementary agreement or the activity or project contemplated thereby is inconsistent with the provisions of this compact or a program or activity conducted by or participated in by the Board.

(b) Unless all of the party states participate in a supplementary agreement, any cost or costs thereof shall be borne separately by the states party thereto. However, the Board may administer or otherwise assist in the operation of any supplementary agreement.

(c) No party to a supplementary agreement entered into pursuant to this article shall be relieved thereby of any obligation or duty assumed by said party state under or pursuant to this compact, except that timely and proper performance of such obligation or duty by means of the supplementary agreement may be offered as performance pursuant to the compact.

ARTICLE VII. Other Laws and Relationships

Nothing in this compact shall be construed to:

(a) Permit or require any person or other entity to avoid or refuse compliance with any law, rule, regulation, order or ordinance of a party state or subdivision thereof now or hereafter made, enacted or in force.

(b) Limit, diminish, or otherwise impair jurisdiction exercised by the Atomic Energy Commission, any agency successor thereto, or any other federal department, agency or officer pursuant to and in conformity with any valid and operative act of Congress.

(c) Alter the relations between and respective internal responsibilities of the government of a party state and its subdivisions.

(d) Permit or authorize the Board to exercise any regulatory authority or to own or operate any nuclear reactor for the generation of electric energy; nor shall the Board own or operate any facility or installation for industrial or commercial purposes.

ARTICLE VIII. Eligible Parties, Entry into Force and Withdrawal

(a) Any or all of the States of Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, North Carolina,

Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia shall be eligible to become party to this compact.

(b) As to any eligible party state, this compact shall become effective when its legislature shall have enacted the same into law: Provided that it shall not become initially effective until enacted into law by seven states.

(c) Any party state may withdraw from this compact by enacting a statute repealing the same, but no such withdrawal shall become effective until the governor of the withdrawing state shall have sent formal notice in writing to the governor of each other party state informing said governors of the action of the legislature in repealing the compact and declaring an intention to withdraw.

ARTICLE IX. Severability and Construction

The provisions of this compact and of any supplementary agreement entered into hereunder shall be several and if any phrase, clause, sentence or provision of this compact or such supplementary agreement is declared to be contrary to the constitution of any participating state or of the United States or the applicability thereof to any government, agency, person, or circumstance is held invalid, the validity of the remainder of this compact or such supplementary agreement and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this compact or any supplementary agreement entered into hereunder shall be held contrary to the constitution of any state participating therein, the compact or such supplementary agreement shall remain in full force and effect as to the remaining states and in full force and effect as to the state affected as to all severable matters. The provisions of this compact and of any supplementary agreement entered into pursuant hereto shall be liberally construed to effectuate the purposes thereof. (1965, c. 858, s. 1.)

State Government Reorganization. — The administration of the Southern Interstate Nuclear Compact was transferred to the Department of Administration by § 143A-95, enacted by Session Laws 1971, c. 864.

§ 104D-2. Appointment of North Carolina member and alternate member of Southern Interstate Nuclear Board.—The Governor shall appoint this State's member of the Southern Interstate Nuclear Board as established by Article II of the compact. Such member shall serve at the pleasure of the Governor. The Governor is authorized to appoint an alternate member who may serve at and for such time as the regular member shall designate and shall have the same power and authority as the regular member when so serving. (1965, c. 858, s. 2.)

§ 104D-3. Submission of budgets of Board.—Pursuant to Article III(a) of the compact, the Board shall submit its budgets of estimated expenditures to the Director of the Budget for presentation to the General Assembly. (1965, c. 858, s. 3.)

§ 104D-4. Supplementary agreements ineffective until funds appropriated.—Any supplementary agreement entered into pursuant to Article VI of the compact and requiring the expenditure of funds or the assumption of an obligation to expend funds in addition to those already appropriated shall not become effective as to this State until the required funds therefor are appropriated by the General Assembly. (1965, c. 858, s. 4.)

§ 104D-5. Cooperation with Board.—The departments, institutions and agencies of this State and its subdivisions are hereby authorized to cooperate with the Board in the furtherance of any of its activities pursuant to the compact. (1965, c. 858, s. 5.)

§ 104D-6. Provision of North Carolina's share of funds; limitation.—In order to carry out the provisions of this Chapter and of the compact contained herein the Director of the Budget is hereby authorized and directed to provide the funds necessary for North Carolina's share of the Board's needs as determined by Article III of the compact, which share shall not be greater than five thousand dollars ($5,000) in any fiscal year. (1965, c. 858, s. 6.)

Chapter 105.

Taxation.

CHAPTER I. LEVY OF TAXES.

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Article 1.

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SUBCHAPTER I. LEVY OF TAXES.

§ 105-1. Title and purpose of Subchapter.—The title of this Subchapter shall be "The Revenue Act." The purpose of this Subchapter shall be to raise and provide revenue for the necessary uses and purposes of the government and State of North Carolina during the next biennium and each biennium thereafter, and the provisions of this Subchapter shall be and remain in full force and effect until changed by law. (1939, c. 158, ss. A, B; 1941, c. 50, s. 1.)

Editor's Note. — For article discussing this Subchapter, see 15 N.C.L. Rev. 387.

State Government Reorganization. — The Commissioner of Revenue was transferred to the Department of Revenue by § 143A-188, enacted by Session Laws 1971, c. 864.

Taxing Power of General Assembly. — The General Assembly has an unlimited right to tax all persons domiciled within the State, and all property within the State, except so far as this right has been limited by the provisions of the Constitution, either expressly or by necessary implication. Pullen v. Commissioners of Wake County, 66 N.C. 361 (1872).

Legislative Delegation of Power to Municipal Corporation. — The legislature may authorize a municipal corporation to lay taxes on the town property, the persons, and the subject of taxation incident to the persons, of those who have a business residence in town though they have a residence also out of town. Worth v. Commissioners of Fayetteville, 60 N.C. 617 (1864).

Constitutional Provisions; Uniformity

Required. — Under N.C. Const., Art. V, § 3 [now Art. V, § 2(1), (2) and (6)], the same rule of uniformity applies to the taxing of "trades, professions, franchises and incomes" as to the other species of property therein named, and there must also be uniformity in the mode of assessment. Worth v. Petersburg R.R., 89 N.C. 301 (1883). Uniformity, in its legal and proper sense, is inseparably incident to the power of taxation, whether applied to taxes on property or to those imposed on trades, professions, etc. State v. Moore, 113 N.C. 697, 18 S.E. 342 (1893).

Statement of Object in Levying Taxes. — The N.C. Const., Art. V, § 7 [now Art. V, § 5], requires that every act levying taxes shall state the objects to which they shall be appropriated. This provision, however, has no application to taxes levied by county authorities for county purposes. Parker v. Board of Comm'rs, 104 N.C. 166, 10 S.E. 137 (1889).

Applied in Great American Ins. Co. v. Gold, 254 N.C. 168, 118 S.E.2d 792 (1961).

Cited in Robert E. Harris Evangelistic Ass'n v. Board of Tax Supervision, 3 N.C. App. 479, 165 S.E.2d 67 (1969).

Article 1.

Schedule A. Inheritance Tax.

§ 105-2. General provisions.—A tax shall be and is hereby imposed upon the transfer of any property, real or personal, or of any interest therein or income therefrom, in trust or otherwise, to persons or corporations, in the following cases:

(1) When the transfer is by will or by the intestate laws of this State from any person dying, seized or possessed of the property while a resident of the State.

(2) When the transfer is by will or intestate laws of this or any other state of real property or goods, wares, and merchandise within this State, or of any property, real, personal, or mixed, tangible or intangible, over which the State of North Carolina has a taxing jurisdiction, including State and municipal bonds, and the decedent was a resident of the State at the time of death; when the transfer is of real property or tangible personal property within the State, or intangible personal property that has acquired a situs in this State, and the decedent was a nonresident of the State at the time of death.

(3) When the transfer of property made by a resident, or nonresident, is of real property within this State, or of goods, wares and merchandise within this State, or of any other property, real, personal, or mixed, tangible or intangible, over which the State of North Carolina has taxing jurisdiction, including State and municipal bonds, by deed, grant, bargain, sale, or gift made in contemplation of the death of the grantor, vendor, or donor, or intended to take effect in possession or enjoyment at or after such death, including a transfer under which the transferor has retained for his life or any period not ending before his death (i) the possession or enjoyment of, or the income from, the property or (ii) the right to designate the persons who shall possess or enjoy the property or the income therefrom. Every transfer by deed, grant, bargain, sale, or gift, made within three years prior to the death of the grantor, vendor, or donor, exceeding three percent (3%) of his or her estate, or in the nature of a final disposition or distribution thereof, and without an adequate valuable consideration, shall, in the absence of proof to the contrary, be deemed to have been made in contemplation of death within the meaning of this section.

(4) When any person or corporation comes into possession or enjoyment, by a transfer from a resident, or from a nonresident decedent when such nonresident decedent's property consists of real property within this State or tangible personal property within the State, or intangible personal property that has acquired a situs in this State, of an estate in expectancy of any kind or character which is contingent

or defeasible, transferred by any instrument taking effect after March 24, 1939.

(5) a. For purposes of this Article, the term "general power of appointment" means a power which is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate; except that:

1. A power to consume, invade or appropriate property for the benefit of the decedent which is limited by an ascertainable standard relating to the health, education, support or maintenance of the decedent shall not be deemed a general power of appointment.
2. A power of appointment which is exercisable by the decedent only in conjunction with another person:
   I. If the power is not exercisable by the decedent except in conjunction with the creator of the power, such power shall not be deemed a general power of appointment.
   II. If the power is not exercisable by the decedent except in conjunction with a person having a substantial interest in the property, subject to the power, which is adverse to exercise of the power in favor of the decedent, such power shall not be deemed a general power of appointment. For the purposes of this clause a person who, after the death of the decedent, may be possessed of a power of appointment (with respect to the property subject to the decedent's power) which he may exercise in his own favor shall be deemed as having an interest in the property and such interest shall be deemed adverse to such exercise of the decedent's power.
   III. If (after the application of clauses I and II) the power is a general power of appointment and is exercisable in favor of such other person, such power shall be deemed a general power of appointment only in respect of a fractional part of the property subject to such power, such part to be determined by dividing the value of such property by the number of such persons (including the decedent) in favor of whom such power is exercisable.
   IV. For purposes of clauses II and III, a power shall be deemed to be exercisable in favor of a person if it is exercisable in favor of such person, his estate, his creditors, or the creditors of his estate.

b. Whenever any person shall have a general power of appointment with respect to any interest in property, such person shall, for the purposes of this Article, be deemed the owner of such interest and accordingly:

1. If in connection with any transfer of property taxable under this Article the transferor shall give to any person a general power of appointment with respect to any interest in such property, the transferor shall be deemed to have given such interest in such property to such person.
2. If any person holding a general power of appointment with respect to any interest in property shall exercise such power in favor of any other person or persons, either by will or by an appointment made in contemplation of the death of such person, or by an appointment intended to take effect in possession or enjoyment at or after such death, he shall be deemed to have made a transfer of such interest to such person or persons.

3. If any person holding a general power of appointment with respect to any interest in property shall relinquish such power by any action taken in contemplation of death or intended to take effect at or after his death, or shall die without fully exercising such power, he shall be deemed, to the extent of such relinquishment or nonexercise, to have made a transfer of such interest to the person or persons who shall benefit thereby.

(6) Neither the exercise nor the relinquishment of a special power of appointment (which shall mean any power other than a general power) with respect to an interest in property shall be deemed to constitute a transfer of such interest within the meaning of this Article. If in connection with any transfer taxable under this Article the transferor shall give to any person a special power of appointment with respect to any interest in property, he shall be deemed, for the purpose of computing the tax applicable thereto, to have given such interest in equal shares to those persons, not more than two, among the possible appointees and takers in default of appointment whom the transferor's executor or administrator may designate as transferees in the inheritance tax return, except that:

a. If a gift tax return is filed with respect to such transfer, the persons designated therein shall also be designated in the inheritance tax return, and

b. The tax shall be computed according to the relationship of the donee of the power to the persons designated if the possible appointees and takers in default of appointment include any persons more closely related to the donee of the power than to the donor, and if such computation would produce a higher tax.

(7) Where real property is held by husband and wife as tenants by the entirety, the surviving tenant shall be taxable on one half of the value of such property.

(8) Where the proceeds of life insurance policies are payable as provided in G.S. 105-13.

(9) Whenever any person or corporation comes into possession or enjoyment of any personal property, including bonds of the United States and bonds of a state or subdivision or agency thereof, at or after the death of an individual and by reason of said individual's having entered into a contract or other arrangement with the United States, a state or any person or corporation to pay, transfer or deliver said personal property, including bonds of the United States and bonds of a state, to the person or corporation receiving the same, whether said person or corporation is named in the contract or other arrangement or not: Provided, that no tax shall be due or collected on that portion of the personal property received under the conditions outlined herein which the person or corporation receiving the same purchased or otherwise acquired by funds or property of the person or corporation receiving the same, or had acquired by a completed inter vivos gift.

Nothing in subdivision (9) shall apply to the proceeds of life insurance policies.

However, nothing in this Article shall be construed as imposing a tax upon any transfer of intangibles not having a commercial or business situs in this State, by a person, or by reason of the death of a person, who was not a resident of this State at the time of his death, and, if held or transferred in trust, such intangibles shall not be deemed to have a commercial or business situs in this State merely because the trustee is a resident or, if a corporation, is doing business in this State, unless the same be employed in or held or used in connection with some business carried on in whole or in part in this State.

(1939, c. 158, s. 1; 1941, c. 50, s. 2; 1943, c. 400, s. 1; 1951, c. 643, s. 1; 1963, c. 941, ss. 1-3; 1967, c. 1110, s. 1.)

Editor's Note. — For comment on the 1941 amendment which added the last paragraph, see 19 N.C.L. Rev. 526. For comment on changes in the inheritance tax law made by the 1947 General Assembly, see 25 N.C.L. Rev. 470. For note on trust as device to escape inheritance taxes, see 12 N.C.L. Rev. 180. For article on planning for North Carolina death and gift taxes, see 27 N.C.L. Rev. 114. For history of inheritance tax statute, see State v. Scales, 172 N.C. 915, 90 S.E. 439 (1916). For note on effect of North Carolina inheritance tax on will compromise agreement, see 36 N.C.L. Rev. 236 (1958).

Many of the cases in the notes to this and the following sections are constructions of the corresponding provisions (§ 7772 et seq.) of the Consolidated Statutes and of subsequent revenue laws.

Liberal Construction. — A liberal construction will be given to inheritance tax statutes to the end that all property fairly and reasonably coming within their provision may be taxed. State v. Scales, 172 N.C. 915, 90 S.E. 439 (1916). See also Norris v. Durfey, 168 N.C. 321, 84 S.E. 687 (1915); Reynolds v. Reynolds, 208 N.C. 578, 182 S.E. 341 (1935); Watkins v. Shaw, 234 N.C. 96, 65 S.E.2d 881 (1951).

Under this liberal construction in favor of the government, every transfer of property that could be reasonably brought within the purview of the law has been subjected to taxation. Norris v. Durfey, 168 N.C. 321, 84 S.E. 687 (1915).

Whole Revenue Act Construed in Pari Materia. — The whole Revenue Act of 1939 and all of its parts are to be considered in pari materia and construed accordingly. Valentine v. Gill, 223 N.C. 396, 27 S.E.2d 2 (1943).

Basis of Inheritance Tax. — The theory on which taxation on the devolution of estates is based and its legality upheld is clearly established and is founded upon two principles: (1) A succession tax is a tax on the right of succession to property, and not on the property itself. (2) The right to take property by devise or descent is not one of the natural rights of man, but is the creature of the law. In re Morris Estate, 138 N.C. 259, 50 S.E. 682 (1905). See Waddell v. Doughton, 194 N.C. 537, 140 S.E. 160 (1927).

The Revenue Act reflects the same philosophy which underlies the statutes of descent and distribution. It recognizes in the decedent the privilege of disposition of his property, and, if not the moral and social obligations which rest upon him with respect to its exercise, yet, indeed, the fitness of his provision for those more closely related to him by consanguinity or marital ties. This privilege may be exercised either by testamentary disposition or by leaving his property to be distributed under the law. Valentine v. Gill, 223 N.C. 396, 27 S.E.2d 2 (1943).

Situs for Taxation. — The personal property of a decedent, whatever its character and wherever located, is subject to an inheritance tax in the state in which its owner was a resident at the time of his death. This position is upheld upon the principle that the situs of personal property, for the purpose of taxation, is said to be in the state where the owner resides and has his domicile. Rhode Island Hosp. Trust Co. v. Doughton, 187 N.C. 263, 121 S.E. 741 (1924), rev'd on other grounds in 270 U.S. 69, 46 S. Ct. 256, 70 L. Ed. 475, 43 A.L.R. 1374 (1926).

Thus, if the testator or intestate had his domicile abroad and his personal estate also, no tax would be demanded of the legatee or next of kin, though they might be resident in the State. State v. Brim, 57 N.C. 300 (1858). After the legacy or distributive share has been received, it then becomes a part of the property of one of the citizens of the State, and then it may be taxed in common with any other property of the like kind. Rhode Island Hosp. Trust Co. v. Doughton, 187 N.C. 263, 121 S.E. 741 (1924), rev'd on other grounds in 270 U.S. 69, 46 S. Ct. 256, 70 L. Ed. 475, 43 A.L.R. 1374 (1926).

Former Law Applying to Nonresidents Invalid in Part. — Under the provisions of the prior law an inheritance or transfer tax was imposed upon the right of nonresident legatees or distributees to take by will or to receive, under the intestate laws of another state, from a nonresident testator or intestate, shares of stock in a foreign corporation having a stated proportion of its property located within this State and conducting its business here. This provision was held invalid upon the principle that the subject to be taxed must be within the jurisdiction of the state assessing and collecting the tax, and that this principle applies as well in the case of a transfer tax as in that of a property tax. Rhode Island Hosp. Trust Co. v. Doughton, 270 U.S. 69, 46 S. Ct. 256, 70 L. Ed. 475, 43 A.L.R. 1374 (1926), rev'g 187 N.C. 263, 121 S.E. 741 (1924), discussed in 3 N.C.L. Rev. 107. See Rotan v. State, 195 N.C. 291, 141 S.E. 733 (1928).

"Transfer" Construed. — The transfer of property, as that term is used in this section, contemplates both the legal power to transmit property at death and the privilege of receiving property. Rigby v. Clayton, 274 N.C. 465, 164 S.E.2d 7 (1968).

Transfer Necessary. — The thing taxed is the privilege of transferring, and it is essential that there shall be a transfer, within the meaning of this section, from decedent to the beneficiary by reason of death. There must be a

transfer of something before there can be a tax upon its transfer, and where the decedent had no interest in or control over a life insurance policy which could be transferred by his death its proceeds are not subject to this Article. Wachovia Bank & Trust Co. v. Maxwell, 221 N.C. 528, 20 S.E.2d 840 (1942). See § 105-13.

Kind of Property Transferred Is Immaterial. — The right to impose an inheritance tax does not depend upon the kind of property transferred. In re Morris Estate, 138 N.C. 259, 50 S.E. 682 (1905).

United States savings bonds held subject to inheritance tax. See Watkins v. Shaw, 234 N.C. 96, 65 S.E.2d 881 (1951).

A widow's dower and year's allowance allotted to her upon her dissent from her husband's will is property passing by will or by intestate laws within the meaning of this statute. State v. Dunn, 174 N.C. 679, 94 S.E. 481 (1917).

Interest Subject to Appointment of Third Person. — The corresponding section of the prior law included and laid a tax upon an interest made subject by will to the appointment of a third person. In re Inheritance Tax, 172 N.C. 170, 90 S.E. 203 (1916).

Death of Beneficiary of Testamentary Trust. — Under the provisions of a will, the entire beneficial interest in the estate vested in testator's three sons upon testator's death with the right of full enjoyment postponed until the termination of the trust. One of the sons died during minority, prior to the termination of the trust, leaving his two brothers as his sole heirs at law. It was held that the surviving brothers took the deceased brother's interest under the laws of descent and distribution, and the estate so inherited was subject to the appropriate State and federal inheritance taxes and was encumbered by the lien for such taxes. Coddington v. Stone, 217 N.C. 714, 9 S.E.2d 420 (1940).

Settlement of Taxes by Compromise. — The settlement of taxes by compromise, in a court of competent jurisdiction, in view of the bona fide controversies between the parties, and the facts and circumstances of the case, was affirmed on appeal, the matter being a legitimate subject of compromise and all parties affected being duly represented. Reynolds v. Reynolds, 208 N.C. 578, 182 S.E. 341 (1935).

Cited in State v. Scoggin, 236 N.C. 19, 72 S.E. 2d 54 (1952); Pulliam v. Thrash, 245 N.C. 636, 97 S.E.2d 253 (1957); Cornwell v. Huffman, 258 N.C. 363, 128 S.E.2d 798 (1963); Ingram v. Johnson, 260 N.C. 697, 133 S.E.2d 662 (1963).

§ 105-3. **Property exempt.**—The following property shall be exempt from taxation under this Article:

(1) Property passing to or for the use of the State of North Carolina, or to or for the use of municipal corporations within the State or other political subdivisions thereof, for exclusively public purposes.

(2) Property passing to religious, charitable, or educational corporations, or to churches, hospitals, orphan asylums, public libraries, religious, benevolent, or charitable organizations, or passing to any trustee or trustees for religious, benevolent, or charitable purposes, where such religious, charitable, or educational institutions, corporations, churches, trusts, etc., are located within the State and not conducted for profit.

(3) Property passing to religious, educational, or charitable corporations, foundations or trusts, not conducted for profit, incorporated or created or administered under the laws of any other state: If such other state levies no inheritance or estate taxes on property similarly passing from residents of such state to religious, educational or charitable corporations, foundations or trusts incorporated or created or administered under the laws of this State; or if such corporation, foundation or trust is one receiving and disbursing funds donated in this State for religious, educational or charitable purposes.

(4) The amount of twenty thousand dollars ($20,000), only, of the total proceeds of life insurance policies, when such policy or policies are payable to a beneficiary or beneficiaries named in such policy or policies, and such beneficiary or beneficiaries are any such person or persons as are designated in G.S. 105-4, subsection (a); and the amount of two thousand dollars ($2,000) only, of the total proceeds of life insurance policies, when such policy or policies are payable to a beneficiary or beneficiaries named in such policy or policies, and such

beneficiary or beneficiaries are any person or persons as are designated in G.S. 105-5 and 105-6. Provided, that no more than the amounts so specified of any such policy or policies shall be exempt from taxation, whether in favor of one beneficiary or more, and the exemption thus provided shall be prorated between the beneficiaries in proportion to the amounts received under the policies, unless otherwise provided by the decedent; provided further, that the exemption herein provided in the sum of two thousand dollars ($2,000) as to insurance policies payable to beneficiaries designated in G.S. 105-5 and 105-6 shall be allowed only to the extent that such amount is not allowed as to insurance policies payable to beneficiaries designated in G.S. 105-4, subsection (a), it being the intention to grant an exemption as to policies payable to Class B and Class C beneficiaries only in those cases where the exemption allowed as to Class A beneficiaries is less than two thousand dollars ($2,000). And also proceeds of all life insurance policies payable to beneficiaries named in subdivisions (1), (2) and (3) of this section. And also proceeds of all policies of insurance and the proceeds of all adjusted service certificates that have been or may be paid by the United States government, or that have been or may be paid on account of policies required to be carried by the United States government or any agency thereof, to the estate, beneficiary, or beneficiaries of any person who has served in the armed forces of the United States or in the merchant marine during the first or second World War or any subsequent military engagement; and proceeds, not exceeding the sum of ten thousand dollars ($10,000), of all policies of insurance paid to the estate, beneficiary or beneficiaries of any person whose death was caused by enemy action during the second World War or any subsequent military engagement involving the United States. This provision will be operative only when satisfactory proof that the death was caused by enemy action is filed by the executor, administrator or beneficiary with the Commissioner of Revenue.

(5) The value of an annuity or other payment receivable by any beneficiary (other than the executor) under (a) an employees' trust (or under a contract or insurance policy purchased by an employees' trust) forming part of a pension, stock bonus, or profit-sharing plan, which at the time of the decedent's separation from employment (whether by death or otherwise), or at the time of termination of the plan if earlier, met the requirements of § 401 (a) of the United States Internal Revenue Code; or (b) a retirement annuity contract purchased by an employer (and not by an employees' trust) pursuant to a plan, which at the time of decedent's separation from employment (by death or otherwise), or at the time of termination of the plan if earlier, met the requirements of paragraph 3 of § 401 (a) of such Code. If such amounts payable after the death of the decedent under a plan described in clause (a) or (b) are attributable to any extent to payments or contributions made by the decedent, no exemption shall be allowed for that part of the value of such amounts in the proportion that the total payments or contributions made by the decedent bears to the total payments or contributions made. For purposes of the preceding sentence contributions or payments made by the decedent's employer or former employer under a trust or plan described in clause (a) or (b) shall not be considered to be contributed by the decedent. Provided, that the value of such annuities or other payments receivable described in this subdivision shall not be exempt unless the payments received therefrom are or will be subject to income taxation under Article 4 of this Subchapter, and if such

payments are not or will not be subject to income taxation under Article 4 of this Subchapter the value of such annuities or other payments receivable shall be included in the gross value of the estate of the decedent and taxable under the provisions of this Article. (1939, c. 158, s. 2; 1943, c. 400, s. 1; 1947, c. 501, s. 1; 1951, c. 643, s. 1; 1959, c. 1247.)

Editor's Note.—For comment on exemption of property passing to foreign eleemosynary organizations, see 17 N.C.L. Rev. 381.

Exemptions Are Strictly Construed. — Exemptions of property from taxation are to be strictly construed. Benson v. Johnston County, 209 N.C. 751, 185 S.E. 6 (1936).

Municipal property is liable for county taxes where it is not used by the municipality for a governmental purpose, and therefore does not come within the constitutional provision for the exemption of property from taxation (N.C. Const., Art. V, § 2(3)) or within the scope of this section enacted pursuant thereto. Benson v. Johnston County, 209 N.C. 751, 185 S.E. 6 (1936).

Municipal Property Held for Business Purposes. — Property was held subject to taxation by the county in which the property is situate, although owned by a municipal corporation, where the property was held by the municipal corporation purely for business purposes and not for any governmental or necessary public purpose. Board of Financial Control v. Henderson County, 208 N.C. 569, 181 S.E. 636, 101 A.L.R. 783 (1935).

Applied in Nash v. Town of Tarboro, 227 N.C. 283, 42 S.E.2d 209 (1947).

Cited in Town of Weaverville v. Hobbs, 212 N.C. 684, 194 S.E. 860 (1938); Ingram v. Johnson, 260 N.C. 697, 133 S.E.2d 662 (1963).

§ 105-4. Rate of tax—Class A.—(a) Where the person or persons entitled to any beneficial interest in such property shall be the lineal issue, or lineal ancestor, or husband or wife of the person who died possessed of such property aforesaid, or stepchild of the person who died possessed of such property aforesaid, or child adopted by the decedent in conformity with the laws of this State or of any of the United States, or of any foreign kingdom or nation, at the following rates of tax (for each one hundred dollars ($100.00) or fraction thereof) of the value of such interest:

First $ 10,000 above exemption					1 percent
Over $ 10,000	and	to $	25,000		2 percent
Over $ 25,000	and	to $	50,000		3 percent
Over $ 50,000	and	to $	100,000		4 percent
Over $ 100,000	and	to $	200,000		5 percent
Over $ 200,000	and	to $	500,000		6 percent
Over $ 500,000	and	to	$1,000,000		7 percent
Over $1,000,000	and	to	$1,500,000		8 percent
Over $1,500,000	and	to	$2,000,000		9 percent
Over $2,000,000	and	to	$2,500,000		10 percent
Over $2,500,000	and	to	$3,000,000		11 percent
Over $3,000,000					12 percent

(b) The persons mentioned in this class shall be entitled to the following exemptions: Widows, ten thousand dollars ($10,000); each child under 21 years of age and each child 21 years of age, or older, who is mentally incapacitated, or by reason of physical disability is unable to support himself, is unmarried and residing with the decedent in his home at the time of such decedent's death, or who is then institutionalized on account of such mental incapacity or physical disability five thousand dollars ($5,000); all other beneficiaries mentioned in this section, two thousand dollars ($2,000) each: Provided that where one or more children predecease their parent (the parent in such instance being the person who died possessed of the property referred to in subsection (a) above), the total exemption which would otherwise have been applicable if such child or children had survived their parent shall be divided per capita among the surviving children of the predeceased child or children; provided further that a grandchild or grandchildren shall be allowed the single exemption or so much thereof as is not applied to the share of the parent, or a pro rata part thereof, when the parent is living and does not share in the estate to the full extent of

said exemption. The same rule shall apply to the taking under a will, and also in the case of a specific legacy or devise. When a person shall die, testate or intestate, leaving a spouse and child or children, and such surviving spouse receives, whether under a will or otherwise than by will, all or substantially all the decedent's property, such surviving spouse shall be allowed at his or her option an additional exemption of five thousand dollars ($5,000) for each child under 21 years of age, and each child 21 years of age, or older, who is mentally incapacitated, or by reason of physical disability is unable to support himself, is unmarried and residing with the decedent in his or her home at the time of such decedent's death, or who is then institutionalized by reason of such mental incapacity or physical disability; provided that whenever such spouse elects to claim such additional exemption, the child or children shall not be allowed the exemption of five thousand dollars ($5,000) for each child hereinabove provided for. (1939, c. 158, s. 3; 1957, c. 1340, s. 1; 1965, c. 583; 1967, c. 1222; 1971, c. 651.)

Cross Reference. — As to kinds of property contemplated by this section, see § 105-2.

Editor's Note. — The 1971 amendment rewrote the two provisos at the end of the first sentence of subsection (b).

History of Section. — See Ingram v. Johnson, 260 N.C. 697, 133 S.E.2d 662 (1963).

Real property, as well as personal, is included in this section. Norris v. Durfey, 168 N.C. 321, 84 S.E. 687 (1915).

Interest under Discretionary Control of Another Taxable. — The interest acquired by the child of testator is taxable and does not escape by reason of the fact that the testator placed it under the discretionary control and disposition of its mother. In re Inheritance Tax, 172 N.C. 170, 90 S.E. 203 (1916).

Categories of Relationship Named Are Inclusive and Exclusive. — The categories of relationship named in this section and § 105-5 are stated with that precision which is necessary to a taxing measure and are both inclusive and exclusive and are controlling in applying the exemption in § 105-14. Valentine v. Gill, 223 N.C. 396, 27 S.E.2d 2 (1943).

Legislature did not use "grandchildren" in a technical or restricted sense but intended to place children—natural, step, or adopted—in the same category. Ingram v. Johnson, 260 N.C. 697, 133 S.E.2d 662 (1963).

Subsection (b) Refers to Class A Beneficiaries. — Subsection (b) grants exemptions to "the persons mentioned in this class," which language manifestly refers to Class A beneficiaries, as no exemptions are allowed Class B or Class C beneficiaries. Ingram v. Johnson, 260 N.C. 697, 133 S.E.2d 662 (1963).

Testator May Treat Stepchildren and Natural Children Equally. — Subsection (a) expressly authorizes a testator to accord his children equality whether they are stepchildren or natural children. Ingram v. Johnson, 260 N.C. 697, 133 S.E.2d 662 (1963).

The exemptions allowed Class A beneficiaries are not intended to force a testator to draw a distinction between his children whether they are stepchildren or natural children. Ingram v. Johnson, 260 N.C. 697, 133 S.E.2d 662 (1963).

Proviso of Subsection (b) Permitting Grandchildren to Take Exemption of Parent Limited to Children of Natural Child. — The first [now second] proviso in subsection (b) permitting grandchildren to take the exemption a parent would have taken is of course limited to the children of a natural child, because a stepchild does not, under North Carolina statutes of descent and distribution, succeed to the estate of his stepparent. Ingram v. Johnson, 260 N.C. 697, 133 S.E.2d 662 (1963).

But Stepchildren Are Class A Beneficiaries.—Stepgrandchildren of testatrix who are the daughters of testatrix' stepchildren who predeceased testatrix, fall within Class A as defined by this section and not Class C as defined by § 105-6, for the purpose of determining the rate of tax to be paid on properties bequeathed them. Ingram v. Johnson, 260 N.C. 697, 133 S.E.2d 662 (1963).

And Entitled to Exemption under Subsection (b) as Legatees.—The language in subsection (b) reading, "The same rule shall apply to the taking under a will, and also in the case of a specific legacy or devise" means that a stepparent, instead of giving to a stepchild who would be entitled to an exemption, might give to the child of a stepchild without depriving the legatee of the exemption his parent could claim. Ingram v. Johnson, 260 N.C. 697, 133 S.E.2d 662 (1963).

The sentence in subsection (b) stating "The same rule shall apply to the taking under a will, and also in the case of a specific legacy or devise," would appear to be superfluous if limited to natural grandchildren—but essential to permit stepgrandchildren to take the exemption. Ingram v. Johnson, 260 N.C. 697, 133 S.E.2d 662 (1963).

Since Subsection (b) Protects Stepchildren Taking by Will. — Subsection (b) protects the stepchildren as well as the natural children who may take, not by descent, but by will of the

person last seized. Ingram v. Johnson, 260 N.C. 697, 133 S.E.2d 662 (1963).

Exemption Allowed W.dow with Stepchild. — If a husband died, leaving a widow and a stepchild, child of the widow, and devised all, or substantially all, of his property to his widow, she could claim an exemption of $15,000—$10,000 for herself and $5,000 for her minor child under the last sentence of subsection (b). Ingram v. Johnson, 260 N.C. 697, 133 S.E.2d 662 (1963).

Additional Exemption to Spouse Is Not of Particular Property. — The additional exemption allowed the wife by subsection (b) of this section is not an exemption of particular property but is a personal exemption to her. It is, like the $10,000 exemption, an amount to be subtracted from whatever interests pass to her by succession so as to be otherwise subject to the inheritance tax. Isaacs v. Clayton, 270 N.C. 424, 154 S.E.2d 532 (1967).

Spouse Not Deprived of It Because Testator's Debts Exceed Property Passing to Her. — The fact that the testator owed debts which, including one half of an indebtedness secured by a mortgage upon real property owned by him and his wife as tenants by the entireties, exceeded the value of the properties passing to the wife under the will itself does not deprive her of the additional exemption from the inheritance tax allowed by subsection (b). Isaacs v. Clayton, 270 N.C. 424, 154 S.E.2d 532 (1967).

Property Owned by Entireties Not Considered in Determining if Will Leaves All Property to Spouse. — In determining whether the will bequeaths and devises to the wife all or substantially all of the testator's property in order for her to qualify for the additional exemption provided in subsection (b) it must be borne in mind that real property held by the testator and his wife, prior to his death, as tenants by the entireties was not his property, but property belonging to the husband and wife as a unitary person, separate and apart from either of them. Isaacs v. Clayton, 270 N.C. 424, 154 S.E.2d 532 (1967).

Nor Are Death Benefits under Insurance Policy Payable to Wife. — The death benefits payable under a policy of insurance upon the life of the husband, payable to the wife as the named beneficiary, do not arise until his death and are not his property, within the meaning of subsection (b) permitting an additional exemption for minor children. Isaacs v. Clayton, 270 N.C. 424, 154 S.E.2d 532 (1967).

Nor Is Property in Trust for Child Revocable by Testator. — The right of the testator to revoke during his lifetime a trust, of which his child is the beneficiary, does not make the trust property his property, within the meaning of subsection (b) permitting an additional exemption for minor children, although the fact that his right of revocation is cut off by his death does make the trust beneficiary liable for an inheritance tax. Isaacs v. Clayton, 270 N.C. 424, 154 S.E.2d 532 (1967).

Exemption in § 105-14. — The inheritance tax of the 1939 Revenue Act is not a tax on the property, but on the transfer of the property, and, while there must be an identity of the property, which is the subject of the transfer and claimed to be recurrently taxed, to qualify for the exemption provided in § 105-14, the exemption is allowed only to the transferees as set out in this section and § 105-5. Valentine v. Gill, 223 N.C. 396, 27 S.E.2d 2 (1943).

Applied in First Union Nat'l Bank v. Melvin, 259 N.C. 255, 130 S.E.2d 387 (1963).

Cited in Pulliam v. Thrash, 245 N.C. 636, 97 S.E.2d 253 (1957); Rigby v. Clayton, 2 N.C. App. 57, 162 S.E.2d 682 (1968).

§ 105-5. Rate of tax—Class B. — Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister or descendant of the brother or sister, or shall be the uncle or aunt by blood of the person who died possessed as aforesaid, at the following rates of tax (for each one hundred dollars ($100.00) or fraction thereof) of the value of such interest:

First $	5,000			4 percent
Over $	5,000	and to $	10,000	5 percent
Over $	10,000	and to $	25,000	6 percent
Over $	25,000	and to $	50,000	7 percent
Over $	50,000	and to $	100,000	8 percent
Over $	100,000	and to $	250,000	10 percent
Over $	250,000	and to $	500,000	11 percent
Over $	500,000	and to $	1,000,000	12 percent
Over $	1,000,000	and to $	1,500,000	13 percent
Over $	1,500,000	and to $	2,000,000	14 percent
Over $	2,000,000	and to $	3,000,000	15 percent
Over $	3,000,000			16 percent

(1939, c. 158, s. 4.)

Cross Reference. — See note to § 105-4.

Quoted in Ingram v. Johnson, 260 N.C. 697, 133 S.E.2d 662 (1963).

§ 105-6. Rate of tax—Class C. — Where the person or persons entitled to any beneficial interest in such property shall be in any other degree of relationship or collateral consanguinity than is hereinbefore stated, or shall be a stranger in blood to the person who died possessed as aforesaid, or shall be a body politic or corporate, at the following rates of tax (for each one hundred dollars ($100.00) or fraction thereof) of the value of such interest:

First $ 10,000				8 percent
Over $ 10,000	and	to $ 25,000		9 percent
Over $ 25,000	and	to $ 50,000		10 percent
Over $ 50,000	and	to $ 100,000		11 percent
Over $ 100,000	and	to $ 250,000		12 percent
Over $ 250,000	and	to $ 500,000		13 percent
Over $ 500,000	and	to $1,000,000		14 percent
Over $1,000,000	and	to $1,500,000		15 percent
Over $1,500,000	and	to $2,500,000		16 percent
Over $2,500,000				17 percent

(1939, c. 158, s. 5.)

Cross Reference. — See note to § 105-4.

Cited in Valentine v. Gill, 223 N.C. 396, 27 S.E.2d 2 (1943).

§ 105-7. Estate tax. — (a) A tax in addition to the inheritance tax imposed by this schedule is hereby imposed upon the transfer of the net estate of every decedent dying after March 24, 1939, whether a resident or nonresident of the State, where the inheritance tax imposed by this schedule is in the aggregate of a lesser amount than the maximum credit of eighty percent (80%) of the federal estate tax allowed by the Federal Estate Tax Act as contained in the Internal Revenue Code of 1954, or subsequent acts and amendments, because of said tax herein imposed, then the inheritance tax provided for by this schedule shall be increased by an estate tax on the net estate so that the aggregate amount of tax due this State shall be the maximum amount of credit allowed under said Federal Estate Tax Act; said additional tax shall be paid out of the same funds as any other tax against the estate.

(b) Where no tax is imposed by this schedule because of the exemptions herein or otherwise, and a tax due the United States under the Federal Estate Tax Act, then a tax shall be due this State equal to the maximum amount of the credit allowed under said Federal Estate Tax Act.

(c) The administrative provisions of this schedule, wherever applicable, shall apply to the collection of the tax imposed by this section. The amount of the tax as imposed by subsection (a) of this section shall be computed in full accordance with the Federal Estate Tax Act as contained in the Internal Revenue Code of 1954, or subsequent acts and amendments. (1939, c. 158, s. 6; 1957, c. 1340, s. 1.)

Editor's Note.—For article on credit allowable against basic federal estate tax for death taxes paid to State, see 30 N.C.L. Rev. 123 (1952). See also 13 N.C.L. Rev. 271.

§ 105-8. Treatment allowed for gift tax paid. — In case a tax has been imposed under Schedule G of the Revenue Act of 1937, or under subsequent acts, upon any gift, and thereafter, upon the death of the donor, the amount thereof is required by any provision of this Article to be included in the gross estate of the decedent, then the tax paid with respect to such gift shall constitute an advance payment of the tax which would otherwise be chargeable against the beneficiaries of the estate under the provisions of this Article, and shall be applied in reduction of said tax. Any additional tax found to be due because of the inclusion of such gift in the gross estate of the decedent, as provided herein, shall be a tax against the estate and shall be paid out of the same funds as any other tax against the estate. Any amount by which the tax paid with respect to such gift exceeds the tax found to be due because of the

inclusion of such gift in the gross estate of the decedent, as provided herein, shall be refunded to the estate of the decedent. (1939, c. 158, s. 6½; 1967, c. 1220.)

Editor's Note. — For comment on this section, see 17 N.C.L. Rev. 381.

§ 105-9. Deductions. — In determining the clear market value of property taxed under this Article, or schedule, the following deductions, and no others, shall be allowed:

(1) Taxes accrued and unpaid at the death of the decedent and unpaid ad valorem taxes accruing during the calendar year of death.
(2) Drainage and street assessments (fiscal year in which death occurred).
(3) Reasonable funeral and burial expenses, which shall include bequests and devises in trust, the entire net income from which is to be applied perpetually to the care and preservation of the burial lot or burial grounds within which the decedent is buried, the enclosure thereof and the structures thereon to the extent to which the value of such bequests and devises does not exceed the smaller of the following amounts: Five hundred dollars ($500.00), or two per centum (2%) of the amount of the decedent's gross estate.
(4) Debts of decedent.
(5) Estate and inheritance taxes paid to other states, and death duties paid to foreign countries.
(6) The amount actually expended for monuments not exceeding the sum of one thousand dollars ($1,000).
(7) Commissions of executors and administrators actually allowed and paid.
(8) Costs of administration, including reasonable attorneys' fees. (1939, c. 158, s. 7; 1941, c. 50, s. 2; 1951, c. 643, s. 1; 1953, c. 1250; 1957, c. 1340, s. 1.)

Editor's Note. — For brief comment on the 1953 amendment which made additions to subdivision (3), see 31 N.C.L. Rev. 434 (1953).

No Corresponding Deduction Where Amount of Federal Tax Increased. — It is proper for a state statute levying inheritance and transfer taxes to refer to a federal statute in allowing deductions for amounts paid the federal government in estate taxes and in excepting from deductible amounts additional taxes levied by the federal government under a federal act effective on a certain date, and a taxpayer relying on the State statute for the right to make deductions may not complain that additional federal taxes not deductible were computed according to an amendment of the federal act changing the schedule of rates but depending upon the original act for the tax-levying provisions, although the amendment was enacted subsequent to the enactment of the State Revenue Act, since in such case the additional federal estate taxes are levied by the original federal act, although the amount thereof is computed under the amendment changing the schedule of rates. Harwood v. Maxwell, 213 N.C. 55, 195 S.E. 54 (1938).

§ 105-9.1. As of what date property valued. — For the purposes of this Article, all property shall be valued at its fair market value as of the date of death of the decedent, except that the personal representative of the estate may elect to value the property as of a date six months after the date of death of the decedent, substituting in the case of property distributed, sold, exchanged or otherwise disposed of during the six-month period, the fair market value of such property as of the date of such distribution, sale, exchange, or other disposition. In all cases in which such election is made, the provisions of the federal estate tax law and regulations as now existing or as they may be subsequently amended pertaining to optional valuation date shall be applicable. (1951, c. 643, s. 1; 1953, c. 1302, s. 1; 1971, c. 1054, s. 1.)

Editor's Note. — The 1971 amendment, in the first sentence, substituted "a date six months after" for "the first anniversary of" and substituted "six-month" for "one-year."

Session Laws 1971, c. 1054, s. 5, provides: "This act shall be effective on 1 July 1971, with respect to estates of decedents dying on and after that date."

For brief comment on the 1953 amendment which rewrote the section, see 31 N.C.L. Rev. 434 (1953).

§ 105-10. Where no personal representative appointed, clerk of superior court to certify same to Commissioner of Revenue. — Whenever an estate subject to the tax under this Article shall be settled or divided among the heirs-at-law, legatees or devisees, without the qualification and appointment of a personal representative, the clerk of the superior court of the county wherein the estate is situated shall certify the same to the Commissioner of Revenue, whereupon the Commissioner of Revenue shall proceed to appraise said estate and collect the inheritance tax thereon as prescribed by this Article. (1939, c. 158, s. 8.)

§ 105-11. Tax to be paid on shares of stock before transferred, and penalty for violation. — (a) Property taxable within the meaning of this Article shall include bonds or shares of stock in any incorporated company incorporated in this State, regardless of whether or not such incorporated company shall have any or all of its capital stock invested in property outside of this State and doing business outside of this State, and the tax on the transfer of any bonds and/or shares of stock in any such incorporated company owning property and doing business outside of the State shall be paid before waivers are issued for the transfer of such shares of stock. No corporation of this State shall transfer any bonds or stock of said corporation standing in the name of or belonging to a decedent or in the joint names of a decedent and one or more persons, or in trust for a decedent, unless notice of the time of such transfer is served upon the Commissioner of Revenue at least 10 days prior to such transfer, nor until said Commissioner of Revenue shall consent thereto in writing. Any corporation making such a transfer without first obtaining consent of the Commissioner of Revenue as aforesaid shall be liable for the amount of any tax which may thereafter be assessed on account of the transfer of such bonds and/or stock, together with the interest thereon, and in addition thereto a penalty of one thousand dollars ($1,000), which liability for such tax, interest, and penalty, may be enforced by an action brought by the State in the name of the Commissioner of Revenue. The word "transfer" as used in this Article shall be taken to include the passing of property or any interest therein, in possession or enjoyment, present or future, by distribution, or by statute, descent, devise, bequest, grant, deed, bargain, sale, gift, or otherwise. A waiver signed by the Commissioner of Revenue of North Carolina shall be full protection for any such company in the transfer of any such stock.

(b) Any incorporated company not incorporated in this State and owning property in this State which shall transfer on its books the shares of stock of any resident decedent holder of bonds and/or shares of stock in such company exceeding in value two hundred dollars ($200.00) before the inheritance tax, if any, had been paid, shall become liable for the payment of said tax; and any property held by such company in this State shall be subject to execution to satisfy same. A receipt or waiver signed by the Commissioner of Revenue of North Carolina shall be full protection for any such company in the transfer of any such stock. (1939, c. 158, s. 9.)

Editor's Note. — For article on joint ownership of corporate securities in North Carolina, see 44 N.C.L. Rev. 290 (1966).

§ 105-11.1. Transfer of shares of stock or bonds of nonresident decedent. — The consent of the Commissioner of Revenue shall not be required in the case of the transfer of any bonds or shares of stock specified in G.S. 105-11(a) when the decedent is not domiciled in this State. In any action brought under G.S. 105-11 it shall be a sufficient defense that the transfer of such bonds or

shares of stock was made in good faith and without knowledge of circumstances sufficient to place the defendant on inquiry as to the domicile of the decedent. (1971, c. 397.)

§ 105-12. Commissioner of Revenue to furnish blanks and require reports of value of shares of stock.— (a) The Commissioner of Revenue shall prepare and furnish, upon application, blank forms covering such information as may be necessary to determine the amount of inheritance tax due the State of North Carolina on the transfer of any such bonds and/or stock; he shall determine the value of such bonds and/or stock, and shall have full authority to do all things necessary to make full and final settlement of all such inheritance taxes due or to become due.

(b) The Commissioner of Revenue shall have authority, under penalties provided in this Article, to require that any reports necessary to a proper enforcement of this Article be made by any such incorporated company owning property in this State. (1939, c. 158, s. 10.)

§ 105-13. Life insurance proceeds. — The proceeds of life insurance policies payable at or after the death of the decedent shall in the following instances be taxable at the rates provided in this Article subject to the exemptions in G.S. 105-3:

(1) When such insurance proceeds are receivable by the executor, administrator or personal representative as insurance under policies upon the life of the decedent.

(2) When such insurance proceeds are receivable by all other beneficiaries under policies upon the life of the decedent with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable alone or in conjunction with any other person. For purposes of the preceding sentence, the term "incident of ownership" includes a reversionary interest (whether arising by the express terms of the policy or other instrument or by operation of law) only if the value of such reversionary interest exceeded five percent (5%) of the value of the policy immediately before the death of the decedent. As used in this paragraph, the term "reversionary interest" includes a possibility that the policy, or the proceeds of the policy, may return to the decedent or his estate, or may be subject to a power of disposition by him. The value of a reversionary interest at any time shall be determined (without regard to the fact of the decedent's death) by usual methods of valuation, including the use of the mortuary and annuity tables set out as G.S. 8-46 and 8-47. In determining the value of a possibility that the policy or proceeds thereof may be subject to a power of disposition by the decedent, such possibility shall be valued as if it were a possibility that such policy or proceeds may return to the decedent or his estate. (1939, c. 158, s. 11; 1943, c. 400, s. 1; 1945, c. 708, s. 1; 1947, c. 501, s. 1; 1965, c. 439.)

Editor's Note. — For comment on 1943 amendment which rewrote this section, see 21 N.C.L. Rev. 366.

Proceeds of Policy Procedure by Beneficiary under Former Statute. — Section 11, c. 127, Public Laws 1937, could not be construed to impose a separate and independent excise tax upon the receipt of the proceeds of life insurance policies when such policies were issued to the beneficiary, who retained all rights and liabilities thereunder, in addition to imposing an inheritance tax on the proceeds of policies when they were issued to the insured or insured retained the right to change the beneficiary or some other incidents of ownership, since that section had to be construed as a part of the whole act, and when so construed, no such intent appeared from its language. Wachovia Bank & Trust Co. v. Maxwell, 221 N.C. 528, 20 S.E.2d 840 (1942).

Where the wife procured a policy of insurance upon the life of her husband, the policy being issued on her application and all rights and liabilities thereunder being retained by her, upon the husband's death the proceeds of the policy were not subject to a tax under the provisions of § 11, c. 127, Public Laws 1937, as a gift inter vivos to take effect at or after death, even though the husband during his life voluntarily paid all premiums, since he did not

procure the issuance of the policy and each payment of premium constituted a completed gift. Wachovia Bank & Trust Co. v. Maxwell, 221 N.C. 528, 20 S.E.2d 840 (1942).

§ 105-14. Recurring taxes. — Where property transferred has been taxed under the provisions of this Article, each transferee (of the classes hereinafter provided) receiving such property on account of any other transfer by reason of a death occurring within two years of the date of the death of the former decedent, shall be allowed a tax credit in an amount equal to the tax paid on such prior transfer of said property. Said tax paid shall be that proportion of the total tax paid on the prior transfer on account of all property received by the prior transferee on the prior transfer as is equal to the proportion of the taxable value, on the prior transfer, of such property to the total taxable value of all property received by the prior transferee on the prior transfer. Provided, that where a transferee receives property which has been taxed under this Article upon transfers by reason of the deaths of two or more former decedents, with such deaths having occurred not more than two years prior to the date of death of the decedent, said transferee shall be allowed tax credits as provided in this section for taxes actually paid upon any or all of such prior transfers. Provided, further, that this section shall apply only to the transferees designated in G.S. 105-4 and 105-5. (1939, c. 158, s. 12; 1957, c. 1340, s. 1.)

Cross References. — See note to § 105-4. As to definition of "transfer," see § 105-11.

Whole Revenue Act Construed in Pari Materia. — The whole Revenue Act, of which this section and its inclusive references are a part, has a connotation of application to the current transfer upon which the tax is imposed—and all of its parts are to be considered in pari materia. Valentine v. Gill, 223 N.C. 396, 27 S.E.2d 2 (1943).

Exemption Is Limited to Circumstances Attending Immediate Transfer. — When there have been successive transfers of the property during the two-year period, the law intends to limit and define the exemption to the circumstances attending the immediate transfer sought to be taxed, and to limit the transferee claiming the exemption to the relationship existing between such transferee and the decedent from whom the estate is received — such transferee must be a Class A or Class B beneficiary of such decedent. Valentine v. Gill, 223 N.C. 396, 27 S.E.2d 2 (1943).

Second Tax Required to Be Paid. — Where inheritance taxes, under the Revenue Act of 1939, are paid on property passing from a wife's estate to her husband, who dies within less than two years thereafter leaving the same property to a sister of his deceased wife, a second inheritance tax must be paid thereon. Valentine v. Gill, 223 N.C. 396, 27 S.E.2d 2 (1943).

§ 105-15. When all heirs, legatees, etc., are discharged from liability. — All heirs, legatees, devisees, administrators, executors, and trustees shall only be discharged from liability for the amount of such taxes, settlement of which they may be charged with, by paying the same for the use aforesaid as hereinafter provided. (1939, c. 158, s. 13.)

Primary Liability of Devisees Not Affected by Compromise Agreement. — The primary liability of the devisees for the inheritance tax on the value of property devised to them under the will is not affected by any compromise agreement under which the ultimate disposition of the lands differs in whole or in part from that prescribed by the will. Pulliam v. Thrash, 245 N.C. 636, 97 S.E.2d 253 (1957).

Will devising certain lands to three devisees as tenants in common was established by verdict and judgment, and by compromise agreement a fourth person was let in as a tenant in common and the land sold for partition. An additional inheritance tax assessed was paid by the commissioner out of the proceeds of sale. It was held that the share of each of the three devisees was chargeable with one third of the tax, and no part thereof was chargeable against the share of the person let in by the compromise agreement or her transferee in the absence of an express or implied agreement to pay same. Pulliam v. Thrash, 245 N.C. 636, 97 S.E.2d 253 (1957).

§ 105-16. Interest and penalty. — All taxes imposed by this Article shall be due and payable at the death of the testator, intestate, grantor, donor or vendor; if not paid within nine months from date of death of the testator, intestate, grantor, donor, or vendor, such tax shall bear interest at the rate of

six per centum (6%) per annum, to be computed from the expiration of nine months from the date of the death of such testator, intestate, grantor, donor, or vendor until paid: Provided, that if the taxes herein levied shall not be paid in full within nine months from the later of the date of death of the testator, intestate, grantor, donor or vendor, or from the qualification of the executor or administrator, then and in such case a penalty of five per centum (5%) upon the amount of taxes remaining due and unpaid shall be added: Provided further, that the penalty of five per centum (5%) herein imposed may be remitted by the Commissioner of Revenue in case of unavoidable delay in settlement of estate or of pending litigation, and the Commissioner of Revenue is further authorized, in case of protracted litigation or other delay in settlement not attributable to laches of the party liable for the tax, to remit all or any portion of the interest charges accruing under this schedule, with respect to so much of the estate as was involved in such litigation or other unavoidable cause of delay. Provided, that time for payment and collection of such tax may be extended by the Commissioner of Revenue for good reasons shown. (1939, c. 158, s. 14; 1947, c. 501, s. 1; 1953, c. 1302, s. 1; 1971, c. 1054, s. 2.)

Editor's Note. — The 1971 amendment, in the first sentence, substituted "nine" for "fifteen" following "not paid within," substituted "nine" for "fifteen" following "expiration of," substituted "nine months" for "two years" following "paid in full within," inserted "the later of the," and inserted "or from the qualification of the executor or administrator."

Session Laws 1971, c. 1054, s. 5, provides: "This act shall be effective on 1 July 1971, with respect to estates of decedents dying on and after that date."

§ 105-17. Collection to be made by sheriff if not paid in one year. — If taxes imposed by this Article are not paid within one year after the death of the decedent, it shall be the duty of the Commissioner of Revenue to certify to the sheriff of the county in which the estate is located the amount of tax due upon such inheritance, and the sheriff shall collect the same as other taxes, with an addition of two and one-half percent (2½%) as sheriff's fees for collecting same, which fees shall be in addition to any salary or other compensation allowed by law to the sheriffs for their services; and the sheriff is hereby given the same rights of levy and sale upon any property upon which the said tax is payable as said officer is given for the collection of any and all other taxes. The sheriff shall make return to the Commissioner of Revenue of all such taxes within 30 days after collection. (1939, c. 158, s. 15; 1971, c. 1054, s. 3.)

Editor's Note. — The 1971 amendment substituted "one year" for "two years" near the beginning of the first sentence.

Session Laws 1971, c. 1054, s. 5, provides: "This act shall be effective on 1 July 1971, with respect to estates of decedents dying on and after that date."

§ 105-18. Executor, etc., shall deduct tax. — The executor or administrator or other trustee paying any legacy or share in the distribution of any estate subject to said tax shall deduct therefrom at the rate prescribed, or if the legacy or share in the estate be not money, he shall demand payment of a sum to be computed at the same rates upon the appraised value thereof for the use of the State; and no executor or administrator shall pay or deliver any specific legacy or article to be distributed, subject to tax, except on the payment into his hands of a sum computed on its value as aforesaid; and in case of neglect or refusal on the part of said legatee to pay the same, such specific legacy or article, or so much thereof as shall be necessary, shall be sold by such executor or administrator at public sale, after notice to such legatee, and the balance that may be left in the hands of the executor or administrator shall be distributed as is or may be directed by law; and every sum of money retained by any executor or administrator or paid into his hands on account of

any legacy or distributive share for the use of the State shall be paid by him to the proper officer without delay. (1939, c. 158, s. 16.)

Applied in First Union Nat'l Bank v. Melvin, 259 N.C. 255, 130 S.E.2d 387 (1963).

Cited in Pulliam v. Thrash, 245 N.C. 636, 97 S.E.2d 253 (1957).

§ 105-19. Transfer for life, etc., tax to be retained, etc., upon the whole amount. — If any transfer, subject to said tax be made to a beneficiary for life or for a term of years, or upon condition or contingency, with remainder to take effect upon the termination of the life estate or the happening of the condition or contingency, the tax on the whole amount shall be due and payable as in other cases, and said tax shall be apportioned between such life tenant and the remaindermen, such apportionment to be made by computation based upon the mortuary and annuity tables set out as G.S. 8-46 and 8-47, and upon the basis of six per centum (6%) of the gross value of the estate for the period of expectancy of the life tenant in determing the value of the respective interests. When property is transferred or limited in trust or otherwise, and the rights, interest, or estate of the transferees or beneficiaries are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended, or abridged, a tax shall be imposed upon said transfer at the highest rate, within the discretion of the Revenue Commissioner, which on the happening of any of the said contingencies or conditions would be possible under the provisions of this Article, and such tax so imposed shall be due and payable forthwith out of the property transferred, and the Commissioner of Revenue shall assess the tax on such property. (1939, c. 158, s. 17; 1967, c. 1110, s. 1.)

§ 105-20. Legacy charged upon real estate, heir or devisee to deduct and pay to executor, etc. — Whenever such legacy shall be charged upon or payable out of real estate, the heir or devisee of such real estate, before paying the same to such legatee, shall deduct the tax therefrom at the rates aforesaid, and pay the amount so deducted to the executor or administrator or the Commissioner of Revenue, and the same shall remain a charge upon such real estate until paid, and in default thereof the same shall be enforced by the decrees of the court in the same manner as the payment of such legacy may be enforced: Provided, that all taxes imposed by this Article shall be a lien upon the real and personal property of the estate on which the tax is imposed or upon the proceeds arising from the sale of such property from the time said tax is due and payable, and shall continue a lien until said tax is paid and receipted for by the proper officer of the State: Provided further, than no lien for inheritance or estate taxes shall attach or affect the land after 10 years from the date of death of the decedent. (1939, c. 158, s. 18; 1951, c. 643, s. 1; 1957, c. 1340, s. 1.)

Cited in Pulliam v. Thrash, 245 N.C. 636, 97 S.E.2d 253 (1957).

§ 105-21. Computation of tax on resident and nonresident decedents. — A tax shall be assessed on the transfer of property, including property specifically devised or bequeathed, made subject to tax as aforesaid in this State of a resident or nonresident decedent, if all or any part of the estate of such decedent, wherever situated, shall pass to persons or corporations taxable under this Article, which tax shall bear the same ratio to the entire tax which the said estate would have been subject to under this Article if such decedent had been a resident of this State, and all his property, real and personal, had been located within this State, as such taxable property within this State bears to the entire estate, wherever situated. It shall be the duty of the personal representative to furnish to the Commissioner of Revenue such information as may be necessary or required to enable the Commissioner to ascertain a proper computation of his tax. Where the personal representative fails or refuses to

furnish information from which this assessment can be made, the property in this State liable to tax under this Article shall be taxed at the highest rate applicable to those who are strangers in blood. (1939, c. 158, s. 19.)

Constitutionality. — The constitutionality of this section has been established. Rigby v. Clayton, 2 N.C. App. 57, 162 S.E.2d 682 (1968).

The equality and uniformity required by the State Constitution in property taxation does not apply to inheritance or succession taxation. Rigby v. Clayton, 274 N.C. 465, 164 S.E.2d 7 (1968).

This section, which levies an inheritance tax upon the transfer of property within the State at a rate which considers decedent's entire estate wherever situated, even outside the State, is a valid exercise of legislative powers, the statute neither denying equal protection of laws in violation of the Fourteenth Amendment, nor imposing an arbitrary and capricious classification in violation of N.C. Const., Art. V, § 1(2). Rigby v. Clayton, 274 N.C. 465, 164 S.E.2d 7 (1968).

The "due process" provisions of the federal or State Constitution are not violated by use of the value of decedent's entire estate, wherever located, to determine the rate of inheritance tax to be applied under this section to the transfer of property within the State. Rigby v. Clayton, 274 N.C. 465, 164 S.E.2d 7 (1968).

The broad power of a state legislature to classify and thus to discriminate for purposes of inheritance taxation has been fully established. Rigby v. Clayton, 2 N.C. App. 57, 162 S.E.2d 682 (1968).

Tax Is Imposed on Privilege to Succeed to Property. — The North Carolina inheritance tax is not a tax upon property itself, but is a tax imposed on the privilege to succeed to property upon the death of the former owner. Rigby v. Clayton, 2 N.C. App. 57, 162 S.E.2d 682 (1968).

North Carolina is not alone in imposing an inheritance tax upon succession to property within its borders but at a rate determined by reference to the decedent's entire estate wherever located. At least 10 other states use a similar taxing method. Rigby v. Clayton, 2 N.C. App. 57, 162 S.E.2d 682 (1968).

§ 105-22. Duties of the clerks of the superior court.—(a) It shall be the duty of the clerk of the superior court to obtain from any executor or administrator, at the time of the qualification of such executor or administrator, the address of the personal representative qualifying, the names and addresses of the heirs-at-law, legatees, distributees, devisees, etc., as far as practical; the approximate value and character of the property or estate, both real and personal; the relationship of the heirs-at-law, legatees, devisees, etc., to the decedents, and forward the same to the Commissioner of Revenue on or before the tenth day of each month; and the Commissioner of Revenue shall furnish the several clerks blanks upon which to make said report, but the failure to so furnish blanks shall not relieve the clerk from the duty herein imposed. The clerk shall make no report of a death where the estate of a decedent is less than two thousand dollars ($2,000) in value, when the beneficiary is husband or wife or child or grandchild of the decedent. Any clerk of the superior court who shall fail, neglect, or refuse to file such monthly reports as required by this section shall be liable to a penalty in the sum of one hundred dollars ($100.00) to be recovered by the Commissioner of Revenue in an action to be brought by the Commissioner of Revenue.

(b) It shall also be the duty of the clerk of the superior court of each of the several counties of the State to enter in a book, prepared and furnished by the Commissioner of Revenue, to be kept for that purpose, and which shall be a public record, a condensed copy of the settlement of inheritance taxes of each estate, together with a copy of the receipt showing payment, or a certificate showing no tax due, as shall be certified to him by the Commissioner of Revenue.

(c) For these services, where performed by the clerk, the clerk shall be paid by the Commissioner of Revenue, upon submission of proper certification that the service has been performed, as follows: For recording the certificate of the Commissioner of Revenue showing no tax due, the sum of fifty cents (50¢). For recording the certificate of the Commissioner of Revenue, showing that the tax received by the State is one hundred dollars ($100.00) or less, he shall be paid the sum of two dollars ($2.00). For recording the certificate of the Commissioner of Revenue showing that the tax received by the State is more

than one hundred dollars ($100.00) and not over five hundred dollars ($500.00) he shall be paid the sum of three dollars ($3.00). For recording the certificate of the Commissioner of Revenue showing that the tax received by the State is more than five hundred dollars ($500.00) and not over one thousand dollars ($1,000) he shall be paid the sum of five dollars ($5.00). For recording of certificates of the Commissioner of Revenue showing that the tax received by the State is more than one thousand dollars ($1,000) he shall be paid the sum of ten dollars ($10.00), which sum shall be the maximum amount paid for recording the certificate of the Commissioner of Revenue for any one estate: Provided, that where the decedent owned real estate in one or more counties, other than the county in which the administration of the estate is had, then the fee of the clerks of the courts of such other counties for recording the certificates of the Commissioner of Revenue shall be fifty cents (50¢) each, and the fee paid to the clerks of courts for recording the certificate of the Commissioner in the case of the settlements of the estates of nonresidents shall be one dollar ($1.00). The clerk of the superior court shall receive the sum of two dollars ($2.00) for making up and transmitting to the Commissioner of Revenue the report required in this section, containing a list of persons who died leaving property in his county during the preceding month, etc.: Provided, further, that where the clerk of the superior court has failed or neglected to make the report required of him in this section, in that case he shall only receive for recording the certificate of the Commissioner of Revenue the sum of fifty cents (50¢).

The clerks of the superior courts of the several counties shall be allowed the fees provided for in this section in addition to other fees or salaries received by them. (1939, c. 158, s. 20; 1943, c. 400, s. 1; 1953, c. 1302, s. 1.)

§ 105-23. Information by administrator and executor. — Every administrator shall prepare a statement showing as far as can be ascertained the names of all the heirs-at-law and their relationship to decedent, and every executor shall prepare a like statement, accompanied by a copy of the will, showing the relationship to the decedent of all legatees, distributees, and devisees named in the will, and the age at the time of the death of the decedent of all legatees, distributees, devisees to whom property is bequeathed or devised for life or for a term of years, and the names of those, if any, who have died before the decedent, together with the post-office address of executor, administrator, or trustee. If any of the heirs-at-law, distributees, and devisees are minor children of the decedent, such statement shall also show the age of each of such minor children. The statement shall also contain a complete inventory of all the real property of the decedent located in and outside the State, and of all personal property, wherever situate, of the estate, of all insurance policies upon the life of the decedent, together with an appraisal under oath or affirmation of the value of each class of property embraced in the inventory, and the value of the whole, together with any deductions permitted by this statute, so far as they may be ascertained at the time of filing such statement; and also the full statement of all gifts or advancements made by deed, grant, or sale to any person or corporation, in trust or otherwise, within three years prior to the death of the decedent. The statement herein provided for shall be filed with the Commissioner of Revenue at Raleigh, North Carolina, within nine months after the qualification of the executor or administrator, upon blank forms to be prepared by the Commissioner of Revenue. If any administrator or executor fails or refuses to comply with any of the requirements of this section, he shall be liable to a penalty in the sum of five hundred dollars ($500.00), to be recovered by the Commissioner of Revenue in an action to be brought by the Commissioner of Revenue to collect such sum in the Superior Court of Wake County against such administrator or executor. The Commissioner of Revenue, for good cause shown, may remit all or any

portion of the penalty imposed under the provisions of this section. Every executor or administrator may make a tentative settlement of the inheritance tax with the Commissioner of Revenue, based on the sworn inventory provided in this section: Provided, that this does not apply to estates of less than two thousand dollars ($2,000) in value when the beneficiaries are husband or wife or children or grandchildren, or parent or parents of the decedent. If any executor, administrator, collector, committee, trustee or any other fiduciary within or without this State holding or having control of any funds, property, trust or estate, the transfer of which becomes taxable under the provisions of this Article, shall fail to file the statement herein required, within the times herein required, the Commissioner of Revenue is authorized and shall be required to secure the information herein required from the best sources available, and therefrom assess the taxes levied hereunder, together with the penalties herein and otherwise provided. (1939, c. 158, s. 21; 1947, c. 501, s. 1; 1951, c. 643, s. 1; 1971, c. 1054, s. 4.)

Editor's Note. — The 1971 amendment in the first sentence deleted "in duplicate" preceding "a statement," in the third sentence inserted "or affirmation," and in the fourth sentence substituted "nine" for "fifteen."

Session Laws 1971, c. 1054, s. 5, provides: "This act shall be effective on 1 July 1971, with respect to estates of decedents dying on and after that date."

§ 105-24. Access to safe deposits of a decedent; withdrawal of bank deposit, etc., payable to either husband or wife or the survivor. — No safe deposit company, trust company, corporation, bank, or other institution, person or persons having in possession or control or custody, in whole or in part, securities, deposits, assets, or property belonging to or standing in the name of a decedent, or belonging to or standing in the joint names of a decedent and one or more persons, shall deliver or transfer the same to any person whatsoever, whether in a representative capacity or not, or to the survivor or to the survivors when held in the joint names of a decedent and one or more persons, without retaining a sufficient portion or amount thereof to pay taxes or interest which would thereafter be assessed thereon under this Article; but the Commissioner of Revenue may consent in writing to such delivery or transfer, and such consent shall relieve said safe deposit company, trust company, corporation, bank or other institution, person or persons from the obligation herein imposed. Provided: The clerk of superior court of the resident county of a decedent may authorize in writing any bank, safe deposit company, trust company, or any other institution to transfer to the properly qualified representative of the estate any funds on deposit in the name of the decedent or the decedent and one or more persons when the total amount of such deposit or deposits is three hundred dollars ($300.00) or less, and when such deposit or deposits compose the total cash assets of the estate. Such authorization shall have the same force and effect as when issued in writing by the Commissioner of Revenue. Every safe deposit company, trust company, corporation, bank or other institution, person, or persons engaged in the business of renting lock boxes for the safekeeping of valuable papers and personal effects, or having in their possession or supervision in such lock boxes such valuable papers or personal effects shall, upon the death of any person using or having access to such lock box, as a condition precedent to the opening of such lock box by the executor, administrator, personal representative, lessee or cotenant of such deceased person, require the presence of the clerk of the superior court of the county in which such lock box is located. It shall be the duty of the clerk of the superior court, or his representative, in the presence of an officer or representative of the safe deposit company, trust company, corporation, bank, or other institution, person or persons, to make an inventory of the contents of any such lock box and to furnish a copy of such inventory to the Commissioner of Revenue, to the executor, administrator, personal

representative, or cotenant of the decedent, and a copy to the safe deposit company, trust company, corporation, bank, or other institution, person, or persons having possession of such lock box; provided, that for lock boxes to which decedent merely had access the inventory shall include only assets in which the decedent has or had an interest. The clerk of the superior court shall be paid for his services rendered as hereinbefore described by the representative of said estate at the time of his qualification the sum of two ($2.00) dollars for the first hour or portion thereof actually required for said services, and the sum of one ($1.00) dollar for each additional hour or portion thereof actually required for said services, subject to a maximum fee of five ($5.00) dollars, and in addition thereto he shall receive the same mileage as is now allowed by law to witnesses for going from his office to any place located in his county to perform such services. The clerks of the superior court of the several counties shall be allowed the fees provided for in this section in addition to other fees or salaries received by them, and any and all provisions in local acts in conflict with this Article are hereby repealed. Notwithstanding any of the provisions of this section any life insurance company may pay the proceeds of any policy upon the life of a decedent to the person entitled thereto as soon as it shall have mailed to the Commissioner of Revenue a notice, in such form as the Commissioner of Revenue may prescribe, setting forth the fact of such payment; but if such notice be not mailed, all of the provisions of this section shall apply.

Notwithstanding any of the provisions of this section, in any case where a bank deposit has been heretofore made or is hereafter made, or where building and loan stock has heretofore been issued or is hereafter issued, in the names of a husband and wife and payable to either or the survivor of them, such bank or building and loan association may, upon the death of either of such persons, upon mailing notice to the Commissioner of Revenue in such form as may be prescribed by the Commissioner stating the facts with respect to such deposits or stock, allow the survivor to withdraw as much as eighty percent (80%) of such deposit or stock, and the balance thereof shall be retained by the bank or building and loan association to cover any taxes that may thereafter be assessed against such deposit or stock under this Article. When such taxes as may be due on such deposit or stock are paid, or when it is ascertained that there is no liability of such deposit or stock for taxes under this Article, the Commissioner of Revenue shall furnish the bank or building and loan association his written consent for the payment of the retained percentage to the survivor; and the Commissioner of Revenue may furnish such written consent to the bank or building and loan association upon the qualification of a personal representative of the deceased. No bank or building and loan association shall be liable for any failure to withhold the specified percentage of such deposit or stock if the same was paid out prior to actual notice of the death of the deceased.

Failure to comply with the provisions of this section shall render such safe deposit company, trust company, corporation, bank or other institution, person or persons liable for the amount of the taxes and interest due under this Article on the succession to such securities, deposits, assets, or property, but in any action brought under this provision it shall be a sufficient defense that the delivery or transfer of securities, deposits, assets, or property was made in good faith without knowledge of the death of the decedent and without knowledge of circumstances sufficient to place the defendant on inquiry. (1939, c. 158, s. 21½; 1943, c. 400, s. 1; 1959, c. 1192.)

Clerk of Superior Court May Not Delegate Duty to Be Present to Officer of Bank. — See opinion of Attorney General to Honorable Sion H. Kelly, Clerk of Superior Court of Lee County, 41 N.C.A.G. 44 (1970).

§ 105-25. Supervision by Commissioner of Revenue.—The Commissioner

of Revenue shall have complete supervision of the enforcement of all provisions of the Inheritance Tax Act and the collections of all inheritance taxes found to be due thereunder, and shall make all necessary rules and regulations for the just and equitable administration thereof. He shall regularly employ such deputies, attorneys, examiners, or special agents as may be necessary for the reasonable carrying out of its full intent and purpose. Such deputies, attorneys, examiners, or special agents shall, as often as required to do so, visit the several counties of the State to inquire and ascertain if all inheritance taxes due from estates of decedents, or heirs-at-law, legatees, devisees, or distributees thereof have been paid; to see that all statements required by this Article are filed by administrators and executors, or by the beneficiaries under wills where no executor is appointed; to examine into all statements filed by such administrators and executors; to require such administrators and executors to furnish any additional information that may be deemed necessary to determine the amount of tax that should be paid by such estate. If not satisfied, after investigation, with valuation returned by the administrator or executor, the deputy, attorney, examiner, or appraiser shall make an additional appraisal after proper examination and inquiry, or may, in special cases, recommend the appointment by the Commissioner of Revenue of a special appraiser who, in such case, shall be paid five dollars ($5.00) per day and expenses for his services. If not satisfied with such additional appraisal, the administrator or executor may, within 30 days, request a conference with the Commissioner of Revenue, and the matter shall be determined as other cases by the Commissioner. (1939, c. 158, s. 22; 1955, c. 1350, s. 16.)

§ 105-26. Proportion of tax to be repaid upon certain conditions. — Whenever debts shall be proven against the estate of a decedent after the distribution of legacies from which the inheritance tax has been deducted in compliance with this Article, and the legatee is required to refund any portion of the legacy, a proportion of the said tax shall be repaid to him by the executor or administrator if the said tax has not been paid into the State treasury, or shall be refunded by the State Treasurer, if it has been so paid in, upon certificate of the Commissioner of Revenue. (1939, c. 158, s. 23.)

§ 105-27. Commissioner of Revenue may order executor, etc., to file account, etc. — If the Commissioner of Revenue shall discover that reports and accounts have not been filed, and the tax, if any, has not been paid as provided in this Article, he shall issue a citation to the executor, administrator, or trustee of the decedent whose estate is subject to tax, to appear at a time and place therein mentioned, not to exceed 20 days from the date thereof, and show cause why said report and account should not be filed and said tax paid; and when personal service cannot be had, notice shall be given as provided for service of summons by publication in the county in which said estate is located; and if said tax shall be found to be due, the said delinquent shall be adjudged to pay said tax, interest and cost; if said tax shall remain due and unpaid for a period of 30 days after notice thereof, the Commissioner of Revenue shall certify the same to the sheriff, who shall make collection of said tax, cost and commissions for collection, as provided in G.S 105-16. (1939, c. 158, s. 24.)

§ 105-28. Failure of administrator, executor, or trustee to pay tax.— Any administrator, executor, or trustee who shall fail to pay the lawful inheritance taxes due upon any estate in his hands or under his control within two years from the time of his qualification shall be liable for the amount of the said taxes, and the same may be recovered in an action against such administrator, executor, or trustee, and the sureties on his official bond. Any clerk of the court who shall allow any administrator, executor, or trustee to make a final settlement of his estate without having paid the inheritance tax due by law, and exhibiting his receipt from the Commissioner of Revenue

therefor, shall be liable upon his official bond for the amount of such taxes. (1939, c. 158, s. 25.)

§ 105-29. Uniform valuation. — (a) If the value of any estate taxed under this schedule shall have been assessed and fixed by the federal government for the purpose of determining the federal taxes due thereon prior to the time the report from the executor or administrator is made to the Commissioner of Revenue under the provisions of this Article, the amount or value of such estate so fixed, assessed, and determined by the federal government shall be stated in such report. If the assessment of the estate by the federal government shall be made after the filing of the report by the executor or administrator with the Commissioner of Revenue, as provided in this Article, the said executor or administrator shall, within 30 days after receipt of notice of the final determination by the federal government of the value or amount of said estate as assessed and determined for the purpose of fixing federal taxes thereon, make report of the amount so fixed and assessed by the federal government, under oath or affirmation, to the Commissioner of Revenue. If the amount of said estate as assessed and fixed by the federal government shall be in excess of that theretofore fixed or assessed under this schedule for the purpose of determining the amount of taxes due the State from said estate, then the Commissioner of Revenue shall reassess said estate and fix the value thereof at the amount fixed, assessed, and determined by the federal government, unless the said executor or administrator shall, within 30 days after notice to him from the Commissioner of Revenue, show cause why the valuation and assessment of said estate as theretofore made should not be changed or increased. If the valuation placed upon said estate by the federal government shall be less than that theretofore fixed or assessed under this Article, the executor or administrator may, within 30 days after filing his return of the amount so fixed or assessed by the federal government, file with the Commissioner of Revenue a petition to have the value of said estate reassessed and the same reduced to the amount as fixed or assessed by the federal government. In either event the Commissioner of Revenue shall proceed to determine, from such evidence as may be brought to his attention or which he shall otherwise acquire, the correct value of the said estate, and if the valuation is changed, he shall reassess the taxes due by said estate under this Article and notify the executor or administrator of such fact. In the event the valuation of said estate shall be decreased and if there shall have been an overpayment of the tax in the amount of three dollars ($3.00) or more, the Commissioner of Revenue shall, within 60 days after the final determination of the value of said estate and the assessment of the correct amount of tax against the same, refund the amount of such excess tax theretofore paid. In the event that the amount of such overpayment is less than three dollars ($3.00) the overpayment shall be refunded upon receipt by the Commissioner of Revenue of a written demand for such refund from the taxpayer. No overpayment shall be refunded, irrespective of whether upon discovery or receipt of written demand if such discovery is not made or such demand is not received within three years from the date set by the statute for the filing of the return, or within six months after the date of the final determination of the federal estate tax liability, or within six months from the date of the payment of the tax alleged to be an overpayment, whichever is the later.

(b) If the executor or administrator shall fail to file with the Commissioner of Revenue the return under oath or affirmation, stating the amount or value at which the estate was assessed by the federal government as provided for in this section, the Commissioner of Revenue shall assess and collect from the executor or administrator a penalty equal to twenty-five percent (25%) of the amount of any additional tax which may be found to be due by such estate upon reassessment and reappraisal thereof, which penalty shall under no condition be less than twenty-five dollars ($25.00) or more than five hundred

dollars ($500.00) and which cannot be remitted by the Commissioner of Revenue except for good cause shown. The Commissioner of Revenue is authorized and directed to confer quarterly with the Department of Internal Revenue of the United States government to ascertain the value of estates in North Carolina which have been assessed for taxation by the federal government, and he shall cooperate with the said Department of Internal Revenue, furnishing to said Department such information concerning estates in North Carolina as said Department may request. (1939, c. 158, s. 26; 1957, c. 1340, s. 14; 1967, c. 1171.)

§ **105-30. Executor defined.** — Wherever the word "executor" appears in this Article it shall include executors, administrators, collectors, committees, trustees, and all fiduciaries. (1939, c. 158, s. 27.)

§ **105-31. Additional remedies for enforcement of tax.** — In addition to all other remedies which may now exist under the law, or may hereafter be established, for the collection of the taxes imposed by the preceding sections of this Article, the tax so imposed shall be a lien upon all of the property and upon all of the estate, with respect to which the taxes are levied, as well as collectible out of any other property, resort to which may be had for their payment; and the said taxes shall constitute a debt, which may be recovered in an action brought by the Commissioner of Revenue in any court of competent jurisdiction in this State, and/or in any court having jurisdiction of actions of debt in any state of the United States, and/or in any court of the United States against an administrator, executor, trustee, or personal representative, and/or any person, corporation, or concern having in hand any property, funds, or assets of any nature, with respect to which such tax has been imposed. No title or interest to such estate, funds, assets, or property shall pass, and no disposition thereof shall be made by any person claiming an interest therein until the said taxes have been fully paid. (1939, c. 158, s. 28.)

Cited in Pulliam v. Thrash, 245 N.C. 636, 97 S.E.2d 253 (1957).

§ **105-32. Uncollected inheritance taxes remitted after 20 years.** — All inheritance taxes levied by the State which remain uncollected 20 years or more after the death of the person upon whose estate said taxes were levied shall be, and they are hereby remitted. The provisions of this section shall be retroactive from the date of its enactment. (1935, c. 483; 1949, c. 605; 1971, c. 806, s. 2.)

Editor's Note. — This section was formerly § 105-404. It was transferred to its present position by Session Laws 1971, c. 806, s. 2.

Article 2.

Schedule B. License Taxes.

§ **105-33. Taxes under this Article.**—(a) Taxes in this Article or schedule shall be imposed as State license taxes for the privilege of carrying on the business, exercising the privilege, or doing the act named, and nothing in this Article shall be construed to relieve any person, firm, or corporation from the payment of the tax prescribed in this Article or schedule: Provided, the obtaining of a license required by this Article shall not of itself authorize the practice of a profession, business, or trade for which a State qualification license is required.

(b) If the business made taxable or the privilege to be exercised under this Article or schedule is carried on at two or more separate places, a separate State license for each place or location of such business shall be required.

(c) Every State license issued under this Article or schedule shall be for 12

months, shall expire on the thirtieth day of June of each year, and shall be for the full amount of tax prescribed; provided, that where the tax is levied on an annual basis and the licensee begins such business or exercises such privilege after the first day of January and prior to the thirtieth day of June of each year, then such licensee shall be required to pay one half of the tax prescribed other than the tax prescribed to be computed and levied upon a gross receipts and/or percentage basis for the conducting of such business or the exercising of such privilege to and including the thirtieth day of June, next following. Every county, city and town license issued under this Article or schedule shall be for 12 months, and shall expire on the thirty-first day of May or thirtieth day of June of each year as the governing body of such county, city or town may determine: Provided, that where the licensee begins such business or exercises such privilege after the expiration of seven months of the current license year of such municipality, then such licensee shall be required to pay one half of the tax prescribed other than the tax prescribed to be computed upon a gross receipts and/or percentage basis.

(d) The State license issued under G.S. 105-41, 105-41.1, 105-42, 105-43, 105-45, 105-48, 105-53, 105-54, 105-55, 105-56, 105-57, 105-58, 105-59 and 105-91 shall be and constitute a personal privilege to conduct the profession or business named in the State license, shall not be transferable to any other person, firm or corporation and shall be construed to limit the person, firm or corporation named in the license to conducting the profession or business and exercising the privilege named in the State license to the county and/or city and location specified in the State license, unless otherwise provided in this Article or schedule. Other license issued for a tax year for the conduct of a business at a specified location shall upon a sale or transfer of the business be deemed a sufficient license for the succeeding purchaser for the conduct of the business specified at such location for the balance of the tax year: Provided, that if the holder of a license under this schedule moves the business for which a license has been paid to another location, a new license may be issued to the licensee at a new location for the balance of the license year, upon surrender of the original license for cancellation and the payment of a fee of five dollars ($5.00) for each license certificate reissued.

(e) Whenever, in any section of this Article or schedule, the tax is graduated with reference to the population of the city or town in which the business is to be conducted or the privilege exercised, the minimum tax provided in such section shall be applied to the same business or privilege when conducted or exercised outside of the municipality, unless such business is conducted or privilege exercised within one mile of the corporate limits of such municipality, in which event the same tax shall be imposed and collected as if the business conducted or the privilege exercised were inside of the corporate limits of such municipality: Provided, that with respect to taxes in this Article, assessed on a population basis, the same rates shall apply to incorporated towns and unincorporated places or towns alike, with the best estimate of population available being used as a basis for determining the tax in incorporated places or towns. The term "places or towns" means any unincorporated community, point or collection of people having a geographical name by which it may be generally known, and is so generally designated.

(f) All State taxes imposed by this Article shall be paid to the Commissioner of Revenue, or to one of his deputies; shall be due and payable on or before the first day of July of each year, and after such date shall be deemed delinquent, and subject to all the remedies available and the penalties imposed for the payment of delinquent State license and privilege taxes; provided, that if a person, firm, or corporation begins any business or the exercise of any privilege requiring a license under this Article or schedule after the thirtieth day of June and prior to the thirtieth day of the following June of any year, then such person, firm, or corporation shall apply for and obtain a State license for

conducting such business or exercising any such privilege in advance, and before the beginning of such business or the exercise of such privilege; and a failure to so apply and to obtain such State license shall be and constitute a delinquent payment of the State license tax due, and such person, firm, or corporation shall be subject to the remedies available and penalties imposed for the payment of such delinquent taxes.

(g) The taxes imposed and the rates specified in this Article or schedule shall apply to the subjects taxed on and after the first day of June, 1939, and prior to said date the taxes imposed and the rates specified in the Revenue Act of 1937 shall apply.

(h) It shall be the duty of a grantee, transferee, or purchaser of any business or property subject to the State license taxes imposed in this Article to make diligent inquiry as to whether the State license tax has been paid, but when such business or property has been granted, sold, transferred, or conveyed to an innocent purchaser for value and without notice that the vendor owed or is liable for any of the State license taxes imposed under this Article, such property, while in the possession of such innocent purchaser, shall not be subject to any lien for such State license taxes.

(i) All county or municipal taxes levied by the board of county commissioners of any county, or by the board of aldermen or other governing body of any municipality within this State, under the authority conferred in this Article, shall be collected by the sheriff or tax collector of such county and by the tax collector of such city, and the county or municipal license shall be issued by such officer.

(j) Any person, firm, or corporation who shall wilfully make any false statement in an application for a license under any section of this Article or schedule shall be guilty of a misdemeanor, and upon conviction shall be fined and/or imprisoned in the discretion of the court, which fine shall not be less than the amount of tax specified under such section, and shall be in addition to the amount of such tax.

(k) Wherever the business taxed in G.S. 105-61, 105-62, 105-79 and/or 105-84 is of a seasonal character at summer or winter resorts, license may be issued for such seasonal business at one half of the annual license tax for the four months' period from June first to October first in summer resorts and from December first to April first in winter resorts. (1939, c. 158, s. 100; 1943, c. 400, s. 2; 1951, c. 643, s. 2; 1953, c. 981, s. 1; 1963, c. 294, s. 3.)

Editor's Note. — For comment on 1943 amendment which made additions to the section, see 21 N.C.L. Rev. 368.

Where Several Occupations Conducted by Individual. — Where several occupations are conducted in a town by the same individual, a privilege tax on one does not prevent a similar tax on another. Guano Co. v. Town of Tarboro, 126 N.C. 68, 35 S.E. 231 (1900).

Where Goods Manufactured in Another State. — The right of a state to tax traders, professions and avocations within the borders of the state is unquestionable, though the goods dealt in be manufactured in another state. State v. Gorham, 115 N.C. 721, 20 S.E. 179 (1894).

Peddling. — A State license issued under § 105-53 authorizes the licensee to engage in the business of peddling. State v. Byrd, 259 N.C. 141, 130 S.E.2d 55 (1963).

Applied in Eastern Carolina Tastee-Freez, Inc. v. City of Raleigh, 256 N.C. 208, 123 S.E.2d 632 (1962).

Cited in State v. Warren, 211 N.C. 75, 189 S.E. 108 (1937); Duke Power Co. v. Bowles, 229 N.C. 143, 48 S.E.2d 287 (1948); Northcutt v. Clayton, 269 N.C. 428, 152 S.E.2d 471 (1967).

§ **105-34. Amusement parks.** — (a) Every person, firm, or corporation engaged in the business of operating a park, open to the public as a place of amusement, and in which there may be either a bowling alley, trained animal show, penny or nickel machine for exhibiting pictures, theatrical performance, or similar entertainment, shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of conducting such amusement park, and shall pay for such license the following tax:

State license for two months $200.00

State license for four months	400.00
State license for eight months	600.00
State license for 12 months	800.00

(b) This section shall not apply to bathing beaches which are not operated for more than four months each year.

(c) The licensee shall have the privilege of doing any or all of the things set out in this section; but the operation of a carnival, circus, or a show of any kind that moves from place to place shall not be allowed under the State license provided for in this section.

(d) Counties shall not levy a license tax on the business taxed under this section. (1939, c. 158, s. 102.)

§ **105-35. Amusements — traveling theatrical companies, etc.** — Every person, firm, or corporation engaged in the business of a traveling theatrical, traveling moving picture, and/or traveling vaudeville company, giving exhibitions or performances in any hall, tent, or other place not licensed under G.S. 105-34 or 105-37, whether on account of municipal ownership or otherwise, shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of engaging in such business, and pay for such license a tax of twenty-five dollars ($25.00) for each day or part of a day's exhibits or performances: Provided, that

(1) Artists exhibiting paintings or statuary work of their own hands shall only pay two dollars ($2.00) for such State license.

(2) Such places of amusement as do not charge more than a total of fifty cents (50¢) for admission at the door, including a reserved seat, and shall perform or exhibit continuously in any given place as much as one week, shall be required to pay for such State license a tax of twenty-five dollars ($25.00) per week.

(3) The owner of the hall, tent, or other place where such amusements are exhibited or performances held shall be liable for the tax.

(4) In lieu of the State license tax, hereinbefore provided for in this section, such amusement companies, consisting of not more than 10 performers, may apply for an annual statewide license, and the same may be issued by the Commissioner of Revenue for the sum of three hundred dollars ($300.00), paid in advance, prior to the first exhibition in the State, shall be valid in any county of this State, and shall be in full payment of all State license taxes imposed in this section.

(5) Any traveling organization which exhibits animals or conducts side shows in connection with its exhibitions or performances shall not be taxed under this section, but shall be taxed as herein otherwise provided.

(6) The owner, manager, or proprietor of any such amusements described in this section shall apply in advance to the Commissioner of Revenue for a State license for each county in which a performance is to be given.

Upon all performances taxable under this section there is levied, in addition to the license tax levied in this section, a tax upon the gross receipts of such business at the rate of tax levied in Schedule E, G.S. 105-164 to 105-187, upon retail sales of merchandise. The license tax herein levied shall be treated as an advance payment of the tax upon gross receipts herein levied, and the license tax shall be applied as a credit upon or advance payment of the gross receipts tax. The Commissioner of Revenue may adopt such regulations as may be necessary to effectuate the provisions of this section and shall prescribe the form and character of reports to be made, and shall have such authority or supervision as may be necessary to effectuate the purposes of this Subchapter.

(7) Counties, cities, and towns may levy a license tax not in excess of the license tax levied by the State.

(8) Where the taxpayer elects to pay an annual statewide license in the sum of three hundred dollars ($300.00) in advance, as provided for in subdivision (4) of this section, counties, cities and towns may each levy a license tax not in excess of ten dollars ($10.00) per week, provided such places of amusement do not charge more than a total of fifty cents (50¢) for admission at the door, as provided for in subdivision (2) of this section. (1939, c. 158, s. 103.)

§ 105-36. Amusements—manufacturing, selling, leasing, or distributing moving picture films or checking attendance at moving picture shows.—Every person, firm, or corporation engaged in the business of manufacturing, selling, leasing, furnishing and/or distributing films to be used in this State in moving picture theatres or other places at which an admission fee is charged shall apply for and obtain from the Commissioner of Revenue a statewide license for the privilege of engaging in such business in this State, and shall pay for such license a tax of six hundred and twenty-five dollars ($625.00): Provided, that persons, firms, or corporations engaged exclusively in the business of selling, leasing, furnishing and/or distributing films for use in places where no admission fee is charged or in schools, public or private, and other institutions of learning in this State, shall pay a tax of twenty-five dollars ($25.00).

Any person, firm, or corporation engaged under contract or for compensation in the business of checking the attendance of any moving picture or show for the purpose of ascertaining attendance or amount of admission receipts at any theatre or theatres shall apply for and obtain from the Commissioner of Revenue a statewide license for the privilege of engaging in such business in this State, and shall pay for such license an annual tax of two hundred and fifty dollars ($250.00): Provided, that persons engaged in the public practice of accounting and licensed under G.S. 105-41(c) shall be exempt from the payment of this license tax.

Counties, cities, and towns shall not levy a license tax on the business taxed under this section. (1939, c. 158, s. 104; 1947, c. 981; 1965, c. 641.)

§ 105-36.1. Amusements—outdoor theatres.—(a) Every person, firm or corporation engaged in the business of operating an outdoor or drive-in moving picture show or places where vaudeville exhibitions or performances are given for compensation shall apply for and obtain in advance from the Commissioner of Revenue a State license for the privilege of engaging in such business and shall pay a tax in accordance with the following schedule:

For drive-in or outdoor theatres located in or within 10 miles of the corporate limits of cities and towns of

	Car Capacity Up to 150	Car Capacity 150 to 300	Car Capacity 300 to 500	Car Capacity 500 or over
less than 3,000 pop.	$ .67 per car	$ .74 per car	$ .80 per car	$ .87 per car
3,000 to 5,000 pop.	.74 per car	.80 per car	.87 per car	.94 per car
5,000 to 10,000 pop.	.80 per car	.87 per car	.95 per car	1.00 per car
10,000 to 20,000 pop.	.87 per car	.94 per car	1.00 per car	1.07 per car
20,000 to 40,000 pop.	.94 per car	1.00 per car	1.07 per car	1.17 per car
40,000 and over	1.00 per car	1.07 per car	1.17 per car	1.34 per car

In addition to the foregoing tax based upon population and car capacity, every operator of a business taxed under this section shall pay a tax of one dollar ($1.00) for each seat or seating space provided for patrons outside of motor vehicles driven into the enclosure by patrons. For the purpose of this section, car capacity shall be determined by the number of outlets provided for

individual speakers. In the case of drive-in or outdoor theatres not equipped with individual speakers or outlets therefor, but which are equipped with one or more central speakers, the car capacity shall be regarded and rated as 200.

In the case of drive-in or outdoor theatres located within 10 miles of the corporate limits of more than one municipality, the tax herein levied shall be paid in accordance with the rate applicable to the largest of such municipalities.

For the purpose of this section, unincorporated communities shall be regarded as incorporated municipalities, with the corporate limits deemed to extend one mile in every direction from the intersection of the two principal streets in such unincorporated community; and if there is no such intersection, then from the recognized business center of such unincorporated community.

In the case of drive-in or outdoor theatres located more than 10 miles from the corporate limits of any municipality, the tax shall be paid at the rate herein provided for such theatres located within 10 miles of the corporate limits of a municipality having a population of 3,000 to 5,000.

In the case of drive-in or outdoor theatres operating less than six months each year, the tax shall be one half the tax herein levied.

(b) Cities and towns may levy upon the businesses taxed in this section not in excess of the following amounts:

In cities or towns of less than 1,500 population	$ 12.50
In cities or towns of 1,500 and less than 3,000 population	31.25
In cities or towns of 3,000 and less than 5,000 population	62.50
In cities or towns of 5,000 and less than 10,000 population	87.50
In cities or towns of 10,000 and less than 15,000 population	137.50
In cities or towns of 15,000 and less than 25,000 population	187.50
In cities or towns of 25,000 population or over	212.50

(1949, c. 392, s. 1; 1957, c. 1340, s. 2; 1959, c. 1259, s. 9F.)

§ 105-37. Amusements—moving pictures or vaudeville shows—admission.—(a) Every person, firm, or corporation engaged in the business of operating a moving picture show or place where vaudeville exhibitions or performances are given or operating a theatre or opera house where public exhibitions or performances are given for compensation shall apply for and obtain in advance from the Commissioner of Revenue a State license for the privilege of engaging in such business, and shall pay for such State license for each room, hall, or tent used the following tax:

	Seating Capacity up to 600 Seats	Seating Capacity of 600 to 1200 seats	Seating Capacity over 1200 Seats
In cities or towns of less than 1,500 population	$ 83.34	$ 100.00	$ 133.34
In cities or towns of 1,500 and less than 3,000 population	133.34	166.67	200.00
In cities or towns of 3,000 and less than 5,000 population	166.67	200.00	266.67
In cities or towns of 5,000 and less than 10,000 population	233.34	266.67	400.00
In cities or towns of 10,000 and less than 15,000 population	266.67	400.00	533.34
In cities or towns of 15,000 and less than 25,000 population	333.34	533.34	666.67
In cities or towns of 25,000 and less than 40,000 population	400.00	666.67	1,000.00
In cities or towns of 40,000 population or over	533.34	1,000.00	1,666.67

(b) For any moving picture show operated more than two miles from the business center of any city having a population of 25,000, or over (for the purpose of this provision, the term "business center" to be defined as the intersection of the two principal business streets of the city), the tax levied shall be one third of the above, based upon the population of the city in which such theatre is located or adjacent to.

(c) For any moving picture show operated within the city limits or within one mile of the corporate limits of any city having a population of 25,000, or over, and known as neighborhood or suburban theatres, or for any theatre operated exclusively for colored people in a city having a population of 2,500, or over, the tax levied shall be one third of the above tax, based upon the population of such city.

(d) For any moving picture show operated at bathing beaches or resort towns for less than six months each year, the tax levied shall be one half the annual tax provided above, based upon the population of the city or town in which such seasonal moving picture show shall be operated.

(e) For any motion picture show operating three days or less each week, the tax levied shall be one half the annual tax provided above, based upon the population of the city or town in which such theatre is located.

(f) Counties shall not levy any license tax on the business taxed under the foregoing portions of this section. On the business described in the first paragraph of this section, cities and towns may levy a license tax not in excess of the following:

In cities or towns of less than 1,500 population	$ 12.50
In cities or towns of 1,500 and less than 3,000 population	31.25
In cities or towns of 3,000 and less than 5,000 population	62.50
In cities or towns of 5,000 and less than 10,000 population	87.50
In cities or towns of 10,000 and less than 15,000 population	137.50
In cities or towns of 15,000 and less than 25,000 population	187.50
In cities or towns of 25,000 population or over	212.50

On the business described in subsection (b) of this section, cities and towns may levy a license tax not in excess of one hundred dollars ($100.00); and on a business described in subsections (c), (d) or (e) of this section, cities and towns may levy a license tax not in excess of one half of the tax authorized by the schedule set forth in this subsection. (1939, c. 158, s. 105; 1943, c. 400, s. 2; 1945, c. 708, s. 2; 1947, c. 501, s. 2; 1949, c. 392, s. 1; c. 1201; 1957, c. 1340, s. 2; 1959, c. 1259, s. 9G.)

Editor's Note. — For comment on the 1943 amendment which rewrote the section, see 21 N.C.L. Rev. 368.

Educational Entertainment Hall Exempt.— A musical conservator, owning a hall in which it gives musical entertainments for the special benefit of its pupils and teachers, charging for admission thereto, is not liable for the opera house tax herein provided. Markham v. Southern Conservatory of Music, 130 N.C. 276, 41 S.E. 531 (1902).

The federal census in use at the time is the basis of determining population for the purposes of this section. State v. Prevo, 178 N.C. 740, 101 S.E. 370 (1919).

§ 105-37.1. Amusements — forms of amusement not otherwise taxed.—(a) Every person, firm or corporation engaged in the business of giving, offering or managing any form of entertainment or amusement not otherwise taxed or specifically exempted in this Article, for which an admission is charged, shall pay an annual license tax for each room, hall, tent or other place where such admission charges are made, graduated according to population, as follows:

In cities or towns of less than 1,500 population	$10.00
In cities or towns of 1,500 and less than 3,000 population	15.00
In cities or towns of 3,000 and less than 5,000 population	20.00
In cities or towns of 5,000 and less than 10,000 population	25.00

In cities or towns of 10,000 and less than 15,000 population 30.00
In cities or towns of 15,000 and less than 25,000 population 40.00
In cities or towns of 25,000 population or over 50.00

In addition to the license tax levied in the above schedule, such person, firm, or corporation shall pay an additional tax upon the gross receipts of such business at the rate of tax levied in Article V, Schedule E, G.S. 105-164 to 105-187, upon retail sales of merchandise. Reports shall be made to the Commissioner of Revenue, in such form as he may prescribe, within the first 10 days of each month covering all such gross receipts for the previous month, and the additional tax herein levied shall be paid monthly at the time such reports are made. The annual license tax herein levied shall be treated as an advance payment of the tax upon gross receipts herein levied, and the annual license tax shall be applied as a credit upon or advance payment of the gross receipts tax.

Every person, firm, or corporation giving, offering, or managing any dance or athletic contest of any kind, except high school and elementary school athletic contests, for which an admission fee in excess of fifty cents (50¢) is charged, shall pay an annual license tax of five dollars ($5.00) for each location where such charges are made, and, in addition, a tax upon the gross receipts derived from admission charges in excess of fifty cents (50¢) at the rate of tax levied in Article V, Schedule E, G.S. 105-164 to 105-187, upon retail sales of merchandise. The additional tax upon gross receipts shall be levied and collected in accordance with such regulations as may be made by the Commissioner of Revenue. No tax shall be levied on admission fees for high school and elementary school contests. The tax levied in this last portion of this section shall apply to all privately owned toll bridges, including all charges made for all vehicles, freight and passenger, and the minimum charge of fifty cents (50¢) for admission shall not apply to bridge tolls.

Dances and other amusements actually promoted and managed by civic and private and public secondary schools, shall not be subject to the license tax imposed by this section and the first one thousand dollars ($1,000) of gross receipts derived from such events shall be exempt from the gross receipts tax herein levied when the entire net proceeds of such dances or other amusements are used exclusively for the school or civic and charitable purposes of such organizations and not to defray the expenses of the organization conducting such dance or amusement. The mere sponsorship of dance or other amusement by such a school, civic, or fraternal organization shall not be deemed to exempt such dance or other amusement as provided in this paragraph, but the exemption shall apply only when the dance or amusement is actually managed and conducted by the school, civic, or fraternal organization and the proceeds are used as hereinbefore required.

(b) Counties shall not levy any license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of one half the base tax levied herein.

(c) No tax shall be collected pursuant to this section with respect to entertainments or amusements offered or given on the Cherokee Indian reservation when the person, firm or corporation giving, offering or managing such entertainment or amusement is authorized to do business on the reservation and pays the tribal gross receipts levy to the tribal council. (1939, c. 158, s. 105; 1943, c. 400, s. 2; 1945, c. 708, s. 2; 1947, c. 501, s. 2; 1963, c. 1231; 1967, c. 865.)

Local Modification.—Cabarrus: 1961, c. 1032.

§ 105-38. Amusements—circuses, menageries, wild west, dog and/or pony shows, etc.—Every person, firm, or corporation engaged in the business of exhibiting performances, such as a circus, menagerie, wild west show, dog and/or pony show, or any other show, exhibition or performance similar thereto, not taxed in other sections of this Article, shall apply for and obtain a

State license from the Commissioner of Revenue for the privilege of engaging in such business, and pay for such license the following tax for each day or part of a day:

(1) Such shows and/or exhibitions traveling on railroads and requiring transportation of:

Not more than two cars	$ 30.00
Three to five cars, inclusive	45.00
Six to 10 cars, inclusive	90.00
11 to 20 cars, inclusive	125.00
21 to 30 cars, inclusive	175.00
31 to 50 cars, inclusive	250.00
Over 50 cars	300.00

(2) Such shows and/or exhibitions traveling by automobiles, trucks, or other vehicles, other than railroad cars, and requiring transportation by:

Not over two vehicles	$ 7.50
Three to five vehicles	10.00
Six to 10 vehicles	15.00
11 to 20 vehicles	25.00
21 to 30 vehicles	45.00
31 to 50 vehicles	60.00
51 to 75 vehicles	75.00
76 to 100 vehicles	100.00
Over 100 vehicles, per vehicle in excess thereof	5.00

It is the intent of this subdivision that every vehicle used in transporting circus property or personnel, whether owned by the circus or by others, shall be counted in computing the tax.

(3) Every person, firm, or corporation by whom any show or exhibition taxed under this section is owned or controlled shall file with the Commissioner of Revenue, not less than five days before entering this State for the purpose of such exhibitions or performances therein, a statement, under oath, setting out in detail such information as may be required by the Commissioner of Revenue covering the places in the State where exhibitions or performances are to be given, the character of the exhibitions, the mode of travel, the number of cars or other conveyances used in transferring such shows, and such other and further information as may be required. Upon receipt of such statement, the Commissioner of Revenue shall fix and determine the amount of State license tax with which such person, firm, or corporation is chargeable, shall endorse his findings upon such statement, and shall transmit a copy of such statement and findings to each such person, firm, or corporation to be charged, to the sheriff or tax collector of each county in which exhibitions or performances are to be given, and to the division deputy of the Commissioner of Revenue, with full and particular instructions as to the State license tax to be paid. Before giving any of the exhibitions or performances provided for in such statement, the person, firm, or corporation making such statement shall pay the Commissioner of Revenue the tax so fixed and determined. If one or more of such exhibitions or performances included in such statement and for which the tax has been paid shall be canceled, the Commissioner of Revenue may, upon proper application made to him, refund the tax for such canceled exhibitions or performances. Every such person, firm, or corporation shall give to the Commissioner of Revenue a notice of not less than five days before giving any of such exhibitions or performances in each county.

(4) The sheriff of each county in which such exhibitions or performances are advertised to be exhibited shall promptly communicate such information to the Commissioner of Revenue; and if the statement required in this section has not been filed as provided herein, or not filed in time for certified copies thereof, with proper instructions, to be transmitted to the sheriffs of the several counties and the division deputy commissioner, the Commissioner of Revenue shall cause his division deputy to attend at one or more points in the State where such exhibitions or performances are advertised or expected to exhibit, for the purpose of securing such statement prescribed in this section, of fixing and determining the amount of State license tax with which such person, firm, or corporation is taxable, and to collect such tax or give instructions for the collection of such tax.

(5) Every such person, firm, or corporation by whom or which any such exhibition or performance described in this section is given in any county, city or town, or within five miles thereof, wherein is held an annual agricultural fair, during the week of such annual agricultural fair, shall pay a State license of one thousand dollars ($1,000) for each exhibition or performance in addition to the license tax first levied in this section, to be assessed and collected by the Commissioner of Revenue or his duly authorized deputy.

(6) The provisions of this section, or any other section of this Article, shall not be construed to allow without the payment of the tax imposed in this section, any exhibition or performance described in this section for charitable, benevolent, educational, or any other purpose whatsoever, by any person, firm, or corporation who is engaged in giving such exhibitions or performances, no matter what terms of contract may be entered into or under what auspices such exhibitions or performances are given. It being the intent and purpose of this section that every person, firm, or corporation who or which is engaged in the business of giving such exhibitions or performances, whether a part or all of the proceeds are for charitable, benevolent, educational, or other purposes or not, shall pay the State license tax imposed in this section.

(7) Every such person, firm, or corporation who shall give any such exhibitions or performances mentioned in this section within this State, before the statement provided for has been filed with the Commissioner of Revenue, or before the State license tax has been paid, or which shall, after the filing of such statement, give any such exhibitions or performances taxable at a higher rate than the exhibition or performance authorized by the Commissioner of Revenue upon the statement filed, shall pay a State license tax of fifty percent (50%) greater than the tax hereinbefore prescribed, to be assessed and collected either by the Commissioner of Revenue or by his division deputy.

Upon all performances taxable under this section there is levied, in addition to the license tax levied in this section, a tax upon the gross receipts of such business at the rate of tax levied in Schedule E, G.S. 105-164 to 105-187, upon retail sales of merchandise. The license tax herein levied shall be treated as an advance payment of the tax upon gross receipts herein levied, and the license tax shall be applied as a credit upon or advance payment of the gross receipts tax. The Commissioner of Revenue may adopt such regulations as may be necessary to effectuate the provisions of this section and shall prescribe the form and character of reports to be made, and shall have such authority of supervision as may be necessary to effectuate the purpose of this Subchapter.

(8) In lieu of the tax levied in G.S. 105-86, each circus, or other form of amusement taxed under this section, advertising by means of outdoor advertising displays, a bill posting or as otherwise defined in G.S. 105-86, shall pay a tax of one hundred dollars ($100.00) for a statewide license for the privilege of advertising in this manner, said tax to be in addition to the other taxes levied in this section.

(9) Counties, cities, and towns may levy a license tax on the business taxed under this section not in excess of one half of the license tax levied by the State, but shall not levy a parade tax or a tax under subdivision (8) of this section. (1939, c. 158, s. 106.)

§ 105-39. Amusements—carnival companies, etc. — (a) Every person, firm, or corporation engaged in the business of a carnival company or a show of like kind, moving picture and vaudeville shows, museums and menageries, merry-go-rounds, ferris wheels, riding devices, and other like amusements, and enterprises, conducted for profit, under the same general management, or an aggregate of shows, amusements, eating places, riding devices, or any of them operating together on the same lot or contiguous lots or streets, traveling from place to place, whether owned and actually operated by separate persons, firms, or corporations or not, filling week-stand engagements, or giving week-stand exhibitions, under canvas or not, shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of engaging in such business or amusement, and shall pay for such license for each week, or part of a week, a tax based according to the population of the city or town in which such carnival is showing as follows:

In cities or towns of less than 2,500 population	$100.00
In cities or towns of 2,500 population and less than 10,000	200.00
In cities or towns of more than 10,000 population	300.00

Provided that any carnival operating within a radius of five miles of any city shall pay the same tax as if they were actually showing within the city limits of said town. Provided further that if such a carnival operates over five miles from any city or town such a carnival shall be liable for a tax of one hundred dollars ($100.00) per week or part of a week.

Provided, that when a person, firm, or corporation exhibits only riding devices which are not a part of, nor used in connection with any carnival company, the tax shall be ten dollars ($10.00) per week for each such riding device, provided that counties, cities and towns may levy and collect a license tax upon such riding devices not in excess of five dollars ($5.00) for each such device.

Provided, further, that it shall be unlawful under this section for the owners and/or operators of riding devices to operate, or cause to be operated, any show, game, stand or other attraction whatsoever.

(b) This section shall not repeal any local act prohibiting any of the shows, exhibitions, or performances mentioned in this section, or limit the authority of the board of county commissioners of any county, or the board of aldermen or other governing body of any city or town, in prohibiting such shows, exhibitions, or performances. If the Commissioner of Revenue shall issue a State license for any such show, exhibition, or performance in any county or municipality having a local statute prohibiting the same, then the said State license shall not authorize such show, exhibition, or performance to be held in such county or municipality, but the Commissioner of Revenue shall refund, upon proper application, the tax paid for such State license.

(c) No person, firm, or corporation, nor any aggregation of same, giving such shows, exhibitions, or performances, shall be relieved from the payment of the tax levied in this section, regardless of whether or not the State derives a benefit from same. Nor shall any carnival operating or giving performances or exhibitions, in connection with any fair in North Carolina, be relieved from the payment of tax levied in this section. It is the intent and purpose of this section

that every person, firm, or corporation, or aggregation of same which is engaged in the giving of such shows, exhibitions, performances, or amusements, whether the whole or a part of the proceeds are for charitable, benevolent, educational, or other purposes whatsoever, shall pay the State license taxes provided for in this section.

It is not the purpose of this Article to discourage agricultural fairs in the State, and to further this cause, no carnival company will be allowed to play a "still date" in any county where there is a regularly advertised agricultural fair, 30 days prior to the dates of said fair. An agricultural fair shall be construed as meaning one that has operated at least one year prior to March 24, 1939.

Upon all performances taxable under this section there is levied, in addition to the license tax levied in this section, a tax upon the gross receipts of such business at the rate of tax levied in Schedule E, G.S. 105-164 to 105-187, upon retail sales of merchandise. The license tax herein levied shall be treated as an advance payment of the tax upon the gross receipts herein levied, and the license tax shall be applied as a credit upon or advance payment of the gross receipts tax. The Commissioner of Revenue may adopt such regulations as may be necessary to effectuate the provisions of this section and shall prescribe the form and character of reports to be made, and shall have such authority or supervision as may be necessary to effectuate the purposes of this Subchapter.

Nothing herein contained shall prevent veterans' organizations and posts chartered by Congress or organized and operated on a statewide or nationwide basis from holding fairs or tobacco festivals on any dates which they may select, provided said fairs or festivals have heretofore been held as annual events.

(d) Counties, cities and towns may levy a license tax on the business taxed hereunder not in excess of one half of that levied by the State. (1939, c. 158, s. 107; 1941, c. 50, s. 3; 1947, c. 501, s. 2; 1951, c. 643, s. 2.)

Editor's Note. — For comment on the 1941 amendment which rewrote a portion of subsection (a), see 19 N.C.L. Rev. 529.

§ 105-40. Amusements—certain exhibitions, performances, and entertainments exempt from license tax.—All exhibitions, performances, and entertainments, except as in this Article expressly mentioned as not exempt, produced by local talent exclusively, and for the benefit of religious, charitable, benevolent or educational purposes, and where no compensation is paid to such local talent shall be exempt from the State license tax. (1939, c. 158, s. 108.)

Educational Entertainment Hall Exempt.— A musical conservatory, owning a hall in which it gives entertainments for the special benefit of its pupils and teachers, charging admission thereto, is not liable for the opera house tax provided in § 105-37. Markham v. Southern Conservatory of Music, 130 N.C. 276, 41 S.E. 531 (1902).

Cited in Redevelopment Comm'n v. Guilford County, 1 N.C. App. 512, 162 S.E.2d 108 (1968).

§ 105-41. Attorneys at law and other professionals. — (a) Every practicing attorney at law, practicing physician, veterinary, surgeon, osteopath, chiropractor, chiropodist, dentist, oculist, optician, optometrist, any person practicing any professional art of healing for a fee or reward, every practicing professional engineer as defined in Chapter 89 of the General Statutes, every practicing land surveyor as defined in Chapter 89 of the General Statutes, every architect and landscape architect, photographer, canvasser for any photographer, agent of a photographer in transmitting pictures or photographs to be copied, enlarged or colored (including all persons enumerated in this section employed by the State, county, municipality, a corporation, firm or individual), and every person, whether acting as an individual, as a member of a partnership, or as an officer and/or agent of a corporation, who is engaged in

the business of selling or offering for sale, buying or offering to buy, negotiating the purchase, sale, or exchange of real estate, or who is engaged in the business of leasing or offering to lease, renting or offering to rent, or of collecting any rents as agent for another for compensation, or who is engaged in the business of soliciting and/or negotiating loans on real estate as agent for another for a commission, brokerage and/or other compensation, shall apply for and obtain from the Commissioner of Revenue a statewide license for the privilege of engaging in such business or profession, or the doing of the act named, and shall pay for such license twenty-five dollars ($25.00): Provided, that no professional man or woman shall be required to pay a privilege tax after he or she has arrived at the age of 75 years. Further provided, that it shall be unlawful for a nonresident of this State to engage in the real estate business in this State, as defined in this section, unless the State of residence of such person will permit a resident of this State to engage in such business. Any person who shall engage in the real estate business in this State in violation of the terms of this provision shall be guilty of a misdemeanor and shall be punished in the discretion of the court; and further provided, that the obtaining of a real estate dealer's license by such person shall not authorize such nonresident to engage in the real estate business in this State, and provided further that in all prosecutions under this section, a certificate under the hand and seal of the Commissioner of Revenue that the accused filed no income tax returns with his department for the preceding taxable year shall be prima facie evidence that the accused is a nonresident and that his license is void.

(b) Persons practicing the professional art of healing for a fee or reward shall be exempt from the payment of the license tax levied in the preceding paragraph of this section, if such persons are adherents of established churches or religious organizations and confine their healing practice to prayer or spiritual means.

(c) Every person engaged in the public practice of accounting as a principal, or as a manager of the business of public accountant, shall pay for such license twenty-five dollars ($25.00), and in addition shall pay a license of twelve dollars and fifty cents ($12.50) for each person employed who is engaged in the capacity of supervising or handling the work of auditing, devising or installing systems of accounts.

(d) Every licensed mortician or embalmer shall in like manner apply for and obtain from the Commissioner of Revenue a statewide license for practicing his profession, whether for himself or in the employ of another of ten dollars ($10.00).

(e) Licenses issued under this section are issued as personal privilege licenses and shall not be issued in the name of a firm or corporation: Provided, that a licensed photographer having a located place of business in this State, shall be liable for a license tax on each agent or solicitor, employed by him for soliciting business. If any person engages in more than one of the activities for which a privilege tax is levied by this section, such person shall be liable for a privilege tax with respect to each activity engaged in.

(f) Only one half of the tax levied in this section shall be collected from those persons whose gross receipts from the business or profession for the preceding year did not exceed one thousand dollars ($1,000).

(g) License revocable for failure to pay tax. Whenever it shall be made to appear to any judge of the superior court that any person practicing any profession for which the payment of a license tax is required by this section has failed, or fails, to pay the professional tax levied in this section, and execution has been issued for the same by the Commissioner of Revenue and returned by the proper officer "no property to be found," or returned for other cause without payment of the tax, it shall be the duty of the judge presiding in the superior court of the county in which such person resides, upon presentation therefor, to cause the clerk of said court to issue a rule requiring such person to

show cause by the next term of court why such person should not be deprived of license to practice such profession for failure to pay such professional tax. Such rule shall be served by the sheriff upon said person 20 days before the next term of the court, and if at the return term of court such person fails to show sufficient cause, the said judge may enter a judgment suspending the professional license of such person until all such tax as may be due shall have been paid, and such order of suspension shall be binding upon all courts, boards and commissions having authority of law in this State with respect to the granting or continuing of license to practice any such profession.

(h) Counties, cities, or towns shall not levy any license tax on the business or professions taxed under this section; and the statewide license herein provided for shall privilege the licensee to engage in such business or profession in every county, city, or town in this State. (1939, c. 158, s. 109; 1941, c. 50, s. 3; 1943, c. 400, s. 2; 1949, c. 683; 1953, c. 1306; 1957, c. 1064.)

Editor's Note.—The 1941 amendment struck out a provision of subsection (h) excepting photographers, etc. Prior to the amendment each county and city had the privilege of levying a similar tax upon photographers. Lucas v. City of Charlotte, 14 F. Supp. 163 (W.D.N.C. 1936).

For comment on the 1943 amendment which added the last sentence of subsection (e), see 21 N.C.L. Rev. 367.

Persons Making "Negatives" Are Photographers Subject to License Tax.—To solicit persons to have their photographs taken, arrange for the sitting and actually have the camera present and take what is popularly called a picture, but in fact is a "negative," which is the outline of the subject on glass is engaging within the State in the profession or business of photography within the meaning of this section. Lucas v. City of Charlotte, 14 F. Supp. 163 (W.D.N.C. 1936).

Although the "negatives" are sent to another state for development the assessment of the tax under this section on photographers does not constitute an interference with or burden upon interstate commerce. Lucas v. City of Charlotte, 14 F. Supp. 163 (W.D.N.C. 1936).

Discriminatory Statute Applying to Real Estate Brokers Is Unconstitutional. — Public-Local Laws of 1927, c. 241, requiring real estate brokers and salesmen in certain designated counties to be licensed by a real estate commission on the basis of moral character and proficiency in the public interest and requiring the payment of a license fee in addition to the license required by this section was held unconstitutional as discriminatory. State v. Warren, 211 N.C. 75, 189 S.E. 108 (1937).

Quoted in State v. Dixon, 215 N.C. 161, 1 S.E.2d 521 (1939).

Cited in Northcutt v. Clayton, 269 N.C. 428, 152 S.E.2d 471 (1967).

§ 105-41.1. Bondsmen. — Every person, firm, or corporation, excepting agents of insurance or bonding companies which are licensed by the Commissioner of Insurance to issue bonds, engaged in the business of writing or executing, for a consideration, appearance, compliance, or bail bonds, or any type of bond or undertaking required in connection with criminal proceedings in any of the courts of this State, shall apply for and obtain from the Commissioner of Revenue a statewide license for the privilege of engaging in such business and shall pay for such license the following tax:

In cities or towns of less than 2,000 population	$10.00
In cities or towns of 2,000 and less than 5,000 population	15.00
In cities or towns of 5,000 and less than 10,000 population	20.00
In cities or towns of 10,000 population or over	40.00

If any person, firm, or corporation, required to be licensed under the provisions of this section, engages in said business in two or more cities or towns, such person, firm, or corporation shall procure a license based on the population of the largest city or town in which the business taxed under this section is carried on.

Counties, cities and towns may levy a license tax on the business taxed under this section in an amount not in excess of the tax levied by the State.

Persons, firms or corporations licensed hereunder who or which do not engage in any of the kinds of insurance business described in G.S. 58-72 shall be exempt from being licensed or regulated by the Commissioner of Insurance. (1943, c. 400, s. 2; 1945, c. 708, s. 2; 1947, c. 501, s. 2.)

§ 105-42. Detectives.—Every person, whether acting as an individual, as a member of a partnership, or as an officer and/or agent of a corporation, who is engaged in business as a detective or what is ordinarily known as "secret service work," or who is engaged in the business of soliciting such business, shall apply for and obtain from the Commissioner of Revenue a statewide license for the privilege of engaging in such business, and shall pay for such license a tax of twenty-five dollars ($25.00): Provided, any such person regularly employed by the United States government, any state or political subdivision of any state shall not be required to pay the license herein provided for. No license shall be issued pursuant to this section until the applicant exhibits an original or certified copy of the license required by G.S. 66-49.1 which is current and has been issued to the applicant. (1939, c. 158, s. 110; 1971, c. 814, s. 14.)

Editor's Note. — The 1971 amendment added the last sentence.

§ 105-43. Real estate auction sales.—(a) Every person, firm, or corporation engaged in the business of conducting auction sales of real estate for profit or compensation shall apply for and obtain from the Commissioner of Revenue a statewide license for the privilege of engaging in such business in this State, and shall pay for such license a tax of two hundred and fifty dollars ($250.00).

Provided, that any person, firm, or corporation engaged in the business of conducting auction sales in one county only in this State, shall be liable for a license tax in the amount of seventy-five dollars ($75.00).

(b) This section shall not apply to sales for foreclosure of liens or sales made by order of court.

(c) Counties, cities, and towns may levy a tax on the business taxed under this section not in excess of twelve and fifty one-hundredths dollars ($12.50) for each sale conducted in the county, city, or town: Provided, that the total tax levied by any county, city, or town on said business during any year shall not exceed twenty-five dollars ($25.00). (1939, c. 158, s. 111.)

§ 105-44. Coal and coke dealers.—(a) Every person, firm, or corporation, either as agent or principal, engaged in and conducting the business of selling and/or delivering coal or coke in carload lots, or in greater quantities, shall be deemed a wholesale dealer, and shall apply for and procure from the Revenue Commissioner a State license and pay for such license the sum of seventy-five dollars ($75.00): Provided, that if such wholesale dealer shall also sell and/or deliver coal or coke in less than carload lots, he shall not be subject to the retailer's license tax provided in this section.

(b) Every person, firm, or corporation engaged in and conducting the business of selling and/or delivering coal or coke at retail shall apply for and procure from the Commissioner of Revenue a State license, and shall pay for such license for each city or town in which such coal or coke is sold or delivered, as follows:

In cities or towns of less than 2,500 population	$10.00
In cities or towns of 2,500 and less than 5,000 population	15.00
In cities or towns of 5,000 and less than 10,000 population	25.00
In cities or towns of 10,000 and less than 25,000 population	50.00
In cities or towns of 25,000 and over	75.00

Dealers or peddlers in coal who sell in quantities of not more than 100 pounds shall pay a State license tax of five dollars ($5.00); provided that this section shall not apply to persons, firms or corporations who deliver coal or coke to State institutions or public schools only.

(c) No county shall levy any license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of that levied by the State.

(d) From the taxes levied under authority of this section, any person, firm or corporation owning or operating a coal mine in this State shall be allowed to deduct the amount of ad valorem taxes for the current year levied by any county in this State on the mine, mineral rights or land itself, from which said coal is mined: Provided, further, that any person, firm or corporation soliciting orders for pool cars of coal to be distributed without profit shall be subject to the license tax.

(e) The operator of any truck, automobile, or other motor vehicle coming into this State from another state and selling and/or delivering coal or coke, other than to a person, firm, or corporation taxed under this section, shall pay an annual license tax for the privilege of doing business in this State in cities or towns of less than 2,500 population, ten dollars ($10.00); in cities or towns of 2,500 and less than 5,000 population, fifteen dollars ($15.00); in cities or towns of 5,000 and less than 10,000 population, twenty-five dollars ($25.00); in cities or towns of 10,000 and less than 25,000 population, fifty dollars ($50.00); in cities and towns of 25,000 and over, seventy-five dollars ($75.00). The license secured from the State under this section shall be conspicuously posted within the truck, automobile, or other motor vehicle. This license tax shall be in addition to all other taxes and fees imposed upon such persons by law. (1939, c. 158, s. 112; 1941, c. 50, s. 3; 1959, c. 1259, s. 9B.)

Census Applicable for 1940. — In ascertaining the State license tax on businesses in accordance with the graduated scale based upon the population of the municipalities in which the business is operated, for the tax year beginning July 1, 1940, the Commissioner of Revenue properly used the 1930 United States census figures, since the 1940 figures were not available at the beginning of that tax year. Clark v. City of Greenville, 221 N.C. 255, 20 S.E.2d 56 (1942).

Cited in Atlantic Ice & Coal Co. v. Maxwell, 210 N.C. 723, 188 S.E. 381 (1936).

§ 105-45. Collecting agencies.—(a) Every person, firm, or corporation engaged in the business of collecting, for a profit, claims, accounts, bills, notes, or other money obligations for others, and of rendering an account for same, shall be deemed a collection agency, and shall apply for and receive from the Commissioner of Revenue a State license for the privilege of engaging in such business, and pay for such license a tax of fifty dollars ($50.00).

(b) This section shall not apply to a regularly licensed practicing attorney at law.

(c) Counties shall not levy any license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of that levied by the State. (1939, c. 158, s. 113.)

§ 105-46. Undertakers and retail dealers in coffins.—Every person, firm, or corporation engaged in the business of burying the dead, or in the retail sale of coffins, shall apply for and procure from the Revenue Commissioner a State license for transacting such business within this State, and shall pay for such license the following tax:

In cities or towns of less than 500 population	$ 10.00
In cities or towns of 500 and less than 5,000 population	25.00
In cities or towns of 5,000 and less than 10,000 population	40.00
In cities or towns of 10,000 and less than 15,000 population	50.00
In cities or towns of 15,000 and less than 25,000 population	75.00
In cities or towns of 25,000 population or over	100.00

This section shall not apply to a cabinetmaker (who is not an undertaker) who makes coffins to order.

No county shall levy any license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of that levied by the State. (1939, c. 158, s. 114.)

§ 105-47. Dealers in horses and/or mules.—(a) Every person, firm, or

corporation engaged in the business of purchasing for the purpose of resale, either at wholesale or retail, horses and/or mules shall apply for and procure from the Commissioner of Revenue a State license for the privilege of engaging in such business in this State and shall pay for such license an annual tax for each location where such business is carried on as follows:

Where not more than one carload of horses and/or mules is purchased for the purpose of resale	$ 25.00
Where more than one carload and not more than two carloads of horses and/or mules are purchased for the purpose of resale	50.00
Where more than two carloads of horses and/or mules are purchased for the purpose of resale	100.00

For the purpose of calculating the amount of tax due under the above schedule, a carload of horses and/or mules shall be 25 and purchases for the preceding license tax year shall be used as a medium for arriving at the amount of tax due for the ensuing year: Provided, however, that if during the current license year horses and/or mules are purchased for the purpose of resale in such quantities that would establish liability for a greater tax than that previously paid, it shall be immediately remitted to the Commissioner of Revenue with the license which has already been issued in order that it may be cancelled and a corrected license issued.

(b) In addition to the above license, every person, firm, or corporation engaged in the business of purchasing for the purpose of resale and/or selling horses and/or mules at public auction, either on his or its own behalf or for any other person, whether a commission or fee is or is not charged, shall apply for and procure from the Commissioner of Revenue a State license for each place of auction and shall pay for such license an annual tax of one hundred dollars ($100.00).

(c) In addition to the above license, every transient vendor of horses and/or mules who has no permanent or established place of business in this State shall apply for and procure from the Commissioner of Revenue a State license for each county in which horses and/or mules are sold and shall pay for such license an annual tax of three hundred dollars ($300.00).

(d) Every person, firm, or corporation engaged in the business of purchasing for the purpose of resale, either at wholesale or retail, horses and/or mules shall keep a full, true and accurate record of all purchases and sales, including purchase invoices and freight bills covering such purchases and sales of all horses and/or mules until such purchases and sales, including purchase invoices and freight bills, have been checked by a duly authorized agent of the Commissioner of Revenue.

(e) Any person, firm, or corporation, required to procure from the Commissioner of Revenue a license under this section, who shall purchase and sell or offer for sale by principal or agent any horses and/or mules without first having obtained such license, shall in addition to the other penalties imposed by this Article, be deemed guilty of a misdemeanor and upon conviction shall be fined not to exceed one hundred dollars ($100.00) and/or imprisoned not less than 30 days within the discretion of the court.

(f) Counties, cities and towns may levy an annual license tax on the business taxed under this section not in excess of twelve dollars and fifty cents ($12.50). (1939, c. 158, s. 115; 1941, c. 50, s. 3; 1963, c. 1057.)

Section Does Not Discriminate against Interstate Commerce. — The license tax imposed on dealers purchasing horses or mules for resale by this section, is applicable regardless of whether such animals were raised in this State or are shipped into the State from other states, and therefore the statute makes no discrimination between local and interstate commerce. Nesbitt v. Gill, 227 N.C. 174, 41 S.E.2d 646 (1947).

Head Tax on Animals Bought for Resale. — For case construing former provisions of this section, see Nesbitt v. Gill, 227 N.C. 174, 41 S.E.2d 646 (1947).

§ 105-48. Phrenologists.—Any person engaged in the practice of

phrenology for compensation shall procure from the Commissioner of Revenue a State license for engaging in such practice, and shall pay for same a tax of two hundred dollars ($200.00) for each county in which such person does business.

Counties, cities, and towns may levy any license tax on the business taxed in this section. (1939, c. 158, s. 116.)

§ 105-48.1. Itinerant photographers, their agents and employees.—(a) It is hereby declared that it is in the public interest to require the licensing of persons practicing the profession or occupation of an itinerant photographer and to license an itinerant photographer's employees, agents or servants. An itinerant photographer is defined to be a person, partnership or corporation having no regularly established place of business in this State who personally or through officers, employees, agents or servants goes from town to town or from place to place within a town other than within the county of his residence, soliciting the making of photographic pictures or reproductions with a view to selling the same to the persons solicited. Unless duly licensed as hereinafter provided, it shall be unlawful for any person to practice as an itinerant photographer in this State and it shall be unlawful for any officer, employee, agent or servant of any itinerant photographer to engage in business in behalf of an itinerant photographer. The words "regularly established place of business" are defined to mean a place of business open to the public at least two days a week for not less than four hours daily and having one or more persons in charge thereof, and at which place the same person has the intent to continue in business for at least six consecutive months.

(b) Any person who practices the profession or occupation of an itinerant photographer in this State, whether as principal, officer, employee, agent or servant, and whether engaged in soliciting or in one or more of the operations involved in the making of photographic pictures or reproductions, shall obtain a license as hereinafter provided, paying therefor an annual fee of one hundred dollars ($100.00). All the provisions of the Revenue Act applicable to other State license taxes not inconsistent herewith shall be applicable with respect to the license tax herein provided.

(c) Counties, cities and towns may levy a license tax on each person taxed under this section not in excess of that levied by the State. (1957, c. 1256.)

Opinions of Attorney General. — Mr. William I. Thornton, Jr., Assistant Greensboro City Attorney, 40 N.C.A.G. 861 (1969).

§ 105-49. Bicycle dealers.—Any person, firm, or corporation engaged in the business of buying and/or selling bicycles, supplies and accessories shall apply for and procure a State license from the Commissioner of Revenue for the privilege of transacting such business, and shall pay tax for such license as follows:

In cities and towns of less than 10,000 population	$10.00
In cities and towns of 10,000 and less than 20,000 population	20.00
In cities or towns of 20,000 population or more	25.00

Counties shall not levy a license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of that levied by the State. (1939, c. 158, s. 117.)

§ 105-50. Pawnbrokers.—(a) Every person, firm, or corporation engaged in and conducting the business of lending or advancing money or other things of value for a profit, and taking as a pledge for such loan specific articles of personal property, to be forfeited if payment is not made within a definite time, shall be deemed a pawnbroker, and shall pay for the privilege of transacting such business an annual license as follows:

In cities or towns of less than 10,000 population	$200.00

In cities or towns of 10,000 and less than 15,000 population 250.00
In cities or towns of 15,000 and less than 20,000 population 300.00
In cities or towns of 20,000 and less than 25,000 population 350.00
In cities or towns of 25,000 population or more 400.00

(b) Before such pawnbroker shall receive any article or thing of value from any person or persons, on which a loan or advance is made, he shall issue a duplicate ticket, one to be delivered to the owner of said personal property and the other to be attached to the article, and said ticket shall have an identifying number on the one side, together with the date at the expiration of which the pledger forfeits his right to redeem, and on the other a full and complete copy of this subsection; but such pawnbroker may, after the pledger has forfeited his right to redeem the specific property pledged, sell the same at public auction, deducting from the proceeds of sale the money or fair value of the thing advanced, the interest accrued, and the cost of making sale, and shall pay the surplus remaining to the pledger.

(c) Any person, firm, or corporation transacting the business of pawnbroker without a license as provided in this section, or violating any of the provisions of this section, shall be guilty of a misdemeanor and fined not less than fifty dollars ($50.00) nor more than five hundred dollars ($500.00).

(d) Counties, cities, and towns may levy a license tax on the business taxed under this section not in excess of that levied by the State. (1939, c. 158, s. 118.)

Broker and Pawnbroker Distinguished. — There is a great difference between the terms "broker" and "pawnbroker." A broker is an agent, middleman or negotiator, who works for a commission. A pawnbroker is not an agent at all. He is one who lends money upon personalty pledged as security. Brokers and pawnbrokers constitute distinct classes, and entirely different license taxes may be assessed upon them. Schaul & Co. v. City of Charlotte, 118 N.C. 733, 24 S.E. 526 (1940).

Cited in Lenoir Fin. Co. v. Currie, 254 N.C. 129, 118 S.E.2d 543 (1961).

§ 105-51. Cash registers, adding machines, typewriters, refrigerating machines, washing machines, etc.—Every person, firm, or corporation engaged in the business of selling and/or delivering and/or renting cash registers, typewriters, adding or bookkeeping machines, billing machines, check protectors or protectographs, kelvinators, frigidaires, or other refrigerating machines, lighting systems, washing machines, mechanically or electrically operated burglar alarms, addressograph machines, multigraph and other duplicating machines, vacuum cleaners, mechanically or electrically operated oil burners and coal stokers, card punching, assorting and tabulating machinery, shall apply for and procure from the Commissioner of Revenue a State license for each place where such business is transacted in this State, and shall pay for such license a tax of ten dollars ($10.00).

Counties, cities, and towns shall not levy a license tax on the business taxed under this section. (1939, c. 158, s. 119.)

"Duplicating Machines" within Provisions of Statute. — See opinion of Attorney General to Mr. W.C. Pickett, Jr., Director, N.C. Department of Revenue, 41 N.C.A.G. 251 (1971).

§ 105-52. Sewing machines.—(a) Every person, firm, or corporation engaged in the business of selling sewing machines within this State shall apply for and obtain from the Commissioner of Revenue a statewide license for the privilege of engaging in such business and shall pay for such license a tax of one hundred dollars ($100.00) per annum for each such make of machines sold or offered for sale.

(b) In addition to the annual license tax imposed in subsection (a) of this section, such person, firm, or corporation engaged in the business taxed under this section shall pay a tax at the rate of tax levied in Schedule E, G.S. 105-164 to 105-187, on retail sales of merchandise on the total receipts during the preceding year from the sale, lease, or exchange of sewing machines and/or

accessories within the State, which said tax shall be paid to the Commissioner of Revenue at the time of securing the annual license provided for in subsection (a) of this section: Provided, that the tax on sales in the preceding year, levied in this subsection, shall apply only for the fiscal year ending May 31, 1935: Provided further, that on and after June 1, 1935, the additional tax on sales levied in this subsection shall be assessed and collected under the provisions of Schedule E, G.S. 105-164 to 105-187, the same as the tax on sales of other merchandise.

(c) Any person, firm, or corporation obtaining a license under the foregoing sections may employ agents and secure a duplicate copy of such license for each such agent by paying a tax of ten dollars ($10.00) to the Commissioner of Revenue. Each such duplicate license so issued shall contain the name of the agent to whom it is issued, shall not be transferable, and shall license the licensee to sell or offer for sale only the sewing machines sold by the holder of the original license.

(d) Any merchant or dealer who shall purchase sewing machines from a manufacturer or a dealer who has paid the license tax provided for in this section may sell such sewing machines without paying the annual statewide license tax provided for in subsection (a), but shall procure the duplicate license provided for in subsection (c) of this section: Provided, that the tax imposed by this subsection shall be the only tax required to be paid by dealers in secondhand sewing machines exclusively.

(e) Any person, firm, or corporation who or which violates any of the provisions of this section shall, in addition to all other penalties imposed in this Article, pay an additional tax of double the statewide annual license, and the duplicate tax imposed in this section.

(f) No county shall levy a license tax on the business taxed under this section, except that the county may levy a license tax not in excess of five dollars ($5.00) on each agent in a county who holds a duplicate license provided for in this section.

Cities and towns shall not levy a license tax on the business taxed under this section. (1939, c. 158, s. 120.)

§ **105-53. Peddlers.**—(a) Any person, firm, or corporation who or which shall carry from place to place any goods, wares, or merchandise, and offer to sell or barter the same, or actually sells or barters the same, shall be deemed a peddler, except such person, firm, or corporation who or which is a wholesale dealer, with an established warehouse in this State and selling only to merchants for resale, and shall apply for and procure from the Commissioner of Revenue a State license for the privilege of transacting such business, and shall pay for such license the following tax:

Peddler, on foot, for each county	$ 10.00
Peddler, with horse or other animal, and with or without vehicle, each county, for each vehicle	15.00
Peddler, resident of this State, with vehicle propelled by motor or other mechanical power, for each county, for each vehicle	25.00
Peddler, not a resident of this State, with vehicle propelled by motor or other mechanical power, for four or less counties, for each vehicle	100.00
Peddler, not a resident of this State, with vehicle propelled by motor or other mechanical power, for each county in excess of four, for each vehicle	25.00

(b) Any person, firm, or corporation employing the services of another as a peddler, either on a salary or commission basis, and/or furnishing spices, flavoring extracts, toilet articles, soaps, insecticide, proprietary medicine and household remedies in original packages of the manufacturer and other packaged articles of the kind commonly used on the farm and in the home, to

be sold by a peddler, under any kind of contractual agreement, shall be liable for the payment of taxes levied in this section, instead of the peddler.

Provided, however, any person peddling fruits, vegetables, or products of the farm shall pay a license tax of twenty-five dollars ($25.00) per year, which license shall be statewide. Counties, cities and towns may levy a tax under this subsection not in excess of one half of the State tax. Provided, however, no county, city or town shall issue any license, or permit any person, firm, or corporation to do any business under the provisions of this subsection, until and unless such person shall produce and exhibit to the tax collector of such county, city or town, his or its State license for the privilege of engaging in such business.

(c) Any person, firm or corporation who or which sells or offers to sell from a cart, truck, automobile, or other vehicle operated over and upon the streets and/or highways within this State any fresh fruits and/or vegetables shall be deemed a peddler within the meaning of this section and shall pay the annual license tax levied in subsection (a) of this section with reference to the character of the vehicle employed. Any person, firm, or corporation who or which sells or offers for sale from any railway car fresh fruits and/or vegetables shall be deemed a peddler within the meaning of this section, and shall pay an annual tax of twenty-five dollars ($25.00). Nothing in this section shall apply to the sale of farm products raised on the premises owned or occupied by the person, firm, or corporation, his or its bona fide agent or employee selling same.

(d) Every itinerant salesman or merchant who shall expose for sale, either on the street or in a building occupied, in whole or in part, for that purpose, any goods, wares or merchandise, not being a regular merchant in such county, shall apply for in advance and procure a State license from the Commissioner of Revenue for the privilege of transacting such business, and shall pay for such license a tax of one hundred dollars ($100.00) in each county in which he shall conduct or carry on such business.

Any salesman or merchant, offering for sale goods, wares or merchandise, other than fruits and farm products, shall be deemed an itinerant, within the meaning of this subsection, who conducts said business within the county for less than six consecutive months, except in case of discontinuance for one of the reasons hereinafter mentioned. When any salesman or merchant, beginning said business, does not pay the tax herein levied in advance, on the ground of stated intention to become a regular merchant, the Commissioner of Revenue may, in his discretion, require said salesman or merchant to post satisfactory bond, or make a cash deposit, in the sum of one hundred dollars ($100.00), which bond or deposit shall be forfeited in payment of the tax herein levied in case such salesman or merchant discontinues said business in the county within less than six months for any reason other than death or disablement of said salesman or merchant, or insolvency of said business, or destruction of the stock by fire or other catastrophe. In like manner the tax collector of any county or city levying a tax, as permitted by subsection (g), on the business taxed in this subsection, may, in his discretion, require posting of satisfactory bond or cash deposit in an amount equivalent to the tax so levied by said county or city; and said bond or deposit shall in like manner be subject to forfeiture in payment of said tax. Any salesman or merchant failing to post such bond or make such deposit within three days after being notified to do so by the Commissioner or collector, shall immediately become liable for the taxes levied or authorized to be levied on the business taxed in this subsection. When any salesman or merchant, having been required to post such bond or deposit, has conducted said business for six consecutive months, or has discontinued said business within six months for one of the reasons specifically mentioned herein, he shall be entitled to have said bond cancelled or said deposit returned.

(e) The provisions of this section shall not apply to any person, firm, or

corporation who sells or offers for sale books, periodicals, printed music, ice, wood for fuel, fish, beef, mutton, pork, bread, cakes, pies, products of the dairy, poultry, eggs, livestock, or articles produced by the individual vendor offering them for sale, but shall apply to medicines, drugs, or articles assembled.

(f) The board of county commissioners of any county in this State, upon proper application, may exempt from the annual license tax levied in this section Confederate soldiers, disabled veterans of the Spanish-American War, disabled soldiers of the first and second World Wars, who have been bona fide residents of this State for 12 or more months, continuously, and the blind who have been bona fide residents of this State for 12 or more months continuously, widows with dependent children; and when so exempted, the board of county commissioners shall furnish such person or persons with a certificate of exemption, and such certificate shall entitle the holder thereof to peddle within the limits of such county without payment of any license tax to the State.

(g) Counties, cities, or towns may levy a license tax on the business taxed under this section not in excess of the annual license levied by the State. But the board of county commissioners of any county may levy a license tax on the business taxed in this section not in excess of that levied by the State for each unincorporated town or village in the county with a population of 1,000 or more within a radius of one mile in which such business is engaged in; and any county or city may levy on peddlers of goods, wares, or merchandise with vehicle propelled by motor or other mechanical power, taxed by the State under subsection (a) of this section, a tax not exceeding two hundred dollars ($200.00) for each vehicle, which said tax may, in the discretion of the governing body, be graduated in accordance with the size or weight of said vehicles, the amount of merchandising space in and on said vehicles, the average value of goods carried, the types of products offered for sale, or any other reasonable principle, except that the tax levied hereunder on account of a vehicle of one-half ton capacity or less shall not exceed twenty-five dollars ($25.00).

No county, city, or town shall levy any license tax under this section upon the persons so exempted in this section, nor upon any person, firm or corporation who or which is a wholesale dealer, with an established warehouse in this State and selling only to merchants for resale, nor upon drummers selling by wholesale.

(h) Any person, firm, or corporation who or which maintains a fixed permanent location at or in which at least ninety percent (90%) of his or its total sales volume is made and who or which pays all applicable State and local taxes for such fixed permanent location shall not be deemed a peddler with respect to other sales which may be made from vehicles within the county wherein the fixed permanent location is maintained. (1939, c. 158, s. 121; 1941, c. 50, s. 3; 1943, c. 400, s. 2; 1945, c. 708, s. 2; 1951, c. 643, s. 2; 1955, c. 1315.)

Local Modification. — Gates, as to subsection (g): 1955, c. 923; Hyde, as to subsection (g): 1955, c. 632.

Cross Reference. — As to exemption of gasoline sold to dealers for resale, see § 105-89, subsection (a), subdivision (5).

Editor's Note. — For comment on the 1943 amendment which inserted in the first paragraph of subsection (b) a provision as to furnishing merchandise to be sold under agreement, see 21 N.C.L. Rev. 367.

Nature of Peddling. — To peddle is not a matter of right under the laws, which any person can demand upon the payment of the tax. It is a privilege. It is discretionary with the county commissioners whether or not they will grant a license to a peddler. The privilege is personal to the applicant, and is not assignable. State v. Rhyne, 119 N.C. 905, 26 S.E. 126 (1896).

Power of Legislature. — Under the N.C. Const., Art. V, § 3 [now Art. V, § 2(1), (2), (6)], the General Assembly may tax trades, etc. The term "trade" includes the business of peddling. Smith v. Wilkins, 164 N.C. 135, 80 S.E. 168 (1913).

Nature of Tax. — Peddlers and transient dealers are commonly taxed a specific sum because they are likely to escape any other tax. A peddler's tax is on the occupation, not on the goods, and one who engages in the business, whether as agent or owner, must pay it. State v. Rhyne, 119 N.C. 905, 26 S.E. 126 (1896).

Peddler defined. — A peddler is one who sells and delivers the identical goods he carries

about with him. State v. Lee, 113 N.C. 681, 18 S.E. 713 (1893).

A peddler is primarily one who travels around on foot, selling or bartering the identical goods he carries. State v. Frank, 130 N.C. 724, 41 S.E. 785 (1902).

Under general State law, "peddling," as defined in this section, is a lawful business or occupation. State v. Byrd, 259 N.C. 141, 130 S.E.2d 55 (1963).

A State license issued under this section authorizes the licensee to engage in the business of peddling. State v. Byrd, 259 N.C. 141, 130 S.E.2d 55 (1963).

Such as Peddling Ice Cream. — Under a license issued in accordance with general State law, the sale and offering for sale of ice cream products on public streets in the area covered by such license is a lawful business or occupation. State v. Byrd, 259 N.C. 141, 130 S.E.2d 55 (1963).

And the statutory provisions contemplate the use of motor vehicles by peddlers in the prosecution of their business or occupation. State v. Byrd, 259 N.C. 141, 130 S.E.2d 55 (1963).

A city cannot, by ordinance, prohibit conduct that is legalized and sanctioned by the General Assembly. Eastern Carolina Tastee-Freez, Inc. v. City of Raleigh, 256 N.C. 208, 123 S.E.2d 632 (1962), holding invalid a municipal ordinance prohibiting the peddling of ice cream along the streets and sidewalks of a city.

Whether City May Prohibit or Regulate Selling on Streets Depends on Delegated Powers. — Whether a municipal corporation has the power to regulate or prohibit the sale of articles of merchandise on its streets and sidewalks depends upon the legislative power delegated to it by the State legislature. State v. Byrd, 259 N.C. 141, 130 S.E.2d 55 (1963).

There Is No Express Grant of Powers as to Peddling. — Former § 160-200 [see now § 160A-11], which set forth express powers conferred on municipal corporations, contained no provision relating to the prohibition or regulation of the business or occupation of peddling. State v. Byrd, 259 N.C. 141, 130 S.E.2d 55 (1963).

Other Than to Impose License Taxes. — No express power has been conferred by the General Assembly on municipal corporations to prohibit or to regulate the business or occupation of peddling otherwise than by imposing license taxes thereon. State v. Byrd, 259 N.C. 141, 130 S.E.2d 55 (1963).

But City Has Implied Power to Regulate Selling on Streets from Mobile Units. — In the exercise of express powers conferred upon municipal corporations by the General Assembly a municipal corporation has the implied power to adopt an ordinance providing for the reasonable regulation, but not for the prohibition, of the sale and offering for sale of merchandise upon its streets from mobile units. State v. Byrd, 259 N.C. 141, 130 S.E.2d 55 (1963).

Sales by Samples. — It was held that a former statute, similar to this section, did not apply to sales by sample of goods not at the time of sale within the State and ready for immediate delivery, but applied only where goods were actually exposed and offered for sale, and ready for delivery at once to the purchaser. In re Flinn, 57 F. 496 (W.D.N.C. 1893).

A person who travels from house to house on foot selling goods by sample, and afterwards delivers them on foot, is not a peddler. State v. Frank, 130 N.C. 724, 41 S.E. 785 (1902).

One who sells goods by sample, which goods are shipped to the purchaser in care of one who sold them and delivered by him, is a peddler. State v. Franks, 127 N.C. 510, 37 S.E. 70 (1900).

A picture dealer; who contracts to sell pictures, has them sent out to him, delivers to the purchaser, and receives the price agreed upon beforehand, is no peddler. City of Greensboro v. Williams, 124 N.C. 167, 32 S.E. 492 (1899).

Selling Fruit in Wholesale Lots. — It was held that a former statute, similar to this section, did not apply to a person selling watermelons in wholesale lots in the City of Salisbury, to be shipped from a nearby town, and only delivered to those from whom he had taken orders. State v. Ninestein, 132 N.C. 1039, 43 S.E. 936 (1903).

The words "any articles of the farm," in an earlier statute, were used to embrace all the products of the farm, and a farmer who butchered cattle raised on his farm and sold the beef was not a peddler. State v. Smith, 173 N.C. 772, 92 S.E. 325 (1917).

Statute Not Applicable to Citizens of Other States. — The provision of a statute similar to this was held unconstitutional on the grounds that it was made to apply to citizens of other states, thus regulating interstate commerce. In re Spain, 47 F. 208 (E.D.N.C. 1891). See also In re Flinn, 57 F. 496 (W.D.N.C. 1893).

Former Subsection Requiring License for Display of Goods by One Not Regular Retailer Was Unconstitutional. — Former subsection (e), requiring one not a regular retail merchant in North Carolina to obtain a $250 license to entitle him to display goods for purpose of securing orders for retail sale, violated "commerce" clause of federal Constitution as applied to a New York merchandise establishment which rented display room in a North Carolina hotel for several days and took orders for goods corresponding to samples, which orders were filed by shipping direct to customers from New York City, where regular retail merchants in North Carolina were subject to only an annual $1 license tax for privilege of doing business. Best & Co. v. Maxwell, 311 U.S. 454, 61 S. Ct. 334,

85 L. Ed. 275 (1940). For note on this case, see 18 N.C.L. Rev. 48.

Subsections (e) and (g) relate exclusively to privilege taxes upon peddlers. State v. Bridgers, 211 N.C. 235, 189 S.E. 869 (1937).

Subsection (g) Does Not Prohibit City Tax on Trades and Businesses. — A tax levied under the general authority given a city in its charter, authorizing the levying of a tax upon trades and businesses carried on within its corporate limits is not such a tax as is prohibited by subsection (g) of this section. The prohibition relates to license taxes levied "under this section." The tax complained of was not levied "under this section." State v. Bridgers, 211 N.C. 235, 189 S.E. 869 (1937).

Discretion of County Commissioners to Grant Exemptions. — The discretion vested in the county commissioners to exempt from the peddler's tax the "poor and infirm" is necessary to the administration of statutes like this, and will not be interfered with unless arbitrarily exercised. Smith v. Wilkins, 164 N.C. 135, 80 S.E. 168 (1913).

Presumption as to Having License. — The case of State v. Crump, 104 N.C. 763, 10 S.E. 468 (1889), contains a dictum to the effect that if a peddler is required by proper authorities to exhibit his license and he fails to do so the presumption is that he has none.

Cited in Kohn v. Elizabeth City, 199 N.C. 529, 155 S.E. 152 (1930).

§ 105-54. Contractors and construction companies.—(a) Every person, firm, or corporation who, for a fixed price, commission, fee, or wage, offers or bids to construct within the State of North Carolina any building, highway, street, sidewalk, bridge, culvert, sewer or water system, drainage or dredging system, electric or steam railway, reservoir or dam, hydraulic or power plant, transmission line, tower, dock, wharf, excavation, grading or other improvement or structure, or any part thereof, the cost of which exceeds the sum of ten thousand dollars ($10,000), shall apply for and obtain from the Commissioner of Revenue an annual statewide license, and shall pay for such license a tax of one hundred dollars ($100.00) at the time of or prior to offering or submitting any bid on any of the above enumerated projects.

(b) In addition to the tax levied in subsection (a) of this section, every person, firm, or corporation who, for a fixed price, commission, fee, or wage, undertakes or executes a contract for the construction, or who superintends the construction of any of the above enumerated projects, shall, before or at the time of entering into such projects and/or such contract, apply for and procure from the Commissioner of Revenue a statewide license, and shall pay for such license the following tax:

When the total contract price or estimated cost of such project is over:

$ 5,000	and not more than	$ 10,000	$ 25.00
10,000	and not more than	$ 50,000	50.00
50,000	and not more than	$ 100,000	125.00
100,000	and not more than	$ 250,000	175.00
250,000	and not more than	$ 500,000	300.00
500,000	and not more than	$ 750,000	400.00
750,000	and not more than	$1,000,000	500.00
1,000,000			625.00

(c) The application for license under subsection (b) of this section shall be made to the Commissioner of Revenue and shall be accompanied by the affidavit of the applicant, stating the contract price, if known, and if the contract price is not known, his estimate of the entire cost of the said improvement or structure, and if the applicant proposes to construct only a part of said improvement or structures, the contract price, if known, or his estimated cost of the part of the project he proposes to superintend or construct.

In the event the construction of any of the above-mentioned improvements or structures shall be divided and let under two or more contracts to the same person, firm, or corporation, the several contracts shall be considered as one contract for the purpose of this Article, and the Commissioner of Revenue shall collect from such person, firm, or corporation the license tax herein imposed as if only one contract had been entered into for the entire improvement or structure.

(d) In the event any person, firm, or corporation has procured a license in one of the lower classes provided for in subsection (b) of this section, and constructs or undertakes to construct or to superintend any of the above-mentioned improvements or structures or parts thereof, the completed cost of which is greater than that covered by the license already secured, application shall be made to the Commissioner of Revenue, accompanied by the license certificate held by the applicant, which shall be surrendered to the Commissioner of Revenue, and upon paying the difference between the cost of the license surrendered and the price of the license applied for, the Commissioner of Revenue shall issue to the applicant the annual statewide license applied for, showing thereon that it was issued on the surrender of the former license and payment of the additional tax.

(e) No employee or subcontractor of any person, firm, or corporation who or which has paid the tax herein provided for, shall be required to pay the license tax provided for in this section while so employed by such person, firm, or corporation.

(f) In the event joint bidders shall submit one joint bid for the construction of any of the projects enumerated under subsection (a), each of the joint bidders shall procure in his own name a bidder's license under subsection (a); provided, that if a joint bidder has already procured a bidder's license for the current year, he will not be required to procure an additional bidder's license by reason of joining in a joint bid, and the license so procured shall entitle the licensee to submit other bids, either severally or in conjunction with others, during the remainder of the current license tax year. In the event a contract shall be awarded to joint bidders, a new project license shall be procured under subsection (b) in the full amount of the contract price or estimated cost of the project, in the same name or names under which the contract is awarded, which new license will be valid for the remainder of the license tax year for the same combination of joint bidders in other joint projects, but will not be valid for a part of the joint bidders, nor for all of them plus others, nor for a part of them plus others.

For the purpose of this subsection, "joint bidders" shall mean two or more separate entities consisting of either individuals, partnerships or corporations who or which combine for the purpose of submitting one joint bid for the construction of a particular project, or who or which jointly enter into a contract for the construction of a particular project.

(g) Counties shall not levy any license tax on the business taxed under this section, but cities and towns may levy an annual contractor's license tax not in excess of ten dollars ($10.00) when the license provided for under this section has been paid: Provided, that this subsection shall not be construed to prevent the collection of building, electrical, and plumbing inspection charges by municipalities to cover the actual cost of said inspection.

(h) The tax under this section shall not apply to the business taxed in G.S. 105-91. (1939, c. 158, s. 122; 1951, c. 643, s. 2.)

The annual renewal fees required by § 87-10 are in no way related to the license taxes required to be paid by contractors by the North Carolina Revenue Act. The renewal fees required by § 87-10 are not part of the State's revenues, but provide the funds by which the North Carolina State Licensing Board for Contractors is enabled to carry out the public purposes for which it was created. Therefore the payment of these fees bears a direct and substantial relationship to the accomplishment of the public purposes of § 87-1 et seq. Ar-Con Constr. Co. v. Anderson, 5 N.C. App. 12, 168 S.E.2d 18 (1969.)

§ 105-55. Installing elevators and automatic sprinkler systems.— (a) Every person, firm, or corporation engaged in the business of selling or installing elevators or automatic sprinkler systems shall apply for and procure from the Commissioner of Revenue an annual statewide license for the transaction of such business in this State, and shall pay for such license a tax of one hundred dollars ($100.00).

(b) Counties, cities, and towns in which there is located a principal office or a branch office may levy a tax on the business taxed under this section not in excess of that levied by the State.

Provided, however, no county, city, or town may collect tax under this section from any person, firm, or corporation who or which does not maintain an established place of business in said county, city or town.

(c) The businesses taxed and licensed hereunder shall not be liable for any tax or license levied under G.S. 105-91. (1939, c. 158, s. 122½.)

§ 105-56. Repairing and servicing elevators and automatic sprinkler systems. — (a) Every person, firm, or corporation engaged in the business of repairing or servicing elevators or automatic sprinkler systems, shall apply for and procure from the Commissioner of Revenue, an annual statewide license for the transaction of such business in this State and shall pay for such license the following tax based on population:

Municipalities of less than 2,000 population	$ 5.00
Municipalities of more than 2,000 and less than 5,000 population	7.50
Municipalities of more than 5,000 and less than 10,000 population	10.00
Municipalities of more than 10,000 and less than 20,000 population	12.50
Municipalities of more than 20,000 and less than 30,000 population	15.00
Municipalities of more than 30,000 and less than 40,000 population	17.50
Municipalities of more than 40,000 and less than 50,000 population	20.00
Municipalities of more than 50,000 population	25.00

(b) Counties, cities and towns in which there is located a principal office or a branch office may levy a tax on the business taxed under this section not in excess of that levied by the State.

Provided, however, no county, city or town may collect tax under this section from any person, firm, or corporation who, or which, does not maintain an established place of business in said county, city or town.

(c) If any person, firm, or corporation, required to be licensed under the provisions of this section, engages in said business in two or more cities or towns, such person, firm or corporation shall procure a license based on the population of the largest city or town in which the business taxed under this section is carried on.

(d) The tax under this section shall not apply to the business taxed in G.S. 105-55 and 105-91. (1939, c. 158, s. 122 ¾; 1947, c. 501, s. 2.)

§ 105-57. Mercantile agencies. — (a) Every person, firm or corporation engaged in the business of reporting the financial standing of persons, firms or corporations for compensation shall be deemed a mercantile agency, and shall apply for and procure from the Commissioner of Revenue a statewide license for the privilege of transacting such business within this State, and shall pay for such license a tax of five hundred dollars ($500.00), the said tax to be paid by the principal office in the State, and if no such principal office in this State, then by the agent of such mercantile agency operating in this State: Provided, however, that mercantile agencies not publishing a statewide credit or financial rating book shall pay only an annual tax of one hundred dollars ($100.00).

(b) Any person representing any mercantile agency which has failed to pay the license tax provided for in this section shall be guilty of a misdemeanor and fined and/or imprisoned in the discretion of the court.

(c) Counties, cities, or towns shall not levy any license tax on mercantile agencies, as herein defined. (1939, c. 158, s. 123; 1941, c. 50, s. 3.)

§ 105-58. Gypsies and fortunetellers.—(a) Every company of gypsies or strolling bands of persons, living in wagons, tents, or otherwise, who or any of whom trade horses, mules, or other things of value, or receive reward for telling or pretending to tell fortunes, shall apply for in advance and procure from the Commissioner of Revenue a State license for the privilege of transacting such things, and shall pay for such license a tax of five hundred dollars ($500.00) in each county in which they offer to trade horses, mules, or other things of value, or to practice the telling of fortunes or any of their crafts. The amount of such license tax shall be recoverable out of any property belonging to any member of such company.

(b) Any person or persons, other than those mentioned in subsection (a) of this section, receiving rewards for pretending to tell and/or telling fortunes, practicing the art of palmistry, clairvoyance and other crafts of a similar kind, shall apply for in advance and procure from the Commissioner of Revenue a State license for the privilege of practicing such arts or crafts, and shall pay for such license a tax of two hundred dollars ($200.00) for each county in which they offer to practice their profession or crafts: Provided, that the tax levied under this section shall not apply to fortunetellers or other artists practicing the art of palmistry, clairvoyance, and other crafts of a similar kind, when appearing under contract in regularly licensed theatres taxed under G. S. 105-37.

(c) Counties, cities, and towns may levy any license tax on the business taxed in this section. (1939, c. 158, s. 124; 1945, c. 708, s. 2.)

§ 105-59. Lightning rod agents.—(a) No manufacturer or dealer, whether person, firm, or corporation, shall sell, or offer for sale, in this State any brand of lightning rod, and no agent of such manufacturer or dealer shall sell, or offer for sale, or erect any brand of lightning rod until such brand has been submitted to and approved by the Insurance Commissioner and a license granted for its sale in this State. The fee for such license, including seal, shall be fifty dollars ($50.00).

(b) Upon written notice from any manufacturer or dealer licensed under the preceding subsection of the appointment of a suitable person to act as his agent in this State, and upon filing an application for license upon the prescribed form, the Insurance Commissioner may, if he is satisfied as to the reputation and moral character of such applicant, issue him a license as general agent of such manufacturer or dealer. Said license shall set forth the brand of lightning rod licensed to be sold, and the fee for such license, including seal, shall be fifty dollars ($50.00).

(c) Such general agent may appoint local agents to represent him in any county in the State by paying to the Insurance Commissioner a fee of ten dollars ($10.00) for each such county. Upon filing application for license of such local agent on a prescribed form and paying him a fee of three dollars ($3.00) for each county in which said applicant is to operate, the Insurance Commissioner may, if he is satisfied that such applicant is of good repute and moral character, and is a suitable person to act in such capacity, issue him a license to sell and erect any brand of lightning rod approved for sale by the general agent in such county applied for.

(d) Each general agent shall submit to the Insurance Commissioner semiannually, on January 31 and July 31, on prescribed forms, a sworn statement of gross receipts from the sale of lightning rods in this State during the preceding six months and pay a tax thereon of eighty cents (80¢) on each one hundred dollars ($100.00), such returns to be accompanied by an itemized list showing each sale, the county in which sold, and the agent making the sale.

(e) No county, city, or town shall levy a license or privilege tax exceeding twenty dollars ($20.00) on any dealer having a general office or selling from a receiving point.

(f) Licenses issued under this section are not transferable, are valid for only one person, and revocable by the Insurance Commissioner for good cause after hearing.

(g) Every agent licensed under this section shall, upon demand, exhibit his license to any officer of the law or citizen, and any person, firm, or corporation acting without a license or selling or offering for sale any brand of lightning rod not approved by the Insurance Commissioner, or otherwise violating any of the provisions of this Article, shall be punished by a fine of not more than two hundred dollars ($200.00) and/or six months imprisonment for each offense. (1939, c. 158, s. 125.)

§ 105-60. Day-care facilities.—Every person, firm or corporation engaged in operating a day-care facility as defined by G.S. 110-86 or a child-care arrangement which provides day care for more than five children who are less than 13 years of age by persons other than their parents, grandparents, guardians or full-time custodians, away from their own homes, on a regular basis, for more than four hours per day, and which receives a payment or fee for any of the children receiving care, wherever operated, and whether or not operated for profit, shall pay an annual license tax for the privilege of operating a day-care facility. This privilege license tax shall be two dollars ($2.00) for each child for which the day-care facility is licensed by the Child Day-Care Licensing Board under Article 7 of Chapter 110 of the North Carolina General Statutes. (1971, c. 803, s.2.)

Editor's Note.—Former § 105-60, relating to hotels, was codified from Session Laws 1939, c. 158, s. 126, as amended by Session Laws 1943, c. 400, s. 2, and repealed by Session Laws 1965, c. 1012, ss. 1, 2.

Session Laws 1971, c. 803, s. 3, makes the act effective Jan. 1, 1972.

§ 105-61. Hotels, motels, tourist courts and tourist homes.—(a) Every person, firm, or corporation engaged in the business of operating any hotel or motel, tourist court, tourist home, or similar place advertising in any manner for transient patronage, or soliciting such business, shall apply for and procure from the Commissioner of Revenue a State license for the privilege of transacting or engaging in such business, and shall pay for such license a tax of two dollars ($2.00) per room. The minimum tax shall be ten dollars ($10.00).

For the purpose of this section, the lobby, clubroom, office, dining room, kitchen and rooms occupied by the owner or lessee of the premises, or members of his family, for his or their personal or private use, shall not be counted in determining the number of rooms for the basis of the tax. The tax herein levied shall be in addition to any tax levied in G.S. 105-62 for the sale of prepared food.

(b) Hotel as referred to in this section shall be given its general or customary meaning; that is, a building or group of buildings providing lodging and usually (but not necessarily) meals, entertainment, and various personal services for the public.

Motel as referred to in this section shall be given its general or customary meaning; that is, a building or group of buildings in which the rooms usually are directly accessible from an outdoor parking area and which are used primarily as lodgings for the public.

In addition to hotels and motels, there is included within the meaning of this section tourist courts, tourist homes and similar places—including, but not limited to, tourist camps, semidetached apartments, resort lodgings and detached structures whenever the operator advertises in any manner for transient patronage, or solicits such business. The principal test of liability is the use of such places for temporary abode by transient patrons. Such patrons are defined as staying for a short time, stopping for a brief period only, not permanent.

(c) It is immaterial for the purposes of this section whether the rental to patrons is on a daily, weekly, biweekly or monthly basis, and it is also immaterial, as to any particular room, whether such room is occupied by a "permanent" guest.

(d) "Advertising in any manner" within the meaning of this section shall be broadly construed to cover any media of advertising whereby the availability of the accommodations may be made known and includes, but is not limited to, signs, placards, folders, newspaper ads, classified ads, listings in commercial or tourist circulars and any other form or means whereby the accommodations may be publicized. Soliciting such business includes every form of solicitation, or listings with boards of trade or chambers of commerce, by a hotel, motel, or any other place referred to herein accommodating transient patrons.

(e) Private residences or cottages designed for single family occupancy located in resort areas and occupied during a part of the season by the owners thereof but rented the remainder of the season to others for single family occupancy do not come within the purview of this section. Such use and occupancy by such tenants is regarded as occasional or incidental and does not require the owner to procure a privilege license under this section.

(f) Counties shall not levy any license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of one half of the base tax levied by the State. (1939, c. 158, ss. 126, 126½; 1943, c. 400, s. 2; 1965, c. 1012, s. 1.)

Tax May Be Exacted of Lessee.—Where a corporation chartered for the purpose of owning and conducting a hotel has paid the franchise tax, the lessee of such corporation is not relieved thereby from paying the tax imposed upon the business of conducting a hotel. Cobb v. Commissioners of Durham County, 122 N.C. 307, 30 S.E. 338 (1898).

§ **105-61.1. Campgrounds, trailer parks, tent camping areas.**—(a) Every person, firm or corporation engaged in the business of operating any campground, trailer park, tent camping area, or similar place for profit (but excluding those businesses taxed in G.S. 105-61 of this Article) and advertising in any manner for transient patronage, or soliciting such business, shall apply for and secure from the Commissioner of Revenue an annual State license for the privilege of transacting or engaging in such business, and shall pay for such license a tax of twenty-five dollars ($25.00).

(b) The term "campground," "trailer park" and "tent camping area" as herein used shall be given their general meaning, and shall include any place where the person, firm or corporation operating such business rents or leases to transient patrons space or facilities for the parking of vehicular-drawn trailers or semitrailers designed for temporary or occasional human occupancy, and specifically including travel trailers or campers of 28 feet or less in length, as well as motorized camper vehicles whether self-propelled or mounted or affixed to a motor vehicle; or for the erection of tents, camps or other nonpermanent, temporary or resort housing not permanently affixed to the ground; or for any combination of such purposes.

(c) It shall be immaterial for the purposes of this section that the rental to patrons is on a daily, weekly, biweekly or monthly basis.

(d) Counties shall not levy any additional license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of one half the tax levied by the State. (1971, c. 578, s. 1.)

§ **105-62. Restaurants.**—(a) Every person, firm, or corporation engaged in the business of operating a restaurant, cafe, cafeteria, hotel, with dining service on the European plan, drugstore, or other place where prepared food is sold, shall apply for and procure from the Commissioner of Revenue a State license for the privilege of transacting such business. The tax for such license shall be based on the number of persons provided with chairs, stools, or benches, and shall be one dollar ($1.00) per person, with a minimum tax of five

dollars ($5.00): Provided, that the tax levied in this subsection shall not apply to industrial plants maintaining a nonprofit restaurant, cafe or cafeteria solely for the convenience of its employees.

(b) All other stands or places where prepared food is sold as a business, and drugstores, service stations, and all other stands or places where prepared sandwiches only are served, shall pay a tax of five dollars ($5.00); however as used in this section the word "sandwiches" shall not be interpreted or construed to include crackers or cookies in combination with any food filling.

(c) Counties, cities and towns shall not levy any license tax on the business taxed or any business exempted under this section, except that cities and towns may levy a license tax not in excess of one half of the base tax levied by the State.

(d) No tax shall be levied under this section, for the privilege of operating vending machines or the sale of any commodity through such machines, against any vending machine operator, licensed under G.S. 105-65.1 and required thereby to pay a gross receipts tax. (1939, c. 158, s. 127; 1965, c. 1036; 1967, c. 1118, s. 1.)

§ **105-63. Cotton compresses.**—Every person, firm, or corporation engaged in the business of compressing cotton shall pay an annual license tax of three hundred dollars ($300.00) on each and every compress.

Counties shall not levy any license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of that levied by the State. (1939, c. 158, s. 128.)

§ **105-64. Billiard and pool tables.**—(a) Every person, firm or corporation who shall rent, maintain, own a building wherein there is a table or tables at which billiards or pool is played, whether operated by slot or otherwise, shall apply for and procure from the Commissioner of Revenue a State license for the privilege of operating such billiard or pool tables, and shall pay for such license a tax for each table as follows:

Tables measuring not more than 2 feet wide and 4 feet long	$ 5.00
Tables measuring not more than 2½ feet wide and 5 feet long	10.00
Tables measuring not more than 3 feet wide and 6 feet long	15.00
Tables measuring not more than 4 feet wide and 8 feet long	20.00
Tables measuring not more than 4½ feet wide and 9 feet long	25.00
Tables measuring more than 4½ feet wide and 9 feet long	30.00

Provided, each such billiard or pool table so licensed shall receive a number and receipt from the Commissioner of Revenue when the license is issued, and it shall be the duty of each operator to attach said numbered license to said table or machine and display the same at all times. Failure to have such license and receipt on display attached to said machine or table shall be prima facie evidence that the tax has not been paid hereunder.

(b) This section shall not apply to fraternal organizations having a national charter, American Legion Posts, or posts or other local organizations of other veterans' organizations chartered by Congress or organized and operating on a statewide or nationwide basis, Young Men's Christian Associations, and Young Women's Christian Associations, or nonstock, nonprofit charitable recreational corporations, foundations or centers to which a municipality or county contributes any portion of the operating expense.

(c) If the Commissioner of Revenue shall have issued any such State license to any person, firm, or corporation to operate any billiard or pool tables in any city or town, the board of aldermen or other governing body of such city or town shall have the right at any time, and notwithstanding the issuance of such State license, to prohibit any billiard or pool tables within its limits, unless otherwise provided in its charter; and in the event any city or town shall exercise the right to prohibit the keeping and operation of such billiard or pool tables, the Commissioner of Revenue shall refund the proportion of the tax

thereof during the time which the right is not allowed to be exercised bears to the time for which the tax is paid. And, where the Commissioner of Revenue has issued any such license and the said billiard or pool tables is or are to be, or are operated outside of the corporate limits of any incorporated city or town, the board of county commissioners may by resolution request that such license be revoked, and upon receipt of such resolution the Commissioner of Revenue shall forthwith revoke said license and refund the proportion of the tax thereof during the time which the right is not allowed to be exercised bears to the time for which the tax is paid.

(d) Counties may levy a license tax on the business taxed under this section upon such billiard or pool tables as are located outside of incorporated cities or towns, and cities and towns may levy a license tax upon such as are within the city limits, but in neither case shall the license tax so levied be in excess of the tax levied by the State. (1939, c. 158, s. 129; 1943, c. 400, s. 2; 1945, c. 995, s. 1; 1953, c. 1302, s. 2; 1961, c. 965, s. 1.)

Constitutionality.—A license tax imposed upon a business is not void as contravening the State Constitution upon the theory that the statute gives an invalid arbitrary power to the county commissioners with reference to the issuance of the license among applicants therefor, as to locality or otherwise; and the tax so imposed will nevertheless remain, these different portions of the law not being so interdependent that one must fall with the other. Brunswick-Balke-Collender Co. v. Mecklenburg County, 181 N.C. 386, 107 S.E. 317 (1921).

License without City Limits. — Billiard and pool tables kept open for indiscriminate use by the public are liable to become a source of disorder and demoralization, coming within the police powers, and requiring, in the nature of the business, that power be lodged in some governmental board to withhold or revoke a license imposed by statute for the conduct of the business, and such power lodged in the board of county commissioners, differentiating as to licenses to be issued within and without the city limits, the latter not subject to the same degree of police protection, and requiring a greater license fee, and certain publicity before the license may be issued, etc., is not an unconstitutional discrimination, or the exercise of an invalid arbitrary power, the decision of the commissioners being reviewable in the courts upon the question of whether this power has been arbitrarily and unjustly exercised. Brunswick-Balke-Collender Co. v. Mecklenburg County, 181 N.C. 386, 107 S.E. 317 (1921).

§ **105-64.1. Bowling alleys.**—(a) Every person, firm, or corporation who shall rent, maintain, or own a building wherein, or any premises on which, there is a bowling alley or alleys of like kind shall apply for and procure from the Commissioner of Revenue a State license for the privilege of operating such bowling alley or alleys, and shall pay for such license a tax of ten dollars ($10.00) for each alley kept or operated.

(b) This section shall not apply to fraternal organizations having a national charter, American Legion Posts, Young Men's Christian Associations, and Young Women's Christian Associations, or nonstock, nonprofit charitable recreational corporations, foundations or centers to which a municipality or county contributes any portion of the operating expense.

(c) If the Commissioner of Revenue shall have issued any such State license to any person, firm, or corporation to operate any bowling alley or alleys, in any city or town, the board of aldermen or other governing body of such city or town shall have the right at any time, and notwithstanding the issuance of such State license, to prohibit any bowling alley or alleys of like kind within its limits, unless otherwise provided in its charter; and in the event any city or town shall exercise the right to prohibit the keeping and operation of such bowling alley or alleys of like kind, the Commissioner of Revenue shall refund the proportion of the tax thereof during the time which the right is not allowed to be exercised bears to the time for which the tax is paid. And, where the Commissioner of Revenue has issued any such license and the said bowling alley or alleys is or are to be, or are operated outside of the corporate limits of any incorporated city or town, the board of county commissioners may by resolution request that such license be revoked, and upon receipt of such

resolution the Commissioner of Revenue shall forthwith revoke said license and refund the proportion of the tax thereof during the time which the right is not allowed to be exercised bears to the time for which the tax is paid.

(d) Counties may levy a license tax on such bowling alley or alleys of like kind as are located outside of incorporated cities or towns, and cities and towns may levy a license tax upon such as are within the city limits, but in neither case shall the license tax so levied be in excess of the tax levied by the State. (1943, c. 400, s. 2; 1947, c. 501, s. 2; 1961, c. 965, s. 2.)

§ 105-65. Music machines. — (a) Every person, firm, or corporation engaged in the business of operating, maintaining, or placing on location anywhere within the State of North Carolina, any machine or machines which plays records, or produces music, shall apply for and procure from the Commissioner of Revenue a statewide license to be known as an annual operator's license, and shall pay for such license the sum of one hundred dollars ($100.00).

(b) In addition to the above annual operator's license, every person, firm, or corporation operating any of the above machines, shall apply for and obtain from the Commissioner of Revenue, what shall be termed an annual statewide license for each machine operated and shall pay therefor the sum of ten dollars ($10.00).

(c) The applicant for license under this section shall, in making application for license, specify the serial number of the machine or machines proposed to be operated, together with a description of the service offered for sale thereby, and the amount of deposit required by or in connection with the operation of such machine or machines. The license shall carry the serial number to correspond with that on the application, and no such license shall under any condition be transferable to any other machines. It shall be the duty of the person in whose place of business the machine is operated or located to see that the proper State license is attached in a conspicuous place on the machine before its operation shall commence.

(d) If any person, firm, or corporation shall fail, neglect or refuse to comply with the terms and provisions of this section, or shall fail to attach the proper State license to any machine as herein provided, the Commissioner of Revenue, or his agents, or deputies, shall forthwith seize and remove such machine, and shall hold the same until the provisions of this section have been complied with. In addition to the above provision the applicant shall be further liable for the additional tax imposed under G.S. 105-112.

(e) Counties, cities and towns may levy and collect a license tax not in excess of fifty percent (50%) of the total amount collected by the State from music machines: Provided, that counties, cities and towns shall not levy and collect an annual operator's occupational license levied for the operation of the above machines.

(f) Counties, cities, and towns levying a tax under the provisions of this section shall have power through their tax collecting officers, upon nonpayment of the tax levied by them, or of any interest or penalty thereon, or upon failure to attach the evidence of license issued by them to any such machines, to seize, remove and hold such machines until all such defaults have been remedied. (1939, c. 158, s. 130; 1941, c. 50, s. 3; 1943, c. 105; c. 400, s. 2; 1945, c. 708, s. 2.)

Cited in State v. Finch, 218 N.C. 511, 11 S.E.2d 547 (1940).

§ 105-65.1. Merchandising dispensers and weighing machines. — (a) Every person, firm, or corporation engaged in the business of operating, maintaining, or placing on location anywhere within the State of North Carolina merchandising dispensers in which are kept any article or

merchandise to be purchased, or weighing machines, shall be deemed a distributor or operator and shall apply for and procure from the Commissioner of Revenue a statewide license to be known as an annual distributor's or operator's license, and shall pay for such license the following tax:

Distributors or operators of five or more drink dispensers other than open cup drink dispensers	$100.00
Distributors or operators of five or more open cup drink dispensers	50.00
Distributors or operators of five or more cigarette dispensers or dispensers of other tobacco products	50.00
Distributors or operators of five or more food or other merchandising dispensers selling products for five cents (5¢) or more	50.00
Distributors or operators of five or more food or other merchandising dispensers selling products for less than five cents (5¢)	25.00
Distributors or operators of five or more weighing machines	50.00

A person, firm, or corporation operating and maintaining soft drink dispensers or any other dispensers as set forth above in places of business operated by him or it, and not elsewhere, shall not be considered a distributor or operator of such dispensers for the purpose of this subsection.

Any person, firm, or corporation operating, maintaining, or placing on location fewer than five such machines or dispensers shall not be considered a distributor or operator for the purpose of this subsection. Any person, firm, or corporation operating, maintaining, or placing on location five or more soft drink dispensers shall not be considered a distributor or operator for the purpose of this subsection when all of said dispensers operated, maintained, or placed on location by such person, firm, or corporation are operated, maintained, or placed in a single building, all parts of which are accessible through the same outside entrance, and which building is occupied by a single commercial, manufacturing, or industrial business. Every machine or dispenser placed on location by a licensed operator or distributor as herein defined shall have affixed thereto identification showing the name and address of the owner, operator, or distributor. The operator of any machine or dispenser not so identified shall be liable for additional license tax as levied by subsection (b)(3).

(b) (1) In addition to the above annual distributor's or operator's license, every distributor or operator distributing or operating dispensers or machines designed or used for the dispensing or selling of soft drinks, other than open cup drinks, shall apply for and obtain from the Commissioner of Revenue a statewide license for such dispensers or machines so operated, and shall pay therefor an annual soft drink dispenser tax according to the following schedule:

For more than five and less than 50 soft drink dispensers seven dollars ($7.00) per machine.	
For 51 and not over 100 soft drink dispensers	$1,070.00
For 101 and not over 150 soft drink dispensers	1,785.00
For 151 and not over 200 soft drink dispensers	2,500.00
For each 50 or fraction thereof additional soft drink dispensers over 200	715.00

Where a distributor or operator procures a license under one of the lower tax brackets under the above schedule and adds additional soft drink dispensers during the tax year whereby license becomes due in a higher tax bracket, such licensee shall apply for additional license based upon the difference between the amount paid and the amount due in the higher bracket. Such additional license shall be applied for at the end of the month in which the additional license became due.

(2) In addition to the above annual distributor's or operator's license, every distributor or operator distributing, maintaining, or operating five or more cigarette dispensers, or five or more dispensers of other tobacco products, or five or more open cup drink dispensers, or five or more food or other merchandising dispensers, or five or more weighing machines shall pay a tax upon the gross receipts obtained from such machines and dispensers at the rate of six tenths of one percent (6/10 of 1%) of gross receipts from cigarette sales, and one tenth of one percent (1/10 of 1%) of gross receipts from all other sales; but the tax paid for the operator's license shall be treated as an advance payment of the gross receipts tax and shall be applied as a credit upon the gross receipts tax, but only for the same year for which the tax was paid. All persons, firms, or corporations liable for the gross receipts tax levied hereunder shall file quarterly reports with the Commissioner of Revenue no later than the 15th day of each of the months of January, April, July and October of each year for the three months' period ended on the last day of the month immediately preceding the month in which the report is due. All taxes due for said period shall be paid to the Commissioner of Revenue at the time the report is required to be filed.

(3) Every person, firm, or corporation, operating, maintaining, or placing on location any dispenser or machine described in subsection (a) and not required to procure a distributor's or operator's license under the terms of subsection (a) shall apply for and obtain from the Commissioner of Revenue a statewide license for each such dispenser or machine, and shall pay therefor an annual tax as follows:

Cigarette dispensers or dispensers of other tobacco products	$ 5.00
Drink dispensers having a capacity in excess of 48 bottles or other dispensing units, including those bottles or other dispensing units stored in such machine or dispenser as well as those in the dispensing rack	15.00
Drink dispensers having a capacity not in excess of 48 bottles or other dispensing units, including those bottles or other dispensing units stored in such machine or dispenser as well as those in the dispensing rack	5.00
Food or other merchandising dispensers selling products for five cents (5¢) or more per unit	1.00
Food or other merchandising dispensers selling products for less than five cents (5¢) per unit	.50
Weighing machines	2.50

Provided that the tax on food or merchandising dispensers imposed by this subdivision (3) shall not apply to dispensers dispensing peanuts only or to dispensers dispensing no commodity other than candy containing fifty percent (50%) or more peanuts, or to penny self-service dispensers or machines twenty percent (20%) of the gross revenue from which inures to the benefit of the visually handicapped.

(4) The applicant for license under subdivision (3) above shall, in making application for license, specify the serial number of the dispenser, or dispensers and of the weighing machine, or machines, proposed to be distributed or operated, together with a description of the merchandise or service offered for sale thereby, and the amount of deposit required by or in connection with the operation of such dispenser, or dispensers, and such machine or machines. The license shall carry the serial number to correspond with that on the application; provided, that such licenses shall not be transferable to any other dispensers except under the following conditions: If at any

time during the license tax year an applicant or license holder shall elect to replace a licensed machine by a new or unlicensed machine, he may notify the Commissioner by letter, enclosing the vending license of such machine to be replaced, and giving the serial number of the replacement machine and the serial number of the machine being replaced and certifying that the machine being replaced has been withdrawn from his operation by sale or otherwise, and advising the Commissioner of the disposition of the machine being replaced. A new license will thereupon be issued for the replacement machine without the payment of further license tax for the balance of the license tax year in which the replacement occurs. It shall be the duty of the person in whose place of business the dispenser or machine is operated or located to see that the proper State license is attached in a conspicuous place on the dispenser or machine before its operation shall commence.

(c) If any person, firm, or corporation shall fail, neglect, or refuse to comply with the terms and provisions of this section or shall fail to attach the proper State license to any dispenser or machine as herein provided, the Commissioner of Revenue, or his agent or deputies, shall forthwith seize and remove such dispenser or machine, and shall hold the same until the provisions of this section have been complied with. In addition to the above provision the applicant shall be further liable for the additional tax imposed under G.S. 105-112.

(d) Sales of merchandise herein referred to shall be subject to the provisions of Article 5 of this Chapter, and the tax therein levied shall be paid by the distributor or operator of such dispensers or machines.

(e) Counties, cities and towns shall not levy or collect any annual distributor's or operator's occupational license levied for the distribution or operation of any of the dispensers or machines described in subsection (a), nor any per dispenser or per machine license tax for any machine or dispenser described in subsections (a) or (b) of this section, nor upon the sale of any commodities through such machine or dispenser.

(f) The word "dispenser" or "dispensers" as used in this section shall include any machine or mechanical device through the medium of which any of the merchandise referred to in this section is purchased, distributed or sold.

(g) Neither the tax levied under subsection (b) upon dispensers, nor the tax levied under subsection (a) upon distributors or operators, shall apply to dispensers or vending machines which dispense only milk, milk drinks, products of the dairy, pure uncarbonated fruit or vegetable juices, or newspapers. (1939, c. 158, s. 130; 1941, c. 50, s. 3; 1943, c. 105; c. 400, s. 2; 1945, c. 708, s. 2; 1949, c. 1220, s. 1; 1953, c. 1142; 1955, cc. 1271, 1344; 1957, c. 1340, s. 2; 1963, c. 1169, s. 10; 1965, c. 1078, s. 1; 1967, c. 1118, s. 2.)

Opinions of Attorney General. — Mr. Donald E. Gordon, Monroe City Tax Collector, 40 N.C.A.G. 858 (1969).

Subsections Construed in Pari Materia. — In referring to this section, as it appeared in § 105-65 prior to the 1941 amendment, it was held that all of the subsections of the section must be construed in pari materia. Snyder v. Maxwell, 217 N.C. 617, 9 S.E.2d 19 (1940).

Drink Dispensers. — A bottling company which owns and distributes as a part of its business a large number of machines for distributing its product which it places in location with merchants and others under agreement, is liable for the occupational tax of $100.00 levied under the provisions of subsection (a) of this section and is also liable for a tax on each such distributing machine under subsection (b) of this section. Charlotte Coca-Cola Bottling Co. v. Shaw, 232 N.C. 307, 59 S.E.2d 819 (1950), decided prior to the 1967 amendment which rewrote the section.

Tax on Vendors of Soft Drinks Is Based on Reasonable Classification. — See Snyder v. Maxwell, 217 N.C. 617, 9 S.E.2d 19 (1940), construing this section when it appeared as a part of § 105-65 prior to the 1941 amendment.

Criminal Provisions Not Repealed. — The provisions of the Flanagan Act, Public Laws 1937, c. 196 (§ 14-304 et seq.), proscribing the possession and distribution of a coin slot machine in the operation of which the user

could secure additional chances or rights to use the machine, were not repealed by this section as it read when a part of § 105-65 prior to the 1941 amendment. State v. Abbott, 218 N.C. 470, 11 S.E.2d 539 (1940), followed in State v. Brown, 218 N.C. 480, 11 S.E.2d 545 (1940).

Enjoining Criminal Law. — As to enjoining statute proscribing slot machines, see McCormick v. Proctor, 217 N.C. 23, 6 S.E.2d 870 (1940).

Applied in Partin v. City of Raleigh, 9 N.C. App. 269, 175 S.E.2d 760 (1970).

§ 105-66. Bagatelle tables, merry-go-rounds, etc. — (a) Every person, firm, or corporation that is engaged in the operation of a bagatelle table, merry-go-round or other riding device, hobbyhorse, switchback railway, shooting gallery, swimming pool, skating rink, other amusements of a like kind, or a place for other games or play with or without name (unless used solely and exclusively for private amusement or exercise), at a permanent location, shall apply for and procure from the Commissioner of Revenue a State license for the privilege of operating such objects of amusement, and shall pay for each subject enumerated the following tax:

In cities or towns of less than 10,000 population	$10.00
In cities or towns of 10,000 population and over	25.00

(b) The tax under this section shall not apply to machines and other devices licensed under G.S. 105-64 and 105-65.

(c) Counties, cities or towns may levy a license tax on the business taxed under this section not in excess of that levied by the State. (1939, c. 158, s. 131.)

Opinions of Attorney General. — Mr. Benton H. Walton, III, Attorney, Town of Chadbourn, 40 N.C.A.G. 868 (1969).

§ 105-67. Security dealers. — (a) Every person, firm, or corporation who or which is engaged in the business of dealing in securities as defined in G.S. 78-1 to 78-24, or who or which maintains a place for or engages in the business of buying and/or selling shares or stock in any corporation, bonds, or any other securities on commission or brokerage, shall apply for and procure from the Commissioner of Revenue a State license for the privilege of transacting such business, and shall pay for such license the following tax:

In cities or towns of less than 5,000 population	$25.00
In cities or towns of 5,000 and less than 10,000 population	50.00
In cities or towns of 10,000 and less than 15,000 population	100.00
In cities or towns of 15,000 and less than 25,000 population	200.00
In cities or towns of 25,000 population and above	300.00

(b) Every dealer, as defined herein, who shall maintain in the State of North Carolina more than one office for dealing in securities, as hereinbefore defined, shall apply for and procure from the Commissioner of Revenue a license for the privilege of transacting such business at each such office, and shall pay for such license the same tax as hereinbefore fixed.

(c) Every foreign dealer, as dealer is hereinbefore defined, who shall maintain an office in this State, or have a salesman in this State, shall apply for and procure from the Commissioner of Revenue a State license for the privilege of transacting such business, and shall pay for such license the tax hereinbefore imposed.

(d) If such person, firm, or corporation described in subsection (a) of this section maintains and/or operates a leased or private wire and/or ticker service in connection with such business the annual license tax shall be as follows:

In cities and towns of less than 10,000 population	$150.00
In cities and towns of 10,000 and less than 15,000 population	250.00
In cities and towns of 15,000 and less than 20,000 population	350.00
In cities and towns of 20,000 to 25,000 population	450.00
In cities and towns of 25,000 or more	600.00

Provided, that the tax levied in subsection (d) shall not apply to private wire service not connected with or handling quotations of a stock exchange, grain or cotton exchange.

(e) Counties shall not levy any license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of fifty dollars ($50.00). (1939, c. 158, s. 132.)

Cited in State v. Carolina Tel. & Tel. Co., 243 N.C. 46, 89 S.E.2d 802 (1955).

§ 105-68. Cotton buyers and sellers on commission.—(a) Every person, firm, or corporation who or which engages in the business of buying and/or selling on commission any cotton, grain, provisions, or other commodities, either for actual, spot, or instant delivery, shall apply for and procure from the Commissioner of Revenue a State license for the privilege of transacting such business in this State, and shall pay for such license a tax of fifty dollars ($50.00).

(b) Every person, firm, or corporation who or which engages in the business of buying or selling any cotton, grain, provisions, or other commodities, either for actual, spot, instant or future delivery, and also maintains and/or operates a private or leased wire and/or ticker service in connection with such business shall apply for and procure from the Commissioner of Revenue a State license for the privilege of transacting such business in this State and shall pay for such license the following tax:

In cities and towns of less than 10,000 population	$100.00
In cities and towns of 10,000 and less than 15,000 population	200.00
In cities and towns of 15,000 and less than 25,000 population	400.00
In cities and towns of 25,000 population or more	600.00

Persons, firms, and corporations who pay the tax imposed in subsection (d) of G.S. 105-67 shall not be required to pay the tax imposed in this subsection.

(c) Every person, firm, or corporation, domestic or foreign, who or which is engaged in the business of selling any cotton either for actual, spot, instant, or future delivery, in excess of 5,000 bales per annum, shall be deemed to be a cotton merchant, shall apply for and obtain from the Commissioner of Revenue a statewide license for each office or agency maintained in this State for the sale of cotton and shall pay for each such license the following tax:

In cities and towns of less than 10,000 population	$ 50.00
In cities and towns of 10,000 and less than 15,000 population	100.00
In cities and towns of 15,000 and less than 25,000 population	200.00
In cities and towns of 25,000 population and over	300.00

(d) Counties shall not levy any license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of fifty dollars ($50.00). (1939, c. 158, s. 133.)

Stated in Robinson & Hale, Inc. v. Shaw, 242 N.C. 486, 87 S.E.2d 909 (1955).

§ 105-69. Manufacturers, producers, bottlers and distributors of soft drinks.—(a) Every person, firm, or corporation or association manufacturing, producing, bottling and/or distributing in bottles, or other closed containers, soda water, coca-cola, pepsi-cola, chero-cola, ginger ale, grape and other fruit juices or imitations thereof, carbonated or malted beverages and like preparations, or preparations of any nature whatever commonly known as soft drinks, shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of doing business in this State, and shall pay for such license the following base tax for each place of business:

Low-Pressure Equipment

Where the machine or the equipment unit used in the manufacture of the above beverage is a:

51 spouts or greater capacity, low pressure filler	$1,800
41 spouts and less than 51 spouts, low pressure filler	1,500
36 spouts and less than 41 spouts, low pressure filler	1,200
32 spouts and less than 36 spouts, low pressure filler	1,000
24 spouts and less than 32 spouts, low pressure filler	700
18 spouts and less than 24 spouts, low pressure filler	500
12 spouts and less than 18 spouts, low pressure filler	175

Provided, that counter-pressure or premix fillers shall be deemed to have the following equivalent capacities and shall be taxed in accordance with the above schedule upon the basis of the nearest equivalent capacity; 24 spout premix, equivalent to 40 spout low-pressure; 34 spout premix, equivalent to 50 spout low-pressure; 40 spout premix, equivalent to 60 spout low-pressure. For a 50 spout counter-pressure or premix filler, the tax shall be two thousand and one hundred dollars ($2,100).

High-Pressure Equipment

Where the machine or the equipment unit used in the manufacture of the above mentioned beverages is a Royal (8-head), Shields (6-head), Adriance (6-head), or other high-pressure equipment having manufacturer's rating capacity of over 60 bottles per minute, one thousand two hundred dollars ($1,200).

Royal (4-head), Adriance (2-head), Shields (2-head), full equipment having manufacturer's rating capacity of over 50 and less than 60 bottles per minute, one thousand dollars ($1,000).

Royal (4-head), Adriance (2-head), Shields (2-head) (full automatic), or other high-pressure equipment having manufacturer's rating capacity of more than 40 and less than 50 bottles per minute, seven hundred dollars ($700.00).

Dixie (automatic), Shields (2-head hand feed), Adriance (1-head), Calleson (1-head), Senior (high-pressure), Junior (high-pressure), or Burns or other high-pressure equipment having manufacturer's rating capacity of more than 24 bottles and less than 40 bottles per minute, one hundred five dollars ($105.00).

Single-head Shields, Modern Bond (power), Baltimore (semiautomatic), and all other machines or equipment having manufacturer's rating capacity of less than 24 bottles per minute and all foot-power bottling machines, seventy dollars ($70.00).

Provided, that any bottling machine or equipment unit not herein specifically mentioned shall bear the same tax as a bottling machine or equipment unit of the nearest rated capacity as herein enumerated: Provided further, that where any person, firm, corporation, or association has within his or its bottling plant or place of manufacture more than one bottling machine or equipment unit, then such person, firm, corporation, or association shall pay the tax as herein specified upon every such bottling machine or equipment unit if in actual operation: Provided further, that where no standard high- or low-pressure bottling machine is used to fill the containers, a tax of fifty dollars ($50.00) shall apply. The tax levied in this section shall not apply to any product containing more than fifty percent (50%) of milk, put up in containers for sale as food rather than soft drink preparations.

(b) Every person, corporation, or association distributing, selling at wholesale, or jobbing bottled beverages as enumerated in subsection (a) of this section shall pay an annual license tax for the privilege of doing business in this State, as follows:

In cities or towns of 30,000 inhabitants or more	$100.00
In cities or towns of 20,000 inhabitants and less than 30,000 inhabitants	90.00
In cities or towns of 10,000 inhabitants and less than 20,000 inhabitants	80.00
In cities or towns of 5,000 inhabitants and less than 10,000 inhabitants	70.00

In cities and towns of 2,500 inhabitants and less than 5,000 inhabitants 60.00
In rural districts and towns of less than 2,500 inhabitants 50.00

The tax levied in this subsection shall not include the right to sell products authorized to be sold under Schedule F, §§ 18-63 to 18-92.

(c) Every distributing warehouse selling or supplying to retail stores cereal or carbonated beverages manufactured or bottled within the State, but outside of the county in which such cereal or carbonated beverages are manufactured or bottled, shall pay one half of the annual license tax for the privilege of doing business in this State provided for in subsection (b) of this section.

(d) Every distributing warehouse selling or supplying to retail stores cereal or carbonated beverages on which the tax has not been paid under the provisions of subsection (a) of this section shall pay the annual license tax for the privilege of doing business in the State provided in subsection (b) of this section.

(e) Each truck, automobile, or other vehicle coming into this State from another state, and selling and/or delivering carbonated beverages on which the tax has not been paid under the provisions of subsection (a) of this section, shall pay an annual license tax for the privilege of doing business in this State, in the sum of two hundred dollars ($200.00) per truck, automobile, or vehicle. The license secured from the State under this section shall be posted in the cab of the truck, automobile, or vehicle.

(f) No county shall levy a tax on any business taxed under the provisions of this section, nor shall any city or town in which any person, firm, corporation, or association taxed hereunder has its principal place of business levy and collect more than one eighth of the State tax levied under this section; nor shall any tax be levied or collected by any county, city, or town on account of the delivery of the products, beverages, or articles enumerated in subsection (a) or (b) or (c) or (d) of this section when a tax has been paid under any of those subsections. (1939, c. 158, s. 134; 1943, c. 400, s. 2; 1949, c. 782.)

Editor's Note.—Sections 18-63 to 18-92, referred to at the end of subsection (b), were rewritten by Session Laws 1971, c. 872. See now §§ 105-113.70 to 105-113.100.

When Each Distributing Point Liable for Tax.—Under the prior law, it was held that where the bottling of the beverage was done at a company's home office in this State and, at its expense of delivery and storage, sent to warehouses owned by it for distribution in other cities and towns herein, each of these distributing points was liable for the payment of the license tax, and did not come within the intent and meaning of the exempting provision. Mavis Bottling Co. v. Doughton, 196 N.C. 791, 147 S.E. 289 (1929).

Stated in Robinson & Hale, Inc. v. Shaw, 242 N.C. 486, 87 S.E.2d 909 (1955).

§ 105-70. Packing houses.—Every person, firm, or corporation engaged in or operating a meat packinghouse in this State, and every wholesale dealer in meat packing-house products who owns, leases, or rents and operates a cold-storage room or warehouse in connection with such wholesale business, shall apply for and procure from the Commissioner of Revenue a State license for the privilege of conducting such business in this State, and shall pay for such license the sum of one hundred dollars ($100.00) for each county in which is located such a packinghouse or a cold-storage room or warehouse; provided, that when an individual required to be licensed under this section employs only one employee in such business, the tax shall be one half. Every person, firm, or corporation maintaining a cold-storage room or warehouse and distributing such products to other stores owned in whole or in part by the distributor for sale at retail shall be deemed a wholesale dealer or distributor in the meaning of this section. Counties shall not levy any tax on business taxed under this section. (1939, c. 158, s. 135; 1965, c. 416.)

Cross Reference. — See N.C. Const., Art V, § 2(1), (2), (6) and note thereto.

§ **105-71. Newspaper contests.**—Every person, firm, or corporation that conducts contests and offers a prize, prizes, or other compensation to obtain subscriptions to newspapers, magazines, or other periodicals in this State shall apply for and procure from the Commissioner of Revenue a State license for the privilege of conducting such contests, and shall pay for such license the following tax for each such contest:

Monthly, weekly, semiweekly newspaper, magazine or other periodical	$ 50.00
Daily newspaper or other daily periodical	200.00

Counties, cities and towns may levy a tax not to exceed one half of that levied by the State under the provisions of this section. (1939, c. 158, s. 136.)

§ **105-72. Persons, firms, or corporations selling certain oils.**—(a) Every person, firm, or corporation engaged in the business of selling illuminating oil or greases, or benzine, naphtha, gasoline, or other products of like kind shall apply for and procure from the Commissioner of Revenue a State license for the privilege of conducting such business, and shall pay for the same a tax of two dollars and fifty cents ($2.50).

(b) In addition to the tax herein levied under subsection (a) of this section, such person, firm, or corporation shall pay to the Commissioner of Revenue, on or before the first day of July of each year, an annual additional license tax equal to five percent (5%) of the total gross sales for the preceding year or part of the year that the business is so conducted or the privilege so exercised, when the total gross sales of such commodities exceed five thousand dollars ($5,000), or pro rata for a part of the year.

(c) The amount of such total gross sales shall be returned to the Commissioner of Revenue on or before the date specified in subsection (b) of this section by such person, firm, or corporation, verified by the oath of the person making the return, upon such forms and in such detail as may be required by the Commissioner of Revenue.

(d) Counties shall not levy any license tax on the business taxed under this section; but cities or towns in which there is located an agency, station, or warehouse for the distribution or sale of such commodities enumerated in this section may levy the following license tax:

In incorporated towns and cities of less than 10,000 population	$25.00
In cities and towns of 10,000 population and over	50.00

(e) Any person, firm, or corporation subject to this license tax, and doing business in this State without having paid such license tax, shall be fined one thousand dollars ($1,000), and in addition thereto double the tax imposed by this section.

(f) No license or privilege tax, other than the license tax permitted in this section to cities or towns, shall be levied or collected for the privilege of engaging in or doing the business named in this section from any person, firm, or corporation paying the inspection fees and charges provided for under the Chapter, Agriculture, except license taxes levied in G.S. 105-89 and 105-99. (1939, c. 158, s. 137; 1957, c. 1340, s. 2.)

§ **105-73:** Repealed by Session Laws 1957, c. 1340, ss. 2, 9.

§ **105-74. Pressing clubs, dry cleaning plants, and hat blockers.**—Every person engaging in the business of operating a dry cleaning plant, pressing club or hat blocking establishment shall apply for and procure from the Commissioner of Revenue a State license for the privilege of conducting such a business, and shall pay for such license the following tax:

In cities or towns of less than 1,000 population	$ 7.50
In cities or towns of 1,000 and less than 5,000 population	15.00

In cities or towns of 5,000 and less than 10,000 population	30.00
In cities or towns of 10,000 and less than 20,000 population	45.00
In cities or towns of 20,000 and less than 50,000 population	60.00
In cities or towns of 50,000 population and over	75.00

Provided that pressing clubs, cleaning plants, and/or hat blocking establishments, as same are defined in this section in cities or towns of 5,000 population or over, employing four or less operators or employees, including the owner if he works in said plant, shall be liable for only one half the amount of license tax specified above.

Every person, firm, or corporation, soliciting cleaning work and/or pressing in any city or town where the actual cleaning and/or pressing is done in a cleaning plant or press shop located outside the city or town wherein said cleaning work and/or pressing is solicited shall procure from the Commissioner of Revenue a State license for the privilege of soliciting in said city or town, and pay for the same an amount equal to the tax which would be paid by said cleaning plant or press shop as if the said cleaning plant or press shop was actually located and being operated in the city or town in which the soliciting is done. This shall not apply to soliciting in cities or towns where there is no cleaning plant, press shop or established agency with fixed place of business, provided that the solicitor shall have paid a State and municipal license tax in this State.

Every person, firm or corporation engaged in the business of soliciting dry cleaning and/or pressing work to be done by a dry cleaning plant which has not paid the State license tax levied herein shall pay a tax of two hundred dollars ($200.00) for each vehicle used in carrying the dry cleaning and/or pressing work, and the license issued by the Commissioner of Revenue shall be carried in the cab of any vehicle so employed. Counties, cities and towns may levy a tax upon such persons, firms or corporations not in excess of that levied by the State.

Cities and towns of under 10,000 population may levy a license tax not in excess of twenty-five dollars ($25.00); cities and towns of 10,000 population and over may levy a license tax not in excess of fifty dollars ($50.00). Counties shall not levy a license tax on the business taxed under this section.

Counties, cities and towns may not collect a privilege license tax under this section unless the State license tax, if due, has been first paid.

Definitions: For the purpose of this section, the following definitions shall apply:

"Dry cleaning, and/or hat blocking, and/or pressing establishments" shall mean any place of business, establishment or vehicle wherein the services of dry cleaning, wet cleaning as a process incidental to dry cleaning, spotting and/or pressing, finishing and/or reblocking hats, garments, or wearing apparel of any kind is performed.

"Soliciting" as used herein shall mean the acceptance of any article or garment to be dry cleaned and/or pressed.

"Person" as used herein shall mean any person, firm, corporation, partnership, or association.

The term "employee" as used herein shall mean any person working either partially or full time for a cleaning plant, press shop, hat blocking establishment, retail outlet or branch office and shall include all drivers, solicitors and route salesmen irrespective of the method of payment they receive for their services, and shall also include independent contractors soliciting under the same style and firm name as the processing plant. It shall also include any member of the firm, association, corporation or partnership who actually performs any work of any nature in the business.

This section shall not apply to any bona fide student of any college or university in this State operating such pressing or dry cleaning business at such college or university during the school term of such college or university.

(1939, c. 158, s. 139; 1943, c. 400, s. 2; 1957, c. 1340, s. 2; 1959, c. 445, ss. 1, 2; 1961, c. 1080, ss. 1, 3; 1969, c. 884.)

Editor's Note.—The 1969 amendment rewrote the opening paragraph and deleted the definitions of "Retail outlet" and "Branch office."

For comment on 1943 amendment which changed the schedule of license taxes, see 21 N.C.L. Rev. 370.

Privilege License Tax May Not Be Levied on Each Laundry and Dry Cleaning Pick-Up Station.—See opinion of Attorney General to Mr. W.A. Watts, Assistant Charlotte City Attorney, 41 N.C.A.G. 80 (1970).

§ **105-75. Barbershops.** — Every person, firm, or corporation engaged in the business of conducting a barbershop, beauty shop or parlor, or other shop of like kind shall apply for and procure from the Commissioner of Revenue a State license for the privilege of conducting such business, and shall pay for such license the following tax:

For each barber chair maintained in a barbershop	$2.50
For each barber, manicurist, cosmetologist, beautician, or operator in beauty parlor, or other shop of like kind in any office, hotel, or other place	2.50

Counties shall not levy a license tax under this section, but cities and towns may levy a license tax not in excess of that levied by the State. (1939, c. 158, s. 140; 1943, c. 400, s. 2.)

§ **105-76. Shoeshine parlors.**—Every person, firm, or corporation who or which maintains or operates a place of business wherein is operated a shoeshine parlor, stand, or chair or other device shall apply for and procure from the Commissioner of Revenue a State license for the privilege of conducting such business and shall pay for such license a tax of one dollar ($1.00) per chair or stool.

Counties shall not levy any license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of one half of that levied by the State. (1939, c. 158, s. 141.)

§ **105-77. Tobacco warehouses.** — (a) Every person, firm, or corporation engaged in the business of operating a warehouse for the sale of leaf tobacco upon commission shall, on or before the first day of July of each year, apply for and obtain from the Commissioner of Revenue a State license for the privilege of operating such warehouse for the next ensuing year, and shall pay for such license the following tax:

For a warehouse in which was sold during the preceding year ending the first day of July:

Less than 1,000,000 pounds	$ 50.00
1,000,000 pounds and less than 2,000,000	75.00
2,000,000 pounds and less than 3,000,000	175.00
3,000,000 pounds and less than 4,000,000	250.00
4,000,000 pounds and less than 5,000,000	400.00
5,000,000 pounds and less than 6,000,000	500.00

For all in excess of 6,000,000 pounds, five hundred dollars ($500.00) and six cents (6¢) per thousand pounds.

(b) If a new warehouse not in operation the previous year, the person, firm, or corporation operating such warehouse may procure a license by payment of the minimum tax provided in the foregoing schedule, and at the close of the season for sales of tobacco in such warehouse shall furnish the Commissioner of Revenue a statement of the number of pounds of tobacco sold in such warehouse for the current year, and shall pay an additional license tax for the current year based on such total volume of sales in accordance with the schedule in this section.

If an old warehouse with new or changed ownership or management, the tax

shall be paid according to the schedule in this section, based on the sale during the preceding year, just as if the old ownership or management had continued its operation.

(c) The Commissioner of Agriculture shall certify to the Commissioner of Revenue, on or before the first day of July of each year, the name of each person, firm, or corporation operating a tobacco warehouse in each county in the State, together with the number of pounds of leaf tobacco sold by such person, firm, or corporation in each warehouse for the preceding year, ending on the first day of July of the current year.

(d) The Commissioner of Agriculture shall report to the solicitor of any judicial district in which a tobacco warehouse is located which the owner or operator thereof shall have failed to make a report of the leaf tobacco sold in such warehouse during the preceding year, ending the first day of July of the current year, and such solicitor shall prosecute any such person, firm or corporation under the provisions of this section.

(e) The tax levied in this section shall be based on official reports of each tobacco warehouse to the State Department of Agriculture showing amount of sales for each warehouse for the previous year.

(f) The Commissioner of Revenue or his deputies shall have the right, and are hereby authorized, to examine the books and records of any person, firm, or corporation operating such warehouse, for the purpose of verifying the reports made and of ascertaining the number of pounds of leaf tobacco sold during the preceding year, or other years, in such warehouse.

(g) Any person, firm, or corporation who or which violates any of the provisions of this section shall, in addition to all other penalties provided for in this Article, be guilty of a misdemeanor, and upon conviction shall be fined not less than five hundred dollars ($500.00) and/or imprisoned, in the discretion of the court.

(h) No county shall levy any license tax on the business taxed under this section. Cities and towns may levy a tax not in excess of fifty dollars ($50.00) for each warehouse. (1939, c. 158, s. 142; 1963, c. 294, s. 4.)

Cited in State v. Morrison, 210 N.C. 117, 185 S.E. 674 (1936).

§ **105-78. News dealers on trains.**—Every person, firm, or corporation engaged in the business of selling books, magazines, papers, fruits, confections, or other articles of merchandise on railroad trains or other common carriers in this State shall apply for and obtain a State license from the Commissioner of Revenue for the privilege of conducting such business, and shall pay for such license the following tax:

Where such person, firm, or corporation operates on railroads or other common carriers on:

Less than 300 miles	$ 250.00
Three hundred and less than 500 miles	500.00
Five hundred miles or more	1,000

This section shall not apply to any railroad company engaged in selling such articles to passengers on its train and paying the tax upon the retail sales of merchandise levied in Schedule E, G.S. 105-164 to 105-187.

Counties, cities, and towns shall not levy any license tax on the business taxed under this section. (1939, c. 158, s. 143.)

§ **105-79. Soda fountains, soft drink stands.**—Every person, firm, or corporation engaged in the business of operating a soda fountain or soft drink stand shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of conducting such business, and shall pay for such license the following tax:

On soda fountains. On each carbonated draft arm of each soda fountain, a tax of ten dollars ($10.00).

On each stand at which soft drinks are sold, the same not being strictly a soda fountain, and on each place of business where bottled carbonated drinks are sold at retail, the license tax shall be five dollars ($5.00); provided, that the tax herein levied shall not apply to stands which sell no drinks except milk, milk drinks, products of the dairy, or pure uncarbonated fruit or vegetable juices.

In addition to the license tax levied in this section, the tax shall be paid upon the gross sales at the rate of tax levied in Schedule E, G.S. 105-164 to 105-187, upon the retail sales of merchandise, such tax to be paid at the time and in the manner required for the sale of other merchandise.

Counties shall not levy a license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of one half of the base tax levied by the State.

No tax shall be levied under this section, for the privilege of operating vending machines or the sale of any commodity through such machines, against any vending machine operator, licensed under G.S. 105-65.1 and required thereby to pay a gross receipts tax. (1939, c. 158, s. 144; 1949, c. 1220, s. 2; 1967, c. 1118, s. 3.)

§ 105-80. Dealers in pistols, etc.—(a) Every person, firm, or corporation who is engaged in the business of keeping in stock, selling, and /or offering for sale any of the articles or commodities enumerated in this section, shall apply for and obtain a State license from the Commissioner of Revenue for the privilege of conducting such business, and shall pay for such license the following tax:

For pistols	$ 50.00
For bowie knives, dirks, daggers, slingshots, leaded canes, iron or metallic knuckles, or articles of like kind	200.00
For blank cartridge pistols	50.00

(b) If such person, firm, or corporation deals only in metallic cartridges, the tax shall be five dollars ($5.00).

(c) Counties, cities, or towns may levy a license tax on the business taxed under this section not in excess of that levied by the State. (1939, c. 158, s. 145; 1941, c. 50, s. 3; 1959, c. 1205.)

§ 105-81: Repealed by Session Laws 1947, c. 501, s. 2.

§ 105-82. Pianos, organs, victrolas, records, radios, accessories.—(a) Every person, firm or corporation engaged in the business of selling, offering or ordering for sale, repairing or servicing any of the articles hereinafter enumerated in this section shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of conducting such business and shall pay for each license the following tax:

For pianos and/or organs, graphophones, victrolas, or other instruments using discs or cylinder records, and/or the sale of records for either or all of these instruments, television sets, television accessories and repair parts, radios or radio accessories and repair parts, including radios designed for exclusive use in automobiles, an annual license tax of ten dollars ($10.00); provided, that persons licensed under this section shall not be required to procure a license under G.S. 105-89 by reason of being engaged in the business of selling, installing, or servicing automobile radios.

(b) Any person, firm, or corporation applying for and obtaining a license under this section may employ traveling representatives or agents, but such traveling agents or representatives shall obtain from the Commissioner of Revenue a duplicate license of such person, firm, or corporation who or which he represents, and pay for the same a tax of ten dollars ($10.00).

Each duplicate copy so issued is to contain the name of the agent to whom it is issued, the instrument to be sold, and the same shall not be transferable.

Representatives or agents holding such duplicate copy of such license thereby to sell or offer for sale only the instrument and/or articles authorized to be sold by the person, firm, or corporation holding the original license, and such license shall be good and valid in any county in the State.

(c) Every person, firm, or corporation violating any of the provisions of this section shall be guilty of a misdemeanor and shall pay a penalty of two hundred and fifty dollars ($250.00), and in addition thereto double the State license tax levied in this section for the then current year.

(d) Counties shall not levy any license tax on the business taxed under this section, except that the county in which the agent or representative holding a duplicate copy of the license aforesaid does business may impose a license tax not in excess of five dollars ($5.00). Cities or towns may levy a license tax on the business taxed under this section not in excess of one half of that levied by the State. (1939, c. 158, s. 147; 1943, c. 400, s. 2; 1957, c. 1340, s. 2.)

License for Each Agent.—If the licensee employs more than one salesman he must make out and furnish each salesman with an additional license. This is because the license authorizes only the person having it in possession to sell under it. State v. Morrison, 126 N.C. 1123, 36 S.E. 329 (1900).

Sales by Sample; Interstate Commerce.—An act requiring everyone, before engaging in selling pianos or organs in the State by sample, list or otherwise, to pay a certain sum for a license, is, in the case of one selling by sample and list, as agent for a manufacturer and dealer located in another state, void, as a regulation of interstate commerce. Ex parte Hough, 69 F. 330 (W.D.N.C. 1895).

§ **105-83. Installment paper dealers.** — (a) Every person, firm, or corporation, foreign or domestic, engaged in the business of dealing in, buying, and/or discounting installment paper, notes, bonds, contracts, evidences of debt and/or other securities, where a lien is reserved or taken upon personal property located in this State to secure the payment of such obligations, shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of engaging in such business or for the purchasing of such obligations in this State, and shall pay for such license an annual tax of one hundred dollars ($100.00).

(b) In addition to the tax levied in subsection (a) of this section, such person, firm, or corporation shall submit to the Revenue Commissioner quarterly on the first day of January, April, July, and October of each year, upon forms prescribed by the said Commissioner, a full, accurate, and complete statement, verified by the officer, agent, or person making such statement, of the total face value of the installment paper, notes, bonds, contracts, evidences of debt, and/or other securities described in this section dealt in, bought and/or discounted within the preceding three months and, at the same time, shall pay a tax of two hundred and seventy-five thousandths of one percent (.275%) of the face value of such obligations dealt in, bought and/or discounted for such period.

(c) If any person, firm, or corporation, foreign or domestic, shall deal in, buy and/or discount any such paper, notes, bonds, contracts, evidences of debt and/or other securities described in this section without applying for and obtaining a license for the privilege of engaging in such business of dealing in such obligations, or shall fail, refuse, or neglect to pay the taxes levied in this section, such obligation shall not be recoverable or the collection thereof enforceable at law or by suit in equity in any of the courts of this State until and when the license taxes prescribed in this section have been paid, together with any and all penalties prescribed in this Article for the nonpayment of taxes.

(d) This section shall not apply to corporations organized under the State or national banking laws.

(e) Counties, cities and towns shall not levy any license tax on the business taxed under this section. (1939, c. 158, s. 148; 1957, c. 1340, s. 2.)

Constitutionality. — The imposition of taxes on installment paper dealers, is not rendered discriminatory by the exemption from the tax of corporations organized under the State or national banking laws, even though banks, in addition to their regular banking business, carry on the identical business of discounting commercial paper, since the two businesses are distinct in fact, and the one is subject to regulations and controls which are not applicable to the other. Lenoir Fin. Co. v. Currie, 254 N.C. 129, 118 S.E.2d 543 (1961).

Bank Distinguished From Installment Paper Dealer. — See Lenoir Fin. Co. v. Currie, 254 N.C. 129, 118 S.E.2d 543 (1961).

§ 105-84. Tobacco and cigarette retailers and jobbers.—Every person, firm, or corporation engaged in the business of retailing and/or jobbing cigarette, cigars, chewing tobacco, snuff, or any other tobacco products shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of engaging in such business, and shall pay for such license the following tax:

Outside of incorporated cities or towns and cities or towns of less than 1,000 population	$ 5.00
Cities or towns of 1,000 population and over	10.00

Counties shall not levy any license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of that levied by the State.

No tax shall be levied under this section, for the privilege of operating vending machines or the sale of any commodity through such machines, against any vending machine operator, licensed under G.S. 105-65.1 and required thereby to pay a gross receipts tax. (1939, c. 158, s. 149; 1967, c. 1118, s. 4.)

Opinions of Attorney General. — Mr. Donald E. Gordon, Monroe City Tax Collector, 40 N.C.A.G. 858 (1969).

§ 105-85. Laundries.—Every person, firm, or corporation engaged in the business of operating a laundry, including wet or damp wash laundries and businesses known as "launderettes," "launderalls" and similar type businesses, where steam, electricity, or other power is used, or who engages in the business of supplying or renting clean linen or towels or wearing apparel, shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of engaging in such business, and shall pay for such license the following tax:

In cities or towns of less than 5,000 population	$ 6.25
In cities or towns of 5,000 and less than 10,000 population	12.50
In cities or towns of 10,000 and less than 15,000 population	18.75
In cities or towns of 15,000 and less than 20,000 population	25.00
In cities or towns of 20,000 and less than 25,000 population	30.00
In cities or towns of 25,000 and less than 30,000 population	36.25
In cities or towns of 30,000 and less than 35,000 population	42.50
In cities or towns of 35,000 and less than 40,000 population	50.00
In cities or towns of 40,000 and less than 45,000 population	56.25
In cities or towns of 45,000 population and above	62.50

Provided, however, that any laundry or other concern herein referred to where the work is performed exclusively by hand or home-size machines only, and where not more than 12 persons are employed, including the owners, the license tax shall be one third of the amount stipulated in the foregoing schedule.

Every person, firm, or corporation soliciting laundry work or supplying or renting clean linen or towels or wearing apparel in any city or town, outside of the city or town wherein said laundry or linen supply or towel supply or wearing apparel supply business is established, shall procure from the Commissioner of Revenue a State license as provided in the above schedule,

and shall pay for such license a tax based according to the population of the city or town, for the privilege of soliciting therein. The additional tax levied in this paragraph shall apply to the soliciting of laundry work or linen supply or towel supply work or wearing apparel supply work in any city or town in which there is a laundry, linen supply or towel supply or wearing apparel supply establishment located in the said city or town. The soliciting of business for or by any person, firm, or corporation engaged in the business of laundry work and/or supplying or renting clean linen or towels or wearing apparel shall and the same is hereby construed to be engaging in the said business. Any person, firm, or corporation soliciting in said city or town shall procure from the Commissioner of Revenue a State license for the privilege of soliciting in said city or town, said tax to be in the sum equal to the amount which would be paid if the solicitor had an establishment and actually engaged in such business in the said city or town; provided the solicitor has paid a State, county and municipal license in this State.

Every person, firm or corporation engaged in the business of soliciting laundry work to be done by a laundry or plant which has not paid the State license tax levied herein shall pay a tax of two hundred dollars ($200.00) for each vehicle used in carrying the laundry work, and the license issued by the Commissioner of Revenue shall be carried in the cab of any vehicle so employed. Counties, cities and towns may levy a tax upon such persons, firms or corporations not in excess of that levied by the State.

Counties, cities and towns, respectively, may levy a license tax not in excess of twelve dollars and fifty cents ($12.50) on any person, firm, or corporation engaged in the business of laundry work and/or supplying or renting clean linen or towels or wearing apparel in instances when said work is performed outside the said county or town, or when the linen or towels or wearing apparel are supplied by business outside said county or town. Cities and towns may levy a license tax not in excess of fifty dollars ($50.00) on any other person, firm or corporation engaged in the business of laundry work and/or supplying or renting clean linen or towels or wearing apparel.

Counties, cities and towns may not collect a privilege license tax under this section unless the State license tax, if due, has been first paid. (1939, c. 158, s. 150; 1943, c. 400, s. 2; 1945, c. 708, s. 2; 1949, c. 392, s. 1; 1959, c. 445, ss. 3-5; 1961, c. 1080, ss. 2, 4; c. 1203.)

Privilege License Tax May Not Be Levied on Each Laundry and Dry Cleaning Pick-Up Station.—See opinion of Attorney General to Mr. W.A. Watts, Assistant Charlotte City Attorney, 41 N.C.A.G. 80 (1970).

§ **105-86. Outdoor advertising.**—(a) Every person, firm, or corporation who or which is engaged in the business of outdoor advertising by placing, erecting or maintaining one or more outdoor advertising signs or structures of any nature by means of signboards, poster boards, or painted bulletins, or other painted matter, or any other outdoor advertising devices, erected upon the grounds, walls or roofs of buildings, shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of engaging in such business in this State, and shall pay annually for said license as follows:

For posting or erecting 20 or more signs or panels	$25.00
For posting or erecting less than 20 signs or panels, for each sign or panel	1.00

And in addition thereto the following license tax for each city, town or other place in which such signboards, poster boards, painted bulletins and other painted or printed matter or other outdoor advertising devices are maintained in cities and towns of:

Less than 1,000 population	$ 5.00
1,000 to 1,999 population	10.00
2,000 to 2,999 population	15.00
3,000 to 3,999 population	20.00

4,000 to 4,999 population	25.00
5,000 to 7,499 population	30.00
7,500 to 14,999 population	50.00
15,000 to 24,999 population	100.00
25,000 to 49,999 population	150.00
50,000 population and over	200.00
In each county outside of cities and towns	25.00

Provided, that the tax levied in this section shall not apply to regularly licensed motion picture theatres taxed under G.S. 105-37 upon any advertising signs, structures, boards, bulletins, or other devices erected by or placed by the theatre upon property which the theatre has secured by permission of the owner.

Every person, firm, or corporation who or which places, erects or maintains one or more outdoor advertising signs, structures, boards, bulletins or devices as specified in this section shall be deemed to be engaged in the business of outdoor advertising, but when the applicant intends to advertise his own business exclusively by the erection or placement of such outdoor advertising signs, structures, boards, bulletins or devices as specified in this section, he may be licensed to do so upon the payment annually of one dollar ($1.00) for each sign up to 1,000 in number, and for 1,000 or more, the sum of one thousand dollars ($1,000) for the privilege in lieu of all other taxation as provided in this section, except such further taxation as may be imposed upon him by cities or towns, acting under the power to levy not in excess of one half of that specified in paragraph two of subsection (a) of this section.

(b) Every person, firm, or corporation shall show in its application for the State license herein provided for the name of each incorporated city or town within which, and the county within which, it is maintaining or proposes to maintain said signboards, poster boards, painted bulletins or other painted or printed signs or other outdoor advertising devices within the State of North Carolina. No person, firm, or corporation, licensed under the provisions of this section, shall erect or maintain any outdoor advertising structure, device or display until a permit for the erection of such structure, device or display shall have been obtained from the Commissioner of Revenue. Application for such permit shall be in writing, signed by the applicant or his duly authorized agent, upon blanks furnished by the Commissioner of Revenue, in such form and requiring such information as said Commissioner of Revenue may prescribe. Each application shall have attached thereto the written consent of the owners or duly authorized agent of the property on which structures, device or display is to be erected or maintained, and shall state thereon the beginning and ending dates of such written permission: Provided, the subsection shall not apply to persons, firms, or corporations who or which advertise their or its own business exclusively, and who or which have been licensed therefor pursuant to subsection (a) of this section.

(c) It shall be unlawful for any person engaged in the business of outdoor advertising to in any manner paint, print, place, post, tack or affix, or cause to be painted, printed, placed, posted, tacked or affixed any sign or other printed or painted advertisement on or to any stone, tree, fence, stump, pole, building or other object which is upon the property of another without first obtaining the written consent of such owner thereof, and any person, firm, or corporation who in any manner paints, prints, places, posts, tacks or affixes, or causes to be painted, printed, posted, tacked or affixed any such advertisement on the property of another except as herein provided shall be guilty of a misdemeanor, and shall be punished by a fine not exceeding fifty dollars ($50.00), or imprisonment of 30 days: Provided, that the provisions of this section shall not apply to legal notices.

(d) It shall be unlawful for any person, firm, or corporation to paint, print, place, post, tack or affix any advertising matter within the limits of the right-of-

way of public highways of the State without the permission of the State Highway Commission, or upon the streets of the incorporated towns of the State without permission of the governing authorities, and if and when signs of any nature are placed without permission within the highways of the State, or within the streets of incorporated towns, it shall be the duty of the Highway Commission or any other administrative body or other governing authorities of the cities and towns of said State to remove said advertising matters therefrom.

(e) Every person, firm, or corporation owning or maintaining signboards, poster boards, printed bulletins, or other outdoor advertisements of any nature within this State shall have imprinted on the same the name of such person, firm, or corporation in sufficient size to be plainly visible and permanently affixed thereto.

(f) A license shall not be granted any person, firm, or corporation having his or its principal place of business outside the State for the display of any advertising of any nature whatsoever, designed or intended for the display of advertising matter, until such person, firm, or corporation shall have furnished and filed with the Commissioner of Revenue a surety bond to the State, approved by him, in such sum as he may fix, not exceeding five thousand dollars ($5,000), conditioned that such licensee shall fulfill all requirements of law, and lawful regulations and orders of said Commissioner of Revenue, relative to the display of advertisements. Such surety bond shall remain in full force and effect as long as any obligations of such licensee to the State shall remain unsatisfied.

(g) No advertising, or other signs specified in this section, shall be erected in the highway right-of-way so as to obstruct the vision or otherwise to increase the hazards, and all signs upon the highways shall be placed in a manner to be approved by the said Highway Commission.

(h) Any person, firm, or corporation who or which shall refuse to or neglect to comply with the terms and provisions of this section, and who shall fail to pay the tax herein provided for within 30 days after the same shall become due, or who shall paint, print, place, post, tack, affix or display any advertising sign or other matter contrary to the provisions of this section, the Highway Commission of the State of North Carolina or other governing body having jurisdiction over the roads and highways of the State, and the governing authorities of cities and towns and its agents and employees, and the board of county commissioners of the various counties of said State and its employees are directed to forthwith seize and remove or cause to be removed all advertisements, signs or other matter displayed contrary to the provisions of this section.

For the purpose of more effectually carrying into effect the provisions of this section, the Commissioner of Revenue is authorized and directed to prepare and furnish to the Highway Commission or other governing body having jurisdiction over the roads and highways of the State a sufficient number of permits to be executed by the owner, lessee or tenant occupying the lands adjacent to the highways of the State, upon which advertisements, signs or other matter displayed contrary to the provisions of this section, in words as follows:

"I, (we), (owner), (lessee), (tenant), authorize and direct the Highway Commission of the State of North Carolina to remove from my lands the following signs and advertising matter placed upon my lands unlawfully or without my permission: .....

"This ..... day of ....., 19..

....."

And the said Highway Commission or other governing body having jurisdiction over the roads and highways of the State shall forthwith proceed, through its agents, servants and employees, wherever and whenever in its

opinion it is necessary to secure the consent to the removal of said signs or other advertising matter from the lands of the owner, lessee or tenant, to secure said consent and to immediately remove said signs or other advertising matter from the lands adjacent to the highways of the State of North Carolina as herein directed.

(i) Every person, firm, or corporation who violates any of the provisions of this section shall be guilty of a misdemeanor, and in addition to the license tax and penalties provided for herein shall be fined not more than one hundred dollars ($100.00) for each sign so displayed, or imprisoned, in the discretion of the court.

(j) Counties shall not levy any license tax under this section, but cities and towns may levy a license tax not in excess of one half of that levied by the State under paragraph two of subsection (a).

(k) The following signs and announcements are exempted from the provisions of this section: Signs upon property advertising the business conducted thereon; notice or advertisements erected by public authority or required by law in any legal proceedings; any signs containing 60 square feet or less bearing an announcement of any town or city advertising itself: Provided, the same is maintained at public expense.

No tax shall be levied under this section against any person, firm, or corporation erecting, painting, posting or otherwise displaying signs or panels advertising his or its own business containing 12 square feet or less of advertising surface: Provided, that this exemption shall not apply if the signs or panels are displayed in more than five counties. (1939, c. 158, s. 151; 1943, c. 400, s. 2; 1957, c. 65, s. 11.)

§ **105-87. Motor advertisers.** — (a) Every person, firm, or corporation operating over the streets or highways of this State any motor vehicle or other mechanical conveyance equipped with radio, phonograph, or other similar mechanism to produce music, or having any loudspeaker attachment or other sound magnifying device to produce sound effects for advertising purposes, whether advertising his or its own products or those of others, shall be deemed a motor advertiser, shall procure from the Commissioner of Revenue a statewide license for the privilege of engaging in such business in this State, and shall pay for such license a tax of one hundred dollars ($100.00) for each vehicle or conveyance so used: Provided, that any such advertiser owning a located place of business in this State and advertising in not more than five counties shall pay one fourth the tax provided in this section.

(b) Counties may levy a license tax on the business taxed under this section not in excess of one fourth of that levied by the State, and cities and towns may levy a tax in excess of ten dollars ($10.00). (1939, c. 158, s. 151½.)

Cited in Frosty Ice Cream, Inc. v. Hord, 263 N.C. 43, 138 S.E.2d 816 (1964).

§ **105-88. Loan agencies or brokers.**—(a) Every person, firm, or corporation engaged in the regular business of making loans or lending money, accepting liens on, or contracts of assignments of, salaries or wages, or any part thereof, or other security or evidence of debt for repayment of such loans in installment payment or otherwise, and maintaining in connection with same any office or other located or established place for the conduct, negotiation, or transaction of such business and/or advertising or soliciting such business in any manner whatsoever, shall be deemed a loan agency, and shall apply for and procure from the Commissioner of Revenue a State license for the privilege of transacting or negotiating such business at each office or place so maintained, and shall pay for such license a tax of seven hundred fifty dollars ($750.00).

(b) Nothing in this section shall be construed to apply to banks, industrial banks, trust companies, building and loan associations, cooperative credit unions, nor installment paper dealers defined and taxed under other sections of

this Article, nor shall it apply to the business of negotiating loans on real estate as described in G.S. 105-41, nor to pawnbrokers lending or advancing money on specific articles of personal property, nor to insurance premium finance companies licensed under Article 4 of Chapter 58 of the General Statutes. It shall apply to those persons or concerns operating what are commonly known as loan companies or finance companies and whose business is as hereinbefore described, and those persons, firms, or corporations pursuing the business of lending money and taking as security for the payment of such loan and interest an assignment of wages or an assignment of wages with power of attorney to collect same, or other order or chattel mortgage or bill of sale upon household or kitchen furniture. No real estate mortgage broker shall be required to obtain a privilege license under this section merely because he advances his own funds and takes a security interest in real estate to secure such advances and when, at the time of such advance of his own funds, he has already made arrangements with others for the sale or discount of the obligation at a later date and does so sell or discount such obligation within the period specified in said arrangement or extensions thereof; or when, at the time of the advance of his own funds, he intends to sell the obligation to others at a later date and does, within 12 months from date of initial advance, make arrangements with others for the sale of said obligation and does sell the obligation within the period specified in said arrangement or extensions thereof; or because he advances his own funds in temporary financing directly involved in the production of permanent-type loans for sale to others; and no real estate mortgage broker whose mortgage lending operations are essentially as described above shall be required to obtain a privilege license under this section.

(c) At the time of making any such loan, the person, or officer of the firm or corporation making the same, shall give to the borrower in writing in convenient form a statement showing the amount received by the borrower, the amount to be paid back by the borrower, and the time in which said amount is to be paid, and the rate of interest and discount agreed upon.

(d) Any such person, firm, or corporation failing, refusing, or neglecting to pay the tax herein levied shall be guilty of a misdemeanor, and in addition to double the tax due shall be fined not less than two hundred and fifty dollars ($250.00) and/or imprisoned, in the discretion of the court. No such loan shall be collectible at law in the courts of this State in any case where the person making such loan has failed to pay the tax levied herein, and/or otherwise complied with the provisions of this section.

(e) Counties, cities, and towns may levy a license tax on the business taxed under this section not in excess of one hundred dollars ($100.00). (1939, c. 158, s. 152; 1967, c. 1080; c. 1232, s. 2.)

Cross Reference. — As to Consumer Finance Act, see §§ 53-164 to 53-191.

Purpose of Section Is to Raise Revenue.—The tax imposed on loan agencies or brokers by this section is merely one of the Schedule B license taxes imposed by this Article for the privilege of carrying on a particular business, and its purpose is to raise revenue. Northcutt v. Clayton, 269 N.C. 428, 152 S.E.2d 471 (1967).

It Is Not Limited to Loan Agencies Subject to Consumer Finance Act. — All loan agencies subject to the provisions of this section are not subject to the provisions of the Consumer Finance Act. This section applies to all the loan agencies specified therein, irrespective of the amounts which they loan or the interest they charge. Northcutt v. Clayton, 269 N.C. 428, 152 S.E.2d 471 (1967).

Former Application to Insurance Premium Finance Companies.—See Northcutt v. Clayton, 269 N.C. 428, 152 S.E.2d 471 (1967) (decided under this section as it read prior to the second 1967 amendment which added "nor to insurance premium finance companies licensed under Article 4 of Chapter 58 of the General Statutes" at the end of the first sentence in subsection (b).)

Cited in Lenoir Fin. Co. v. Currie, 254 N.C. 129, 118 S.E.2d 543 (1961).

§ 105-89. Automobiles, wholesale supply dealers and service stations.— (a) Automotive Service Stations.—

(1) Every person, firm, or corporation engaged in the business of servicing, storing, painting, repairing, welding, or upholstering motor vehicles, trailers, semitrailers, or engaged in the business of retail selling and/or delivering of any tires, tools, batteries, electrical equipment, automotive accessories, including radios designed for exclusive use in automobiles, or supplies, motor fuels and/or lubricants, or any of such commodities, in this State, shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of engaging in such business in this State, and shall pay for such license an annual tax for each location where such business is carried on, as follows:

In unincorporated communities and in cities or towns of less than 2,500 population	$10.00
In cities or towns of 2,500 and less than 5,000 population	15.00
In cities or towns of 5,000 and less than 10,000 population	20.00
In cities or towns of 10,000 and less than 20,000 population	30.00
In cities or towns of 20,000 and less than 30,000 population	40.00
In cities or towns of 30,000 or more	50.00

(2) In rural sections where a service station is operated the tax shall be five dollars ($5.00), unless more than one pump is operated, in which event the tax shall be five dollars ($5.00) per pump: Provided, that any person, firm, or corporation operating a motor vehicle repair shop or garage in rural sections shall be liable for a minimum annual tax of ten dollars ($10.00).

(3) The tax levied in this section shall in no case be less than five dollars ($5.00) per pump.

(4) No additional license tax under this subsection shall be levied upon or collected from any employee, agent, or salesman whose employer or principal has paid the tax for each location levied in this subsection.

(5) The tax imposed in G.S. 105-53 shall not apply to the sale of gasoline to dealers for resale.

(6) Counties, cities, and towns may levy a license tax upon each place of business located therein under this subsection not in excess of one fourth of that levied by the State.

(b) Automotive Equipment and Supply Dealers at Wholesale.—

(1) Every person, firm, or corporation engaged in the business of buying, selling, distributing, exchanging, and/or delivering automotive accessories, including radios designed for exclusive use in automobiles, parts, tires, tools, batteries, and/or other automotive equipment or supplies or any of such commodities at wholesale shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of engaging in such business in this State, and shall pay for such license an annual tax for each location where such business is carried on as follows:

In unincorporated communities and in cities or towns of less than 2,500 population	$ 25.00
In cities or towns of 2,500 and less than 5,000 population	30.00
In cities or towns of 5,000 and less than 10,000 population	50.00
In cities or towns of 10,000 and less than 20,000 population	75.00
In cities or towns of 20,000 and less than 30,000 population	100.00
In cities or towns of 30,000 population or more	125.00

Provided, any person, firm, or corporation engaged in the business enumerated in this section and having no located place of business, but selling to retail dealers by use of some form of vehicle, shall obtain from the Commissioner of Revenue a statewide license for the privilege of engaging in such business in this State, and shall pay for

such license an annual tax for each vehicle used in carrying on such business fifty dollars ($50.00).

(2) For the purpose of this section, the word "wholesale" shall apply to manufacturers, jobbers, and such others who sell to retail dealers, except manufacturers of batteries.

(3) No additional license tax under this subsection shall be levied upon or collected from any employee, agent, or salesman whose employer or principal has paid the tax for each location levied in this subsection.

(4) Counties, cities, and towns may levy a license tax on each place of business located therein, taxed under this subsection, not in excess of one half of that levied by the State, with the exception that the minimum tax may be as much as ten dollars ($10.00).

(5) No person, firm, or corporation paying the wholesalers' tax as levied in subsection (b) hereof shall be required to pay any additional tax under subsection (a) of this section for engaging in any of the types of business levied upon in said subsection (a).

(c) Motor Vehicle Dealers.—

(1) Every person, firm, or corporation engaged in the business of buying, selling, distributing, servicing, storing and/or exchanging motor vehicles, trailers, semitrailers, tires, tools, batteries, electrical equipment, lubricants, and/or automotive equipment, including radios designed for exclusive use in automobiles, and supplies in this State shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of engaging in such business in this State, and shall pay for such license an annual tax for each location where such business is carried on, as follows:

In unincorporated communities and in cities or towns of less than 1,000 population	$ 25.00
In cities or towns of 1,000 and less than 2,500 population	50.00
In cities or towns of 2,500 and less than 5,000 population	75.00
In cities or towns of 5,000 and less than 10,000 population	110.00
In cities or towns of 10,000 and less than 20,000 population	140.00
In cities or towns of 20,000 and less than 30,000 population	175.00
In cities or towns of 30,000 or more	200.00

Provided, that persons, firms, or corporations dealing in secondhand or used motor vehicles exclusively shall be liable for the tax as set out in the foregoing schedule unless such business is of a seasonal, temporary, transient, or itinerant nature, in which event the tax shall be three hundred dollars ($300.00) for each location where such business is carried on.

(2) Any person, firm, or corporation who or which deals exclusively in motor fuels and lubricants, and has paid the license tax levied under subsection (a) of this section, shall not be subject to any license tax under subsections (b) and (c) of this section.

(3) No additional license tax under this subsection shall be levied upon or collected from any employee or salesman whose employer has paid the tax levied in this subsection; nor shall the tax apply to dealers in semitrailers weighing not more than five hundred pounds and carrying not more than one-thousand-pound load, and to be towed by passenger cars, nor to dealers in four-wheel, farm type wagons equipped with rubber tires and designed to be pulled or towed by passenger cars or farm tractors.

(4) Premises on which cars are stored or sold when owned or operated by a licensed car dealer under the same name shall not be deemed as a separate place of business when conducted within the corporate limits of any city or town in which such car business is conducted.

(5) Counties, cities, and towns may levy a license tax on each place of business located therein, taxed under this subsection, not in excess of one fourth of that levied by the State, with the exception that the minimum tax may be as much as twenty dollars ($20.00): Provided, if such business is of a seasonal, temporary, transient, or itinerant nature, counties, cities, and towns may levy a tax of three hundred dollars ($300.00) for each location where such business is carried on. (1939, c. 158, s. 153; 1945, c. 708, s. 2; 1947, c. 501, s. 2; 1949, c. 392, s. 1; 1953, c. 1302, s. 2; 1959, c. 1259, ss. 9C-9E.)

Persons Operating Trailer Sales Lot Are Required to Obtain a Schedule "B" Privilege License. — See opinion of Attorney General to Mr. Jule McMichael, Rockingham County Attorney, 40 N.C.A.G. 870 (1970).

Constitutionality of Former Statute.—A provision in a former statute as to the reduction of the license tax if three fourths of the manufacturer's assets were invested in this State was held constitutional in Bethlehem Motors Corp. v. Flynt, 178 N.C. 399, 100 S.E. 693 (1919). On appeal the statute was held invalid as discriminating against nonresident manufacturers doing business in the State and as discriminating in favor of the products of resident manufacturers by attempting to regulate interstate commerce. Bethlehem Motors Corp. v. Flynt, 256 U.S. 421, 41 S. Ct. 571, 65 L. Ed. 1029 (1921). But this decision of the Supreme Court of the United States was not understood to invalidate the entire statute, since the provision in question was separable from the remainder of the statute. American Exch. Nat'l Bank v. Lacy, 188 N.C. 25, 123 S.E. 475 (1924).

Auto trucks were held to come within the designation of "automobiles" as used in a former statute taxing the manufacturers of automobiles. Bethlehem Motors Corp. v. Flynt, 178 N.C. 399, 100 S.E. 693 (1919).

Bank as "Dealer". — Where a dealer in automobiles has sold to the bank, to which he was indebted, his automobiles on hand, for the purpose of securing the debt, under further provisions that he was to sell and collect and hold the proceeds in trust for the purpose stated and has thereafter left the State and the bank has assumed to continue the sales and make collection therefor, the bank may not avoid payment of the tax upon the ground that it was not a dealer, etc., in contemplation of the statute, and thus evade the practical efficiency of the statute and reduce it to a nullity. American Exch. Nat'l Bank v. Lacy, 188 N.C. 25, 123 S.E. 475 (1924).

Municipal Tax on Operators of Gasoline Pumps.—The provision authorizing counties, cities and towns to levy a license tax on each place of business located therein, not in excess of one fourth of that levied by the State, does not preclude a city from levying a tax on operators of gasoline pumps located on sidewalks along certain streets between the curb and the property line when such city tax is levied in the nature of a permit in the exercise of regulatory police power. State v. Evans, 205 N.C. 434, 171 S.E. 640 (1933).

§ 105-89.1. Motorcycle dealers. — (a) Every person, firm, or corporation, foreign or domestic, engaged in the business of buying, selling, distributing, and/or exchanging motorcycles or motorcycle supplies or any of such commodities in this State shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of engaging in such business in this State, and shall pay for such license an annual tax for each location where such business is carried on, as follows:

In unincorporated communities and cities or towns of less than 2,500 population	$10.00
In cities or towns of 2,500 and less than 5,000 population	15.00
In cities or towns of 5,000 and less than 10,000 population	20.00
In cities or towns of 10,000 and less than 20,000 population	25.00
In cities or towns of 20,000 and less than 30,000 population	30.00
In cities or towns of 30,000 or more	40.00

(b) A motorcycle dealer paying the license tax under this section may buy, sell, and/or deal in bicycles and bicycle supplies without the payment of an additional license tax.

(c) No additional license tax shall be levied upon or collected from any employee or salesman whose employer has paid the tax levied in this section.

(d) No motorcycle dealer shall be issued dealer's tags until the license tax levied under this section has been paid.

(e) Counties, cities, and towns may levy a license tax on each place of business located therein, taxed under this section, not in excess of one fourth of that levied by the State, with the exception that the minimum tax may be as much as ten dollars ($10.00). (1939, c. 158, s. 153; 1947, c. 501, s. 2.)

§ **105-90. Emigrant and employment agents.**—(a) Every person, firm, or corporation, either as agent or principal, engaged in the business of soliciting, hiring, and /or contracting with laborers, male or female, in this State, for employment out of the State shall apply for and obtain from the Commissioner of Revenue a State license for each county for the privilege of engaging in such business, and shall pay for such license a tax of five hundred dollars ($500.00) for each county in which such business is carried on.

(b) Every person, firm, or corporation who or which engages in the business of securing employment for a person or persons and charging therefor a fee, commission, or other compensation shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of engaging in such business in this State, and shall pay for such license the following annual tax for each location in which such business is carried on:

In unincorporated communities and in cities and towns of less than 2,500 population	$100.00
In cities or towns of 2,500 and less than 5,000 population	200.00
In cities or towns of 5,000 and less than 10,000 population	300.00
In cities or towns of 10,000 or more population	500.00

Provided, that this section shall not apply to any employment agency operated by the federal government, the State, any county or municipality, or whose sole business is procuring employees for work in the production and harvesting of farm crops within the State, nor shall it apply to any registry for registered nurses or licensed practical nurses when not operated for profit. And provided further, that under this section the tax on any employment agency whose sole business is the placement of teachers and/or other school employees and which has been approved by the State Superintendent of Public Instruction shall be twenty-five dollars ($25.00): Provided further, that the tax on employment agencies where the sole business is the placement of domestic servants or unregistered nurses for employment within the State shall be twenty-five dollars ($25.00).

(c) Any person, firm, or corporation violating the provisions of this section shall be guilty of a misdemeanor and fined, in addition to other penalties, not less than one thousand dollars ($1,000) and/or imprisoned, in the discretion of the court.

(d) Counties, cities and towns may levy a license tax on the business taxed under this section not in excess of one hundred dollars ($100.00). (1939, c. 158, s. 154; 1945, c. 635; 1963, c. 787, s. 1; 1971, c. 1130.)

Cross Reference.—As to statute applicable to emigrant agents who hire labor or solicit emigrants for employment in a state having a law similar to such statute, see § 105-90.1.

Editor's Note.—The 1971 amendment substituted "one hundred dollars ($100.00)" for "that levied by the State" in subsection (d).

Constitutionality of Tax on Emigrant Agent.—A former statute imposing a tax "on every emigrant agent or person engaged in procuring laborers to accept employment in another state" was held constitutional. State v. Hunt, 129 N.C. 686, 40 S.E. 216, 85 Am. St. R. 758 (1901).

An earlier statute taxing the occupation of "emigrant agent" was held invalid for lack of uniformity. State v. Moore, 113 N.C. 697, 18 S.E. 342 (1893).

Valid Exercise of Taxing Power.—A former statute taxing persons engaged in the business of procuring laborers for employment outside the State was held a valid exercise of the legislative power to tax trades and professions and was not a police regulation. State v. Roberson, 136 N.C. 587, 48 S.E. 595 (1904). See State v. Hunt, 129 N.C. 686, 40 S.E. 216, 85 Am. St. R. 758 (1901); Carr v. Commissioners of Duplin County, 136 N.C. 125, 48 S.E. 597 (1904); Lane v. Commissioners of Rowan County, 139 N.C. 443, 52 S.E. 140 (1905).

Statute Applies to Agents in Business of Hiring Laborers.—A statute imposing a license tax upon "every emigrant agent or person engaged in procuring laborers for employment out of this State" applies to agents who make it their business to hire laborers in this State to be sent beyond the limits of the State to be employed by others. Carr v. Commissioners of Duplin County, 136 N.C. 125, 48 S.E. 597 (1904).

Employment of Laborers to Work for Hirer.—Public Laws 1903, c. 247, s. 74, imposing a license tax upon "every emigrant agent or person engaged in procuring laborers for employment out of this State" was held not to apply to a person who came into this State and employed laborers to work for him in another state. Carr v. Commissioners of Duplin County, 136 N.C. 125, 48 S.E. 597 (1904).

An officer of a foreign corporation coming into this State and hiring hands for employment by the corporation in another state is not "engaged in the business of hiring hands," etc., and was held not liable for the tax on emigrant agents, under a former statute. Lane v. Commissioners of Rowan County, 139 N.C. 443, 52 S.E. 140 (1905).

Municipality May Not Levy Privilege License Tax on Employment Agency when the Only Contact Is by Telephone into the Municipality. — See opinion of Attorney General to Mr. John H. McMurray, Morganton City Attorney, 41 N.C.A.G. 82 (1970).

Amount of Tax Not Reviewable. — A tax on the business of procuring laborers for employment outside the State being an exercise of the power of the State to levy taxes, the amount is not reviewable by the courts. State v. Roberson, 136 N.C. 587, 48 S.E. 595 (1904), wherein the court said: "When the Constitution confers upon the legislature the power to levy taxes, the amount of the tax to be levied is committed to that department of the government and not open to review by the judicial department. We may inquire into the question of power, but not as to the manner of its exercise."

§ **105-90.1. Emigrant and employment agents—hiring or soliciting labor for employment in state having similar law.**—(a) No person other than the North Carolina Employment Security Commission shall engage in the business of emigrant agent in this State without first having obtained a license therefor from the Commissioner of Revenue and the county treasurer of each county in which he solicits emigrants. The term "emigrant agent" as used in this section, shall be construed to mean any person engaged in the business of hiring laborers or soliciting emigrants in this State to be employed beyond the limits of the State or any person engaged in hiring laborers or soliciting laborers in this State to be employed beyond the limits of the State in farm labor, whether in the employ of the emigrant agent or otherwise. Any person shall be entitled to State and county license, which shall be good for one year, upon payment to the Commissioner of Revenue for the use of the State of five hundred dollars ($500.00) for each county in which he operates or solicits emigrants for each year so engaged and upon payment into the county treasury of each county in which he operates or solicits emigrants, for the use of each such county, of one thousand dollars ($1,000) for each year so engaged. Any person other than the North Carolina Employment Security Commission acting as an emigrant agent without having first obtained such license shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine or imprisonment in the discretion of the court, and in addition to such fine or imprisonment the court may, in its discretion, require the defendant to purchase the State and county licenses herein provided.

(b) (1) Every person, firm, or corporation who or which engages in the business of securing employment for a person or persons and charging therefor a fee, commission, or other compensation shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of engaging in such business in this State, and shall pay for such license the following annual tax for each location in which such business is carried on:

In unincorporated communities and in cities and towns of less than 2,500 population	$100.00
In cities or towns of 2,500 and less than 5,000 population	200.00
In cities or towns of 5,000 and less than 10,000 population	300.00
In cities or towns of 10,000 or more population	500.00

Provided, that this section shall not apply to any employment agency operated by the federal government, the State, any county or municipality, or whose sole business is procuring employees for work in the production and harvesting of farm crops within the State, nor shall it apply to any registry for registered nurses or licensed practical nurses when not operated for profit. And provided further, that under this section the tax on any employment agency whose sole business is the placement of teachers and/or other school employees and which has been approved by the State Superintendent of Public Instruction shall be twenty-five dollars ($25.00): Provided further, that the tax on employment agencies where the sole business is the placement of domestic servants or unregistered nurses for employment within the State shall be twenty-five dollars ($25.00).

(2) Any person, firm, or corporation violating the provisions of this subsection shall be guilty of a misdemeanor and fined, in addition to other penalties, not less than one thousand dollars ($1,000) and/or imprisoned, in the discretion of the court.

(3) Counties, cities and towns may levy a license tax on the business taxed under this subsection not in excess of that levied by the State.

(c) The provisions of this section shall apply only to emigrant agents who hire labor or solicit emigrants for employment in a state having a law substantially similar to the provisions of this section. (1939, c. 158, s. 154; 1945, c. 635; 1953, c. 1237, ss. 1-4; 1963, c. 787, s. 2.)

Cross Reference.—For section applying to emigrant and employment agents generally, see § 105-90.

§ **105-91. Plumbers, heating contractors, and electricians.** — Every person, firm, or corporation engaged in the business of a plumber, installing plumbing fixtures, piping or equipment, steam or gas fitter, or installing hot-air heating systems, or installing electrical equipment, or offering to perform such services, shall apply for and obtain from the Commissioner of Revenue a statewide license for the privilege of engaging in such business, and shall pay for such license the following tax based on population:

Municipalities of less than 2,000 population	$ 7.50
Municipalities of 2,000 and less than 5,000 population	12.50
Municipalities of 5,000 and less than 10,000 population	15.00
Municipalities of 10,000 and less than 20,000 population	17.50
Municipalities of 20,000 and less than 30,000 population	22.50
Municipalities of 30,000 and less than 50,000 population	30.00
Municipalities of 50,000 or more	40.00

If any person, firm, or corporation, required to be licensed under the provisions of this section, engages in said business in two or more cities or towns, such person, firm, or corporation shall procure a license based on the population of the largest city or town in which the business taxed under this section is carried on; however, after a basic tax has been paid, in accordance with the above schedule, same shall apply as a credit when a higher tax is required.

Provided, that when an individual required to be licensed under this section employs only one additional person the tax shall be one half: Provided further, that any person, firm, or corporation engaged exclusively in the businesses enumerated in and licensed under this section shall not be liable for the tax provided in G.S. 105-54 to 105-56. All plumbing inspectors in cities or towns shall make a monthly report to the Commissioner of Revenue of all installation or repair permits issued for plumbing or heating.

With respect to electricians and electrical contractors, a license procured under this section shall cover the installation of electrical equipment, fixtures and wiring in or upon the consumer's premises, or on the "customer's side" of

the point of delivery of electric service, but shall not cover the installation of or service to transmission or distribution lines or work on the "distributor's side" of the point of delivery of electric service. With respect to plumbers and plumbing contractors, a license procured under this section shall cover plumbing work and plumbing installations in buildings and upon the premises upon which the buildings are situated and up to the connection with the sewer or water mains, but shall not cover the construction of or work upon water or sewer systems or mains.

Counties shall not levy any license tax on the business taxed under this section, but any city or town may levy a license tax not in excess of the base license tax which would be levied by the State if such city or town was the only city or town in which the licensee engaged in business. (1939, c. 158, s. 155; 1945, c. 708, s. 2; 1951, c. 643, s. 2; 1953, c. 981, s. 2.)

Editor's Note.—For brief comment on the 1953 amendment which rewrote the section, see 31 N.C.L. Rev. 434 (1953).

§ **105-92. Trading stamps.**—(a) Every person, firm, or corporation engaged in the business of issuing, selling, and/or delivering trading stamps, checks, receipts, certificates, tokens, or other similar devices to persons, firms, or corporations engaged in trade or business, with the understanding or agreement, expressed or implied, that the same shall be presented or given by the latter to their patrons as a discount, bonus, premium, or as an inducement to secure trade or patronage, and that the person, firm, or corporation selling and/or delivering the same will give to the person presenting or promising the same, money or other thing of value, or any commission or preference in any way on account of the possession or presentation thereof, shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of engaging in such business, and shall pay for such a license a tax of two hundred dollars ($200.00).

(b) This section shall not be construed to apply to a manufacturer or to a merchant who sells the goods, wares, or merchandise of such manufacturer, offering to present to the purchaser or customer a gift of certain value as an inducement to purchase such goods, wares or merchandise.

(c) Counties, cities, or towns may levy a license tax on the business taxed under this section and not in excess of that levied by the State. (1939, c. 158, s. 156.)

Gift Enterprises. — Dealers in trading stamps do not come within the provision of an ordinance taxing "gift enterprises." Winston v. Beeson, 135 N.C. 271, 47 S.E. 457 (1904).

§ **105-93. Process tax.**—(a) In every indictment or criminal proceeding finally disposed of in the superior court, the party convicted or adjudged to pay the cost shall pay a tax of two dollars ($2.00): Provided, that this tax shall not be levied in cases where the county is required to pay the cost.

(b) At the time of suing out the summons in a civil action in the superior court or other court of record, or the docketing of an appeal from the lower court in the superior court, the plaintiff or the appellant shall pay a tax of two dollars ($2.00): Provided, that this tax shall not be demanded of any plaintiff or appellant who has been duly authorized to sue or appeal in forma pauperis; but when in cases brought or in appeals in forma pauperis the costs are taxed against the defendants the tax shall be included in the bill of costs: Provided, that this tax shall not be levied in cases where the county is required to pay the cost and in tax foreclosure suits.

(c) No county, city, or town, or other municipal corporation shall be required to pay said tax upon the institution of any action brought by it, but whenever such plaintiff shall recover in such action, the said tax shall be included in the bill of costs and collected from the defendant.

(d) In any case where the party has paid the aforesaid cost in a civil action

and shall recover in the final decision of the case, then such cost so paid by him shall be retaxed against the losing party adjudged to pay the cost, plus five percent (5%) which the clerk of the superior court may retain for his services, and this shall be received by him, whether he is serving on a salary or fee basis, and if on a salary basis, shall be in addition to such salary.

(e) This section shall not apply to cases in the jurisdiction of magistrates' courts, whether civil or criminal, except upon appeals to the superior court from the judgment of such magistrate, and shall not apply for the docketing in the superior court of a transcript of a judgment rendered in any other court, whether of record or not.

(f) The tax provided for in this section shall be levied and assessed by the clerk of the superior court or other court in all cases described herein; and on the first Monday in January, April, July, and October of each and every year he shall make to the Commissioner of Revenue a sworn statement and report in detail, showing the number of the case on the docket, the name of the plaintiff or appellant in civil action, or the defendant in criminal action, and accompany such report and statement with the amount of such taxes collected, or which should have been collected, by him in the preceding three months. Any clerk of the superior court failing to make the report and pay the amount of tax due under this section within the first 15 days of the month in which such report is required to be made, shall be liable for a penalty of ten percent (10%) on the amount of tax that may be due at the time such report should be made.

(g) This section shall not apply in any county in which the district court has been established. (1939, c. 158, s. 157; 1967, c. 691, s. 50.)

Where Appeal Is from Clerk to Judge.—Where an appeal is taken from an order of the clerk of the superior court to the judge thereof, the judge has jurisdiction by mandate of § 1-276, and no "docketing" is involved within the meaning of this section, nor is the clerk a "lower court," so the two-dollar tax as here provided is inapplicable to the superior court with respect to appeals, and the judge acquires jurisdiction without the payment of the tax. Windsor v. McVay, 206 N.C. 730, 175 S.E. 83 (1934).

§ **105-94:** Repealed by Session Laws 1947, c. 501, s. 2.

§ **105-95:** Repealed by Session Laws 1947, c. 831, s. 2.

§ **105-96. Marble yards.**—Every person, firm, or corporation engaged in the business of manufacturing, erecting, jobbing, selling, or offering for sale monuments, marble tablets, gravestones or articles of like kind, or, if a nonresident, selling and erecting monuments, marble tablets, or gravestones at retail shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of engaging in such business in this State, and shall pay for such license the following tax:

In unincorporated communities and cities or towns of less than 2,000 population	$15.00
In cities or towns of 2,000 and less than 5,000 population	25.00
In cities or towns of 5,000 and less than 10,000 population	30.00
In cities or towns of 10,000 and less than 15,000 population	40.00
In cities or towns of 15,000 and less than 20,000 population	50.00
In cities or towns of 20,000 and less than 25,000 population	60.00
In cities or towns of 25,000 population or over	70.00

In addition to the license tax levied in this section, an additional tax shall be paid by the person, firm, or corporation engaged in the business taxed under this section of ten dollars ($10.00) for each person soliciting or selling.

Counties shall not levy any license tax on the business taxed under this section, and only the city or town in which the principal office, branch office or plant of any such business is located may levy a license tax on the business taxed under this section. No license tax levied by a city or town on the business taxed under this section shall be greater in amount than the tax herein levied by the State. (1939, c. 158, s. 160; 1951, c. 565.)

§ 105-97. Manufacturers of ice cream.—(a) Every person, firm, or corporation engaged in the business of manufacturing or distributing ice cream at wholesale shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of doing business in this State and shall pay for each factory or place where manufactured and/or stored for distribution the following base tax: Where the machine or the equipment unit used is of the continuous freezer type the rate of tax shall be one dollar and fifty cents ($1.50) per gallon capacity based on the rated capacity in gallons per hour according to manufacturer's rating of such freezer or freezers, but in no case shall the tax be less than ten dollars ($10.00) per annum for any freezer or freezers used; and where the machine or equipment unit used is not of the continuous freezer type the rate of tax shall be five dollars ($5.00) per gallon capacity for the freezer or freezers used; but in no case shall the tax be less than ten dollars ($10.00) per annum for any freezer or freezers used; provided that the Commissioner shall have the right to check the correctness or accuracy of any such manufacturer's rating herein referred to and to levy the tax herein authorized on the basis of such determined capacity; and provided, further that where no standard freezer equipment with manufacturer's capacity rating is used, a tax of fifty dollars ($50.00) shall apply; and provided, further that the license tax herein shall not apply to any farmer who manufactures and sells only the products of his own cows.

Each truck, automobile or other vehicle coming into this State from another state and selling and/or delivering ice cream on which the tax has not been paid under the provisions of this section shall pay an annual license tax for the privilege of doing business in this State in the sum of one hundred dollars ($100.00) per truck, automobile or vehicle. The license secured from the State under this section shall be posted in the cab of the truck, automobile or other vehicle.

(b) For the purpose of this section the words "ice cream" shall apply to ice cream, frozen custards, sherbets, water ices, and/or similar frozen products.

(c) Every retail dealer selling at retail ice cream purchased from a manufacturer other than a manufacturer who has paid the tax imposed in subsection (a) of this section or a manufacturer using counter freezer equipment and selling ice cream at retail only shall pay an annual license tax for the privilege of doing business in this State of ten dollars ($10.00).

(d) Counties shall not levy a license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of one fourth of the above. (1939, c. 158, s. 161; 1945, c. 708, s. 2.)

Applied in Eastern Carolina Tastee-Freez, Inc. v. City of Raleigh, 256 N.C. 208, 123 S.E.2d 632 (1962).

§ 105-98. Branch or chain stores.—Every person, firm, or corporation engaged in the business of operating or maintaining in this State, under the same general management, supervision, or ownership, two or more stores, or mercantile establishments where goods, wares, and/or merchandise are sold or offered for sale, or from which such goods, wares, and/or merchandise are sold and/or distributed at wholesale or retail, or who or which controls by lease, either as lessor or lessee, or by contract, the manner in which any such store or stores are operated, or the kinds, character, or brands of merchandise which are sold therein, shall be deemed a branch or chain store operator, and shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of engaging in such business of a branch or chain store operator, and shall pay for such license a tax according to the following schedule:

On each and every such store operated in this State in excess of one, sixty-five dollars ($65.00).

The term "chain store" as used in this section shall include stores operated under separate charters of incorporation, if there is common ownership of a

majority of stock in such separately incorporated companies, and/or if there is similarity of name of such separately incorporated companies, and/or if such separately incorporated companies have the benefit in whole or in part of group purchase of merchandise, or of common management. And in like manner the term "chain store" shall apply to any group of stores where a majority interest is owned by an individual or partnership.

The term "chain store" as used in this section shall not include retail outlets owned and operated by wholesale bakeries at locations separate and apart from the wholesale bakery under the same ownership, management and control of the wholesale bakery and used solely as outlets for the disposition at retail of surplus or broken products of the wholesale bakery operating same and which do not deal in any other products and where the operation of such stores is only incidental to the operation of the wholesale bakery, such stores being commonly known as "bakery thrift stores."

Counties shall not levy a license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of fifty dollars ($50.00) for each chain store located in such city or town. For the purpose of ascertaining the particular unit in each chain of stores not subject to taxation by the State under this section, and therefore not liable for city license tax, the particular store in which the principal office of the chain in this State is located shall be designated as the unit in the chain not subject to this tax.

In enforcing the provisions of this section, the Commissioner of Revenue may prorate the total amount of tax for a chain to the several units and the amount so prorated may be recovered from each unit in the chain in the same way as other taxes levied in this Article.

This section shall not apply to retail or wholesale dealers in motor vehicles and automotive equipment and supply dealers at wholesale who are not liable for tax hereunder on account of the sale of other merchandise, nor shall it apply to retail stores of nonprofit organizations engaged exclusively in the sale of merchandise processed by handicapped persons employed by any nonprofit organization in the State. This section shall not apply to manufacturers, retail or wholesale dealers solely by reason of the sales of fertilizers, farm chemicals, soil preparants or seeds. (1939, c. 158, s. 162; 1945, c. 708, s. 2; 1949, c. 392, s. 1; 1965, c. 607; 1967, cc. 551, 553.)

Editor's Note.—For brief comment on the 1949 amendment which rewrote the tax schedule, see 27 N.C.L. Rev. 481.

Constitutionality and Nature of Tax. — Public Laws 1929, c. 345, s. 162, imposing a license tax of fifty dollars for each store operated under the same ownership or management where there was more than one store so operated, was held constitutional and valid. Great Atl. & Pac. Tea Co. v. Maxwell, 199 N.C. 433, 154 S.E. 838 (1930).

The statute imposed a license tax for the purpose of raising revenue, and not an ad valorem tax. Nor did the statute seek to regulate chain stores under the police power, and the tax was in accord with the fiscal policy of the State of raising revenue for State purposes by the imposition of taxes on trades, professions, franchises and incomes, and leaving to the counties and municipalities for their support ad valorem taxes on real and personal property. Great Atl. & Pac. Tea Co. v. Maxwell, 199 N.C. 433, 154 S.E. 838 (1930).

Prior Law Invalid. — The prior law which imposed a license tax of fifty dollars each on stores operated in this State where there were six or more such stores under the same management, but which imposed no such tax on other mercantile establishments doing the same business when there were less than six stores under one management, was held an arbitrary classification, and unconstitutional. Great Atl. & Pac. Tea Co. v. Doughton, 196 N.C. 145, 144 S.E. 701 (1928).

"Chain Stores" Subject to Privilege License Tax Includes Montgomery Ward Catalogue Sales Agency.—See opinion of Attorney General to Mr. Fred R. Harwell, Tax Collector, City of Washington, 41 N.C.A.G. 33 (1970).

Corporation Operating Coal and Ice Yards Liable for Tax. — A corporation operating coal and ice yards at established places of business in several cities of the State, one or more yards being operated in each of the cities, and maintaining scales, bins, etc., and a staff composed of a yard foreman and other employees at each establishment, was held

liable for the tax imposed by a similar statute, such coal and ice yards being "mercantile establishments" within the meaning of the statute. Atlantic Ice & Coal Co. v. Maxwell, 210 N.C. 723, 188 S.E. 381 (1936).

§ 105-99. Wholesale distributors of motor fuels.—Every person, firm, or corporation engaged in the business of distributing or selling at wholesale any motor fuels in this State shall apply to the Commissioner for an additional annual license to engage in such business, and shall pay for such privilege an additional annual license tax determined and measured by the number of pumps owned or leased by the distributor or wholesaler through which such motor fuels are sold, at retail, according to the following schedule:

For the first 50 pumps	$ 2.00 per pump
For 51 additional pumps and not more than 100 pumps	4.00 per pump
For 101 additional pumps and not more than 200 pumps	5.00 per pump
For 201 additional pumps and not more than 300 pumps	6.00 per pump
For 301 additional pumps and not more than 400 pumps	7.00 per pump
For 401 additional pumps and not more than 500 pumps	8.00 per pump
For 501 additional pumps and not more than 600 pumps	9.00 per pump
For all over 600 pumps	10.00 per pump

Any contract or agreement, oral or written, express or implied by the terms or the effects of which the tax herein imposed shall be passed on directly or indirectly to any person, firm, or corporation not engaged in the business hereby taxed is hereby declared to be against the public policy of this State and null and void, and any person, firm, or corporation negotiating such an agreement, or receiving the benefits thereof, shall be guilty of a misdemeanor and fined or imprisoned in the discretion of the court.

The tax herein imposed shall be in addition to all other taxes imposed by this Chapter or under any other laws.

Counties, cities and towns shall not levy any tax by reason of the additional tax imposed by this section, but this section shall in no way affect the right given to counties, cities, and towns to levy taxes under G.S. 105-89.

The business taxed under this section shall not be taxed under G.S. 105-98. (1939, c. 158, s. 162½; 1963, c. 1169, s. 12.)

§ 105-100. Patent rights and formulas.—Every person, firm, or corporation engaged in the business of selling or offering for sale any patent right or formula shall apply in advance and obtain from the Commissioner of Revenue a separate State license for each and every county in this State where such patent right or formula is to be sold or offered for sale, and shall pay for each such separate license a tax of ten dollars ($10.00).

Counties, cities, or towns may levy a license on the business taxed under this section not in excess of the taxes levied by the State. (1939, c. 158, s. 163.)

§ 105-101. Tax on seals affixed by officers.—(a) Whenever the seal of the State, of the State Treasurer, the Secretary of State, or of any other public officer required by law to keep a seal (not including clerks of courts, notaries public, and other county officers) shall be affixed to any paper, the tax to be paid by the party applying for same shall be as follows:

For the Great Seal of the State on warrants of extradition for fugitives from justice from other states, the same fee and seal tax shall be collected from the state making the requisition which is charged in this State for like service.	
For the seal of the State Department, to be collected by the Secretary of State	$1.00
For the seal of the State Treasurer, to be collected by him	1.00
For a scroll, when used in the absence of a seal, the tax shall be on the scroll, and the same as for the seal.	

(b) All officers shall keep a true, full, and accurate account of the number of

times any of such seals or scrolls are used, and shall deliver to the Governor of the State a sworn statement thereof.

(c) All seals affixed for the use of any county of the State, used on the commissions of officers of the national guard, and any other public officer not having a salary, under the pension law, or under any process of court, or to any commission issued by the Governor to any person in the employ of the State, or to be employed by the State shall be exempt from taxation. (1939, c. 158, s. 166; 1961, c. 1218.)

§ **105-102. Junk dealers.** — Every person, firm, or corporation, except those described in G.S. 105-102.2, engaged in the business of buying and/or selling or dealing in what is commonly known as junk, including scrap metals, glass, wastepaper, waste burlap, waste cloth, and cordage of every nature, kind and description, shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of engaging in such business in this State and shall pay for such license an annual tax for each location where such business is carried on, according to the following schedule:

In unincorporated communities and in cities or towns of less than 2,500 population	$ 25.00
In cities or towns of 2,500 and less than 5,000 population	30.00
In cities or towns of 5,000 and less than 10,000 population	50.00
In cities or towns of 10,000 and less than 20,000 population	75.00
In cities or towns of 20,000 and less than 30,000 population	100.00
In cities or towns of 30,000 population or more	125.00

Provided, that if any person, firm, or corporation shall engage in the business enumerated in this section within a radius of two miles of the corporate limits of any city or town in this State, he or it shall pay a tax based on the population of such city or town according to the schedule above set out: Provided further, that any person, firm or corporation engaged in the business enumerated in this section who does not maintain an established place of business in this State and who buys and/or sells or disposes of junk and other waste materials purchased or collected in this State shall be liable for the license tax herein imposed upon the same basis as if such person, firm or corporation maintained a place of business in each county and municipality where such activity is carried on.

Counties, cities and towns may levy a license tax not in excess of one half of that levied by the State; provided, however, that any person, firm or corporation dealing solely in waste paper shall not be liable for said tax; and provided further, the license levied herein shall apply to persons engaged in the collection of scrap, who maintain no regular place of business, and further that salvage committees operating, under State or federal sponsorship, community scrap yards where personal profit does not accrue, shall not be required to pay license under this section. (1939, c. 158, s. 168; 1943, c. 400, s. 2; 1949, c. 580, ss. 1, 2; 1957, c. 949; 1965, c. 1035, s. 2.)

Municipal Tax. — The findings of fact made by the trial court under the agreement of the parties were held to support the court's conclusion of law that plaintiff, although his place of business was located one-half mile outside the limits of defendant municipality, was engaged in the business of buying and selling junk within the municipality, and the judgment holding plaintiff liable for license tax levied by the municipality under authority of this section was affirmed. Weinstein v. City of Raleigh, 219 N.C. 643, 14 S.E.2d 661 (1941). See Weinstein v. City of Raleigh, 218 N.C. 549, 11 S.E.2d 560 (1940), wherein cause was remanded because facts agreed were conflicting.

Stated in Hinshaw v. McIver, 244 N.C. 256, 93 S.E.2d 90 (1956).

§ **105-102.1. Certain cooperative associations.**—(a) Every cooperative marketing association operating solely for the purpose of marketing the products of its members or other farmers, which operations may include activities which are directly related to such marketing activities, and turning

back to them the proceeds of sales, less the necessary operating expenses of the association, including interest and dividends on capital stock, on the basis of the quantity of product furnished by them, and every mutual ditch or irrigation association, mutual or cooperative telephone association or company, mutual canning association, cooperative breeding association, or like organizations or associations of a purely local character deriving receipts solely from assessments, dues or fees collected from members for the sole purpose of meeting expenses, or production credit associations organized under the act of Congress known as the Farm Credit Act of 1933, shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of engaging in such business in this State, and shall pay for such license an annual tax of ten dollars ($10.00), but shall not be required to pay any other tax levied by the provisions of this Article.

(b) Counties, cities and towns may not levy any license tax upon such cooperative marketing associations or production credit associations organized under the act of Congress known as the Farm Credit Act of 1933. (1955, c. 1313, s. 1; 1957, c. 1340, s. 2; 1963, c. 601, ss. 1, 2.)

Opinions of Attorney General. — Mr. Frederick J. Sternberg, Attorney for Town of Elon College, 40 N.C.A.G. 860 (1969).

§ **105-102.2. Scrap processors.**—Every person, firm or corporation engaged in the business of buying scrap iron and metals, for the specific purpose of processing into raw materials for remelting purposes only, and whose principal product is ferrous and nonferrous scrap for shipment to steel mills, foundries, smelters and refineries, maintaining an established place of business in this State and having facilities and machinery designed for such processing, shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of engaging in such business in this State and shall pay for such license an annual tax for each location where such business is carried on according to the following schedule:

In unincorporated communities and in cities or towns of less than 2,500 population	$ 25.00
In cities or towns of 2,500 and less than 5,000 population	30.00
In cities or towns of 5,000 and less than 10,000 population	50.00
In cities or towns of 10,000 and less than 20,000 population	75.00
In cities or towns of 20,000 and less than 30,000 population	100.00
In cities or towns of 30,000 population or more	125.00

Provided, that if any person, firm, or corporation shall engage in the business enumerated in this section within a radius of two miles of the corporate limits of any city or town in this State, he or it shall pay a tax based on the population of such city or town according to the schedule above set out.

Counties, cities and towns may levy a license tax not in excess of one half of that levied by the State. (1965, c. 1035, s. 1.)

Administrative Provisions of Schedule B.

§ **105-103. Unlawful to operate without license.**—When a license tax is required by law, and whenever the General Assembly shall levy a license tax on any business, trade, employment, or profession, or for doing any act, it shall be unlawful for any person, firm, or corporation without a license to engage in such business, trade, employment, profession, or do the act; and when such tax is imposed it shall be lawful to grant a license for the business, trade, employment, or for doing the act; and no person, firm, or corporation shall be allowed the privilege of exercising any business, trade, employment, profession, or the doing of any act taxed in this schedule throughout the State under one license, except under a statewide license. (1939, c. 158, s. 181.)

§ **105-104. Manner of obtaining license from the Commissioner of Revenue.**—(a) Every person, firm, or corporation desiring to obtain a State license for the privilege of engaging in any business, trade, employment, profession, or of the doing of any act for which a State license is required, shall, unless otherwise provided by law, make application therefor in writing to the Commissioner of Revenue, in which shall be stated the county, city, or town and the definite place therein where the business, trade, employment, or profession is to be exercised; the name and resident address of the applicant, whether the applicant is an individual, firm, or corporation; the nature of the business, trade, employment, or profession; number of years applicant has prosecuted such business, trade, employment, or profession in this State, and such other information as may be required by the Commissioner of Revenue. The application shall be accompanied by the license tax prescribed in this Article.

(b) Upon receipt of the application for a State license with the tax prescribed by this Article, the Commissioner of Revenue, if satisfied of its correctness, shall issue a State license to the applicant to engage in the business, trade, employment, or profession in the name of and at the place set out in the application. No license issued by the Commissioner of Revenue shall be valid or have any legal effect unless and until the tax prescribed by law has been paid, and the fact of such shall appear on the face of the license. (1939, c. 158, s. 182.)

§ **105-105. Persons, firms, and corporations engaged in more than one business to pay tax on each.**—Where any person, firm, or corporation is engaged in more than one business, trade, employment, or profession which is made under the provisions of this Article subject to State license taxes, such persons, firms, or corporations shall pay the license tax prescribed in this Article for each separate business, trade, employment, or profession. (1939, c. 158, s. 183.)

§ **105-106. Effect of change in name of firm.**—No change in the name of a firm, partnership, or corporation, nor the taking in of a new partner, nor the withdrawal of one or more of the firm, shall be considered as commencing business; but if any one or more of the partners remain in the firm, or if there is change in ownership of less than a majority of the stock, if a corporation, the business shall be regarded as continuing. (1939, c. 158, s. 184.)

§ **105-107. License may be changed when place of business is changed.**—When a person, firm, or corporation has obtained a State license to engage in any business, trade, employment, or profession at any definite location in a county, and desires to remove to another location in the same county, the Commissioner of Revenue may, upon proper application, grant such person, firm, or corporation permission to make such move, and may endorse upon the State license his approval of change in location. (1939, c. 158, s. 185.)

§ **105-108. Property used in a licensed business not exempt from taxation.**—A State license, issued under any of the provisions of this Article shall not be construed to exempt from other forms of taxation the property employed in such licensed business, trade, employment, or profession. (1939, c. 158, s. 186.)

§ **105-109. Engaging in business without a license.**—(a) All State license taxes under this Article or schedule, unless otherwise provided for, shall be due and payable annually on or before the first day of July of each year, or at the date of engaging in such business, trade, employment and/or profession, or doing the act.

(b) If any person, firm, or corporation shall continue the business, trade, employment, or profession, or to do the act, after the expiration of a license

previously issued, without obtaining a new license, he or it shall be guilty of a misdemeanor, and upon conviction shall be fined and/or imprisoned in the discretion of the court, but the fine shall not be less than twenty percent (20%) of the tax in addition to the tax and the costs; and if such failure to apply for and obtain a new license be continued, such person, firm, or corporation shall pay additional tax of five per centum (5%) of the amount of the State license tax which was due and payable on the first day of July of the current year, in addition to the State license tax imposed by this Article, for each and every 30 days, or fraction thereof, that such State license tax remains unpaid from the date that same was due and payable, and such additional tax shall be assessed by the Commissioner of Revenue and paid with the State license tax, and shall become a part of the State license tax. The penalties for delayed payment hereinbefore provided shall not impair the obligation to procure a license in advance or modify any of the pains and penalties for failure to do so.

The provisions of this section shall apply to taxes levied by the counties of the State under authority of this Article in the same manner and to the same extent as they apply to taxes levied by the State.

(c) If any person, firm, or corporation shall commence to exercise any privilege or to promote any business, trade, employment, or profession, or to do any act requiring a State license under this Article without such State license, he or it shall be guilty of a misdemeanor, and shall be fined and/or imprisoned in the discretion of the court; and if such failure, neglect, or refusal to apply for and obtain such State license be continued, such person, firm, or corporation shall pay an additional tax of five per centum (5%) of the amount of such State license tax which was due and payable at the commencement of the business, trade, employment or profession, or doing the act, in addition to the State license tax imposed by this Article, for each and every 30 days, or fraction thereof, that such State license tax remains unpaid from the date that same was due and payable, and such additional tax shall be assessed by the Commissioner of Revenue and paid with the State license tax and shall become a part of the State license tax.

(d) If any person, firm, or corporation shall fail, refuse, or neglect to make immediate payment of any taxes due and payable under this Article, additional taxes, and/or any penalties imposed pursuant thereto, upon demand, the Commissioner of Revenue shall certify the same to the sheriff of the county in which such delinquent lives or has his place of business, and such sheriff shall have the power and shall levy upon any personal or real property owned by such delinquent person, firm, or corporation, and sell the same for the payment of the said tax or taxes, penalty and costs, in the same manner as provided by law for the levy and sale of property for the collection of other taxes; and if sufficient property is not found, the said sheriff or deputy commissioner shall swear out a warrant before some justice of the peace or recorder in the county for the violation of the provisions of this Article and as provided in this Article.

(e) The provisions of this section for the collection of delinquent license taxes shall apply to license taxes levied by the cities and towns of this State under authority of this Article, or any other provision of law, in the same manner and to the same extent as they apply to taxes levied by the State and counties of this State: Provided, the municipal officer charged with the duty of collecting municipal taxes may exercise the powers vested in the sheriff by this section. (1939, c. 158, s. 187; 1957, c. 859; 1963, c. 294, s. 5.)

§ 105-110. Each day's continuance in business without a State license a separate offense.—Each and every day that any person, firm, or corporation shall continue to exercise or engage in any business, trade, employment, or profession, or do any act in violation of the provisions of this Article, shall be and constitute a distinct and a separate offense. (1939, c. 158, s. 188.)

§ **105-111. Duties of Commissioner of Revenue.** — (a) Except where otherwise provided, the Commissioner of Revenue shall be the duly authorized agent of this State for the issuing of all State licenses and the collection of all license taxes under this Article, and it shall be his duty and the duty of his deputies to make diligent inquiry to ascertain whether all persons, firms, or corporations in the various counties of the State who are taxable under the provisions of this Article have applied for the State license and paid the tax thereon levied.

(b) The Commissioner of Revenue shall continually keep in his possession a sufficient supply of blank State license certificates, with corresponding sheets and duplicates consecutively numbered; shall stamp across each State license certificate that is to be good and valid in each and every county of the State the words "statewide license," and shall stamp or imprint on each and every license certificate the words "issued by the Commissioner of Revenue."

(c) Neither the Commissioner of Revenue nor any of his deputies shall issue any duplicate license unless expressly authorized to do so by a provision of this Article or schedule, and unless the original license is lost or has become so mutilated as to be illegible, and in such cases the Commissioner of Revenue is authorized to issue a duplicate certificate for which the tax is paid, and shall stamp upon its face "duplicate." (1939, c. 158, s. 189.)

§ **105-112. License to be procured before beginning business.**—(a) Every person, firm, or corporation engaging in any business, trade, and/or profession, or doing any act for which a State license is required and a tax is to be paid under the provisions of this Article or schedule, shall, annually in advance, on or before the first day of July of each year, or before engaging in such business, trade, and/or profession, or doing the act, apply for and obtain from the Commissioner of Revenue a State license for the privilege of engaging in such business, trade, and/or profession, or doing such act, and shall pay the tax levied therefor.

(b) Licenses shall be kept posted where business is carried on. No person, firm, or corporation shall engage in any business, trade, and/or profession, or do the act for which a State license is required in this Article or schedule, without having such State license posted conspicuously at the place where such business, trade, and/or profession is carried on; and if the business, trade, and/or profession is such that license cannot be so posted, then the itinerant licensee shall have such license required by this Article or schedule in his actual possession at the time of carrying on such business, trade, and/or profession, or doing the act named in this Article or schedule, or a duplicate thereof.

(c) Any person, firm, or corporation failing, neglecting, or refusing to have the State license required under this Article or schedule posted conspicuously at the place of business for which the license was obtained, or to have the same or a duplicate thereof in actual possession if an itinerant, shall pay an additional tax of twenty-five dollars ($25.00) for each and every separate offense, and each day's failure, neglect, or refusal shall constitute a separate offense. (1939, c. 158, s. 190; 1963, c. 294, s. 6.)

§ **105-113. Sheriff and city clerk to report.**—The sheriff of each county and the clerk of the board of aldermen of each city or town in the State shall, on or before the fifteenth day of July of each year, make a report to the Commissioner of Revenue, containing the names and the business, trade, and/or the profession of every person, firm, or corporation in his county or city who or which is required to apply for and obtain a State license under the provisions of this Article or schedule, and upon such forms as shall be provided and in such detail as may be required by the Commissioner of Revenue. (1939, c. 158, s. 191; 1963, c. 294, s. 7.)

§ 105-113.1: Deleted.

Editor's Note.—This section, which related to privilege taxes payable in advance and provided for the reduction of taxes levied under certain sections, was derived from Session Laws 1943, c. 400, s. 2, and was amended by Session Laws 1945, c. 708, s. 2. As the section expired by limitation on June 1, 1947, it has been deleted.

Article 2A.

Schedule B-A. Cigarette Tax.

§ 105-113.2. Short title.—This Article may be cited as the "Cigarette Tax Act" or "Cigarette Tax Article." (1969, c. 1075, s. 2.)

Editor's Note. — Session Laws 1969, c. 1075, s. 8, provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof." As to effective date of this Article, see § 105-113.40.

§ 105-113.3. Purpose.—It is hereby declared to be the intent and purpose of this Article that the incidence of the tax herein provided for shall rest upon the ultimate consumer and not upon the grower or processor of leaf tobacco or upon the manufacturer of cigarettes. This tax shall be paid to the State only once, regardless of the number of times the cigarettes may be sold in this State, but it is the intent of this Article that such tax shall be added to the sales price and passed on from successive sellers to successive purchasers so that it may be included in the ultimate purchase price of the final or last purchaser. The amount of the tax may be stated separately from the price of the cigarettes on all price display signs, sales or delivery slips, bills and statements which advertise or indicate the price, but it is not required that it be stated in such manner or in any other manner. The provisions of this section shall in no way affect the assessment, levy or collection of the taxes provided for by this Article, as the same may be more specifically provided herein with respect to activities hereinafter described, but merely states the general intent with respect to this Article. (1969, c. 1075, s. 2.)

§ 105-113.4. Definitions.—The following words, terms, and phrases when used in this Article have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

(1) "Cigarette" means—
   a. Any roll of tobacco wrapped in paper or in any substance not containing tobacco, and
   b. Any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in subparagraph (1) a above.

(2) "Commissioner" means Commissioner of Revenue of the State of North Carolina.

(3) "Distributor" means any person, wherever resident or located, who purchases unstamped cigarettes directly from the manufacturer thereof and stores, sells or otherwise disposes of the same; and also any person who manufactures or produces cigarettes or causes them to be manufactured or produced.

(4) "In this State" or "within this State" means within the exterior limits of the State of North Carolina, and includes all territory within such limits owned by, leased by or ceded to the United States of America.

(5) "Licensed distributor" means any distributor, as defined in this Article, licensed under the provisions of this Article.

(6) "Manufacturer" means any person engaged in the manufacture or production of cigarettes.

(7) "Package" means the individual packet, can, box or other container used to contain and to convey cigarettes to the consumer.
(8) "Person" means and includes any individual, firm, copartnership, joint venture, association, corporation, estate, trust, business trust, receiver, syndicate, or any other group or combination acting as a unit, the State or any of its political subdivisions, and the plural as well as the singular number.
(9) "Retail dealer" means any person other than a distributor engaged in this State in the business of selling cigarettes at retail.
(10) "Selling" or "sale" means any sale, transfer, exchange, barter, gift, or offer for sale and distribution, in any manner or by any means whatsoever.
(11) "Stamp" means any impression, device, stamp, label or print manufactured, printed or made as prescribed by the Commissioner under this Article.
(12) "Unstamped" means not bearing a North Carolina cigarette tax stamp prescribed by the Commissioner under this Article.
(13) "Use" means the exercise of any right or power over cigarettes, incident to the ownership or possession thereof, other than the making of a sale thereof in the course of engaging in a business of selling cigarettes and shall include the keeping or retention of cigarettes for use. (1969, c. 1075, s. 2.)

§ **105-113.5. Privilege tax levied.**—In addition to all other taxes and fees, a tax is hereby levied upon the sale or possession for sale within this State, by distributors, of all cigarettes at the rate of one mill per individual cigarette.

The tax hereby levied shall not apply to free distribution of sample cigarettes in packages containing five or fewer cigarettes nor to any package of cigarettes customarily donated free of charge by manufacturers of cigarettes to employees in factories where cigarettes are manufactured in this State where such packages of cigarettes are not taxed by the federal government. (1969, c. 1075, s. 2; c. 1246, s. 1.)

Editor's Note.—Session Laws 1969, c. 1246, added the second paragraph to the above section as enacted by Session Laws 1969, c. 1075.

§ **105-113.6. Use tax levied.**—In addition to all other taxes and fees, a tax is hereby levied upon the sale or possession for sale by all persons other than distributors, and upon the use, consumption, and possession for use or consumption of cigarettes within this State at the rate set forth in G.S. 105-113.5; provided, that the tax levied by this section shall not be applicable to the sale or possession for sale by persons other than distributors, or to the use, consumption or possession for use or consumption of cigarettes with respect to which the tax levied by the provisions of G.S. 105-113.5 has been computed and paid. (1969, c. 1075, s. 2.)

§ **105-113.7. Tax with respect to inventory on effective date of Article.**—Every person subject to the taxes levied in G.S. 105-113.5 and G.S. 105-113.6 who, on the effective date of this Article, has on hand any cigarettes shall file a complete inventory thereof within 20 days thereafter, and shall pay to the Commissioner at the time of filing such inventory a tax with respect thereto computed at the rate set forth in G.S. 105-113.5 and G.S. 105-113.6. All provisions of this Article relative to the collection, verification and administration of the tax herein imposed shall, insofar as pertinent, be applicable to the tax imposed by this section, but the affixing of stamps as evidence of the payment of such tax by persons subject to the taxes levied in G.S. 105-113.6 shall not be necessary except as the Commissioner by regulation or administrative rule may require. (1969, c. 1075, s. 2.)

Cross Reference.—As to effective date of this Article, see § 105-113.40.

§ **105-113.8. Federal Constitution and statutes.**—Any activities which this Article may purport to tax in violation of the Constitution of the United States or any federal statute are hereby expressly exempted from taxation under this Article. (1969, c. 1075, s. 2.)

§ **105-113.9. Out-of-state shipments.**—Any distributor engaged in interstate business shall be permitted to set aside such part of his stock as may be necessary for the conduct of such interstate business without paying the tax or affixing the stamps otherwise required by this Article, but only if such distributor complies with the regulations and administrative rules concerning keeping of records, making of reports, posting of bond and such other rules and regulations as may be promulgated by the Commissioner for the administration of this Article. (1969, c. 1075, s. 2.)

§ **105-113.10. Manufacturers shipping to distributors exempt.**—Any manufacturer shipping cigarettes to other distributors who are licensed to affix stamps as provided in this Article may, upon application to the Commissioner and upon compliance with such regulations and administrative rules in regard thereto as may be promulgated by the Commissioner, be relieved of the requirement of paying the taxes and affixing the stamps required by this Article, but no manufacturer may be relieved of the requirement to be licensed as a distributor in order to make shipments, including drop shipments, to a retail dealer or ultimate user. However, the Commissioner may permit monthly reports from the manufacturer instead of requiring stamps to be affixed on free cigarettes given complimentary by the manufacturer has imprinted on said package the wording "State tax paid." (1969, c. 1075, s. 2; c. 1246, s. 2.)

Editor's Note.—Session Laws 1969, c. 1246, deleted "when the package contains only five or less cigarettes and" preceding "has imprinted" in the last sentence of this section as enacted by Session Laws 1969, c. 1075.

§ **105-113.11. Licenses required.**—After the effective date of this Article, no person shall engage in business as a distributor in this State, without having first obtained from the Commissioner the appropriate license for that purpose as prescribed herein. Any license required by this Article shall be in addition to any and all other licenses which may be required by law. (1969, c. 1075, s. 2.)

Cross Reference. — As to effective date of this Article, see § 105-113.40.

§ **105-113.12. Distributors' license.**—(a) Distributors shall obtain, for each place of business, a continuing license, for which a fee of twenty-five dollars ($25.00) shall be paid.

(b) For the purposes of this section, "place of business" means any place where unstamped packages of cigarettes are received or stored by a distributor for the purposes of affixing stamps thereto, and any place where a distributor actually affixes stamps to unstamped packages of cigarettes.

(c) Out-of-state distributors may obtain appropriate distributors' licenses upon compliance with the provisions of G.S. 105-113.24, for which a fee of twenty-five dollars ($25.00) shall be paid for each such license. (1969, c. 1075, s. 2.)

§ **105-113.13. Issuance of licenses.**—(a) All licenses shall be issued by the Commissioner.

(b) No license shall be issued to a distributor except upon payment of the full fee therefor.

(c) Prior to the issuance of any license under this Article, the Commissioner may cause to be made such investigation as he deems necessary respecting the eligibility of the applicant to receive such license and the accuracy of the

information contained in the application therefor. The Commissioner may refrain from the issuance of a license where he has reasonable cause to believe that the applicant has wilfully withheld information requested by him for the purpose of determining the eligibility of the applicant to receive a license or where he has reasonable cause to believe that the information submitted in the application is false or misleading and is not made in good faith.

(d) When the Commissioner deems it necessary to the proper administration of this Article, he may require any distributor upon application for a license to file with him a bond payable to the State of North Carolina in such amount and upon such conditions as in the opinion of the Commissioner will guarantee the performance of the duties and the discharge of the liabilities of said distributor under this Article. Such bond shall be executed by the distributor as principal and by an indemnity company licensed to do business under the insurance laws of this State as surety.

(e) No license shall be assignable or transferable. (1969, c. 1075, s. 2.)

§ **105-113.14. Refund of license fee.**—No refund of a license fee shall be paid to any person upon the surrender, suspension or revocation of any license except a license fee paid or collected in error. (1969, c. 1075, s. 2.)

§ **105-113.15. Duplicate or amended license.**—Upon application to the Commissioner, a distributor may obtain without charge:

(1) A duplicate license, upon a satisfactory showing that the original has been lost, destroyed or defaced;

(2) An amended license, upon a satisfactory showing that the location of the place of business represented by the license has been changed.

Each duplicate or amended license shall bear the words "duplicate license" or "amended license" on its face, as appropriate. (1969, c. 1075, s. 2.)

§ **105-113.16. Revocation of license.** — (a) The Commissioner shall, without notice or hearing, revoke the license of every distributor who voluntarily surrenders the same.

(b) Whenever any distributor violates any provision of this Article or any regulation or administrative rule of the Commissioner made pursuant to the provisions of this Article, or has ceased to act in the capacity for which the license was issued, the Commissioner, upon hearing, after giving the licensed distributor 10 days' notice in writing, specifying the time and place of hearing and requiring him to show cause why his license should not be revoked, may revoke or suspend the license held by such distributor. The notice may be served personally or by registered mail directed to the last known address of such person. All provisions with respect to review and appeals of the Commissioner's decisions as provided by G.S. 105-241.2, G.S. 105-241.3 and G.S. 105-241.4 shall be applicable to this subsection (b).

(c) No distributor whose license has been suspended or revoked shall sell cigarettes or permit the same to be sold during the period of such suspension or revocation on premises occupied by him or upon other premises controlled by him or others in any other manner or form whatever.

(d) No disciplinary, penal or regulatory proceeding or action shall be barred or abated by the expiration, transfer, surrender, continuance, renewal or extension of any license issued under the provisions of this Article.

(e) If any person licensed under the provisions of G.S. 105-65.1, G.S. 105-84, G.S. 105-164.4, G.S. 105-164.5, G.S. 105-164.6 and G.S. 105-164.29 shall be convicted by any court of competent jurisdiction in this State of any offense under this Article, the Commissioner is authorized to revoke any or all licenses issued to such person under the provisions of the aforesaid sections of Chapter 105 of the General Statutes. The provisions of subsection (b) above relative to notice, hearing, review and appeal shall apply to this subsection (e). (1969, c. 1075, s. 2.)

§ **105-113.17. Exhibit of license; identification of dispensers.**—(a) Each license, or certificate thereof, or such other evidence of license as the Commissioner may authorize, shall be exhibited in the place of business for which it is issued and in such manner as may be prescribed by the Commissioner.

(b) Every vending machine which dispenses cigarettes shall be identified as to ownership in such manner as the Commissioner may prescribe. (1969, c. 1075, s. 2.)

§ **105-113.18. Reports.**—The following reports are required to be filed with the Commissioner:

(1) Every distributor required to affix stamps as prescribed herein shall file a report on or before the twentieth day of each month, in such form as the Commissioner shall prescribe, which report shall disclose the quantity of cigarettes on hand on the first and last days of the calendar month immediately preceding the month in which such report is required, the amount of stamps purchased, used and on hand during the report period, and such other information as the Commissioner shall prescribe.

(2) Every other person who has acquired unstamped cigarettes for sale, use or consumption subject to the tax imposed by this Article shall, within 96 hours after receipt of same, complete and file, in such form as the Commissioner shall prescribe, a report showing the amount of cigarettes so received and such other information as the Commissioner shall prescribe. Said report shall be accompanied by a remittance of the full amount of the tax.

(3) Any person, except a licensed distributor, who transports cigarettes upon the public highways, roads or streets of this State, upon notice from the Commissioner, shall file a report in such form, on such dates, and containing such information as the Commissioner shall prescribe.

(4) Every distributor, as that term is defined in G.S. 105-250.1, shall include in the report required by G.S. 105-250.1 to be filed as of January 1 of each year, the location and serial number of each vending machine dispensing cigarettes owned and placed on location by said distributor. (1969, c. 1075, s. 2.)

§ **105-113.19. Commissioner to provide stamps.**—(a) The taxes levied by this Article shall be paid or payment shall be evidenced by the use of stamps, except as provided in G.S. 105-113.6. The Commissioner shall make arrangements with some manufacturer to manufacture taxpaid cigarette tax stamps provided for in this Article. The Commissioner shall prescribe the form, design, denominations and such other matters as may be necessary with respect to said stamps. The Commissioner may sell such stamps directly to taxpayers and he may also make arrangements for release of taxpaid stamps to taxpayers by the manufacturer of said stamps. Said manufacturer shall furnish such bond as the Commissioner may deem advisable, in such amount and upon such conditions as in the opinion of the Commissioner will adequately protect the State in the collection of the taxes levied by this Article.

(b) Payment in full shall accompany application for purchase of stamps; provided, however, a licensed distributor may purchase stamps on credit if such distributor has filed with the Commissioner a bond satisfactory to the Commissioner in an amount not less than the amount to be paid for said stamps and prior to the date any such credit purchases are made. Such licensed distributor shall pay for said credit purchases of stamps on or before the tenth day of the month next following the date of purchase, and the bond herein required shall be conditioned upon such payment. The bond shall be executed

by the distributor as principal and by an indemnity company licensed to do business under the insurance laws of this State, as surety.

(c) A licensed distributor using a stamp metering machine as provided for in G.S. 105-113.23 may make payment upon the same terms and conditions as in the case of the purchase of stamps as set forth in subsection (b) of this section. (1969, c. 1075, s. 2.)

§ **105-113.20. Distributors to affix stamps.**—Only licensed distributors shall affix stamps. A licensed distributor shall not sell, borrow, loan, buy or exchange stamps to, from or with any other person, except as provided in G.S. 105-113.19.

Unless stamps have been previously affixed, the stamps required by this Article shall be affixed to packages by the licensed distributor within 48 hours of the receipt of all unstamped cigarettes, exclusive of Saturdays, Sundays and legal holidays of this State, and prior to any and all deliveries to other persons except deliveries to points outside the State, deliveries by manufacturers to licensed distributors and those deliveries which this State is prohibited from taxing under the Constitution or the statutes of the United States. (1969, c. 1075, s. 2.)

§ **105-113.21. Discount on sales of stamps.** — On sales of stamps, the Commissioner shall allow a discount of seven twenty-fourths cent (7/24¢) per stamp as compensation for the services and expenses of the licensed distributor in handling and affixing such stamps to packages. No discount shall be allowed or given on any sales of stamps in amounts less than one hundred dollars ($100.00). (1969, c. 1075, s. 2; cc. 1222, 1238.)

Editor's Note.—Session Laws 1969, cc. 1222 and 1238, substituted the above section for § 105-113.21 as enacted by Session Laws 1969, c. 1075, s. 2.

§ **105-113.22. Manner of affixing and cancelling stamps.**—The Commissioner shall regulate and prescribe the manner of affixing and cancelling stamps, but no more than one stamp shall be affixed to any package and that stamp shall represent the proper tax paid. (1969, c. 1075, s. 2.)

§ **105-113.23. Stamp metering machines.**—The Commissioner, if he shall determine that it is practicable in any case to permit licensed distributors to impress on or attach to each package of cigarettes evidence of tax payment by means of a metering machine, in lieu of stamps, may authorize any licensed distributor to use any metering machine approved by the Commissioner, such machine to be sealed by the Commissioner before being used and used in accordance with rules and regulations prescribed by the Commissioner. All costs and expenses of procuring and using any metering machine shall be borne by the user. (1969, c. 1075, s. 2.)

§ **105-113.24. Sale of stamps to out-of-state distributors.** — (a) In case the Commissioner shall find that the collection of any tax imposed by this Article would be facilitated thereby, he may authorize, under reasonable conditions, any distributor outside this State engaged in the business of selling and shipping cigarettes into the State, upon complying with the rules and regulations of the Commissioner, to purchase and affix or cause to be affixed on behalf of any purchaser of cigarettes, who would otherwise be taxable therefor, the stamps required by this Article, or may authorize the use of a machine by such person in the same manner and under the same conditions as set forth in G.S. 105-113.23.

(b) Any such nonresident distributor shall be required to agree to submit his books, accounts, and records to reasonable examination by the Commissioner or his duly authorized agents. Each such nonresident distributor shall file with the Commissioner a performance bond fulfilling the terms and conditions set forth with respect to bonds in subsection (d) of G.S. 105-113.13.

(c) Each such nonresident distributor, other than a foreign corporation

which has qualified with the Secretary of State as doing business in this State shall, by a duly executed instrument filed in the office of the Secretary of State, constitute and appoint the Secretary of State his lawful attorney in fact upon whom any original process in any action or legal proceeding against such nonresident distributor arising out of any matter relating to this Article may be served, and therein agree that any original process against him so served shall be of the same force and effect as if served on him within this State, and that the authority thereof shall continue in force irrevocably so long as any such nonresident distributor shall remain liable for any taxes, interest and penalties under this Article.

(d) Any nonresident distributor who shall comply with the provisions of this section may be licensed as a distributor. (1969, c. 1075, s. 2.)

§ 105-113.25. Redemption and refund. — The Commissioner shall redeem any unused or mutilated, but identifiable, stamps that any distributor may present for redemption, and refund therefor the face value of said stamps, less the discount allowed at the time of the purchase of the stamps by said distributor. In the event any stamped cigarettes are shipped out of this State, or are sold to those agencies or instrumentalities which this State is prohibited from taxing under the Constitution or statutes of the United States, by any distributor, a refund of the face value of the said stamps less the discount allowed by the Commissioner at the time of the purchase of the stamps by said distributor, shall be made upon the application of the distributor on forms prescribed by the Commissioner together with such evidence and proof of sale as the Commissioner shall require. (1969, c. 1075, s. 2.)

§ 105-113.26. Records to be kept. — Every person required to be licensed under this Article and every person required to make reports under this Article shall keep complete and accurate records of all sales and such other information as is required under this Article. The kind and form of such records may be prescribed by the Commissioner and all records shall be so kept as to be adequate to enable him to determine any tax liability.

All such records shall be safely preserved for a period of three years in such a manner to insure their security and accessibility for inspection by the Commissioner or his duly authorized agents. The Commissioner may, in his discretion, consent to the destruction of any such records at any time within said period. (1969, c. 1075, s. 2.)

§ 105-113.27. Unstamped cigarettes. — (a) Except as otherwise provided in this Article, licensed distributors shall not sell, borrow, loan or exchange unstamped cigarettes to, from or with other licensed distributors.

(b) No person shall sell or offer for sale unstamped cigarettes.

(c) The possession of more than six hundred unstamped cigarettes by any person other than a licensed distributor, shall be prima facie evidence that such cigarettes are possessed in violation of the provisions of this Article. (1969, c. 1075, s. 2.)

§ 105-113.28. Displaying unstamped cigarettes for sale. — It shall be unlawful for any person to display for sale or offer for sale unstamped cigarettes within this State. (1969, c. 1075, s. 2.)

§ 105-113.29. Unlicensed place of business. — It shall be unlawful for any person to maintain a place of business within this State required by this Article to be licensed to engage in the business of selling or offering for sale cigarettes without first obtaining such licenses. (1969, c. 1075, s. 2.)

§ 105-113.30. Records and reports. — It shall be unlawful for any person who is required under the provisions of this Article to keep records or make reports, to fail to keep such records, refuse to keep such reports, make false entries in such records, fail to produce such records for inspection by the

Commissioner or his duly authorized agents, fail to file a report, or make a false or fraudulent report or statement. (1969, c. 1075, s. 2.)

§ 105-113.31. Possession and transportation of unstamped cigarettes; seizure and confiscation of vehicle or vessel. — (a) It shall be unlawful for any person to transport unstamped cigarettes in violation of the provisions of this Article, or to fail or refuse to comply with regulations and administrative rules promulgated by the Commissioner in regard thereto. The Commissioner may make reasonable rules and regulations governing quantities of untaxed cigarettes, not exceeding six hundred, which may be brought into this State by any transient, tourist, or person returning to this State after traveling outside this State, for the use of such transient, tourist or person; and the possession or transportation of such quantities shall not be subject to the penalties imposed by this section.

(b) (1) Every person who shall transport cigarettes not stamped as required by this Article upon the public highways, roads, streets or waterways of this State shall have in his actual possession invoices or delivery tickets for such cigarettes which shall show the true name and complete and exact address of the consignee or purchaser, the quantity and brands of the cigarettes transported and the true name and complete and exact address of the person who has paid or who shall assume the payment of the tax imposed by this Article or the tax, if any, of the state or foreign country at the point of ultimate destination.

(2) Any common carrier which has issued a bill of lading for a shipment of cigarettes and is without notice to itself or to any of its agents or employees that said cigarettes are not stamped as required by this Article shall be deemed to have complied with this Article and the vehicle or vessel in which said cigarettes are being transported shall not be subject to confiscation hereunder. In the absence of such invoices, delivery tickets or bills of lading, as the case may be, the cigarettes so transported, the vehicle or vessel in which the cigarettes are being transported and any paraphernalia or devices used in connection with the unstamped cigarettes are declared to be contraband goods and may be seized by any officer of the law, who shall take possession of the vehicle or vessel and unstamped cigarettes therein, and shall arrest any person in charge thereof.

(3) Such officer shall at once proceed against the person arrested, under the provisions of this Article, in any court having competent jurisdiction; but the said vehicle or vessel shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. All unstamped cigarettes seized under this section shall be held and shall, upon the acquittal of the person so charged, be returned to the established owner.

(4) Unless the claimant can show that the unstamped cigarettes seized were not transported in violation of this Article and that the property seized is his property, or that in the case of property other than cigarettes, such property was used in transporting unstamped cigarettes in violation of this Article without his knowledge or consent, with the right on the part of the claimant to have a jury pass upon his claim, the court shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the cost of stamps which he shall affix to said cigarettes upon sale, expenses of keeping the property, the fee for the seizure, and the costs of the sale, shall pay all liens according to their priorities, which are

established, by intervention or otherwise, at said hearing or in other proceeding brought for said purpose as being bona fide and as having been created without the lienor having any notice that the vehicle or vessel was being used for the unlawful transportation of unstamped cigarettes, and shall pay the balance of the proceeds to the State Treasurer for the general fund.

(5) All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. If, however, no one shall be found claiming the cigarettes, or the vehicle or vessel, the taking of the same, with a description thereof, shall be advertised in some newspaper published in the city or county where taken, or, if there be no newspaper published in such city or county, in a newspaper having circulation in the county, once a week for two weeks and by notices posted in three public places near the place of seizure, and if no claimant shall appear within ten days after the last publication of the advertisement, the property shall be sold, and the proceeds, after deducting the expenses and costs, shall be paid to the State Treasurer for the general fund.

(6) Nothing in this section shall be construed to authorize any officer to search any vehicle or vessel or baggage of any person without a search warrant duly issued, except where the officer sees or has knowledge that there are unstamped cigarettes in such vehicle or vessel. (1969, c. 1075, s. 2.)

§ 105-113.32. Unstamped cigarettes subject to confiscation. — All cigarettes subject to the tax imposed by this Article, to which stamps have not been affixed as required by this Article, together with any container in which they are stored, or displayed for sale (including but not limited to vending machines) are declared to be contraband goods and may be seized by any officer of the law, who shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested, under the provisions of this Article, in any court having competent jurisdiction and the disposition of said unstamped cigarettes and container shall be governed and controlled by the provisions of G.S. 105-113.31. (1969, c. 1075, s. 2.)

§ 105-113.33. Criminal penalties. — Any person who violates any of the provisions of this Article for which no other punishment is specifically prescribed shall be guilty of a misdemeanor punishable by a fine or imprisonment or both in discretion of the court. (1969, c. 1075, s. 2.)

§ 105-113.34. Forging or counterfeiting revenue stamps. — Any person who falsely or fraudulently makes, forges, alters or counterfeits, or causes or procures to be falsely or fraudulently made, forged, altered or counterfeited, any stamps prepared or prescribed by the Commissioner under the authority of this Article, or who knowingly and wilfully utters, publishes, passes or tenders as true, any such false, altered, forged or counterfeited stamps for the purpose of evading the tax levied by this Article, shall be guilty of a felony, and upon conviction thereof shall be fined not more than two thousand dollars ($2,000) or imprisoned in the State prison for a term of not more than five years, or both, in the discretion of the court.

If any person secures, manufactures or causes to be secured or manufactured, or has in his possession any stamp or any counterfeit impression device not prescribed or authorized by the Commissioner, such person shall be guilty of a felony and subject to the punishment above provided for in the first paragraph of this section. (1969, c. 1075, s. 2.)

§ 105-113.35. Interest and penalty. — If any person shall neglect, fail or refuse to pay any tax due under this Article, interest shall be added thereto at the rate of one half of one percent (1/2%) per month from the date due until

paid and there shall also be added to said tax an amount equal to fifty percent (50%) thereof. (1969, c. 1075, s. 2.)

§ 105-113.36. General administrative provisions of Revenue Act applicable. — All provisions not inconsistent with this Article contained in Article 9 entitled "General Administration; Penalties and Remedies" of Subchapter I of Chapter 105 of the General Statutes, including but not limited to administration, auditing, making returns, promulgation of administrative rules and regulations by the Commissioner, additional taxes, assessment procedure, imposition and collection of taxes of the lien thereof, assessments, refunds and penalties are hereby made a part of this Article and shall be applicable thereto. (1969, c. 1075, s. 2.)

§ 105-113.37. Commissioner to make rules and regulations. — Subject to the provisions of G.S. 105-262, the Commissioner is hereby authorized and empowered to make all reasonable regulations and administrative rules necessary for the efficient administration and enforcement of this Article not inconsistent with the provisions of this Article. Upon request, he shall furnish any taxpayer with a copy of such rules and regulations. All provisions with respect to reviews and appeals from the Commissioner's decisions as provided by G.S. 105-241.2, G.S. 105-241.3 and G.S. 105-241.4 of the General Statutes shall be applicable to this Article. (1969, c. 1075, s. 2.)

§ 105-113.38. Tax to be paid only once. — Whenever the tax levied by this Article has been computed and paid to the State with respect to any cigarettes as provided by this Article, and appropriate stamps affixed, the same shall not be required to be paid again to the State regardless of how many times such cigarettes may thereafter be sold or resold, but the seller may add to his sales price thereafter the amount of such tax. (1969, c. 1075, s. 2.)

§ 105-113.39. Local units prohibited to tax. — No city, town or county shall levy any privilege license tax with respect to the sale of cigarettes other than as permitted by Article 2 of Subchapter I of Chapter 105 of the General Statutes. (1969, c. 1075, s. 2.)

§ 105-113.40. Effective date of this Article. — This Article shall be in full force and effect on and after July 1, 1969, or on the first day of the month next after the ninetieth day from its ratification, whichever is the later date. However, the Commissioner is authorized, prior to that time, to do all things necessary to the implementation of the provisions of this Article, including making regulations and administrative rules, procuring the manufacture of stamps, and providing for sale of the same, in order to secure effective administration of this Article on and after its effective date. (1969, c. 1075, s. 2.)

Editor's Note. — Session Laws 1969, c. 1075, which enacted this Article, was ratified June 27, 1969.

Article 2B.

Schedule B-B. Soft Drink Tax.

§ 105-113.41. Short title. — This Article shall be known and cited as the "Soft Drink Tax Act." (1969, c. 1075, s. 3.)

Cross Reference. — As to effective date of this Article, see § 105-113.67.

Editor's Note. — Session Laws 1969, c. 1075, s. 8, provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

§ 105-113.42. Purpose of Article. — It is the purpose of this Article to provide a source of additional revenue which shall be applied to the general fund of the State. (1969, c. 1075, s. 3.)

§ 105-113.43. Liability for tax. — Every person doing domestic or intrastate business within this State and engaging in the business of selling, manufacturing, purchasing, consigning, using, shipping or distributing, for the purpose of sale within this State, soft drinks of every kind whatsoever, including but not limited to the following articles or things, viz: soda water, ginger ale, Coca-Cola, lime-cola, Pepsi-Cola, near beer, fruit juices, vegetable juices, and all fountain drinks and other beverages and things commonly designated as "soft drinks" shall, for the privilege of carrying on such business, be subject to the payment of a license tax which shall be measured by and graduated in accordance with the sales of such person within the State, except as may be otherwise provided in this Article.

Every person within the State of North Carolina, importing, receiving or acquiring from without the State, or from any other source, beverages commonly designated as soft drinks as contemplated by this Article, for use or consumption within North Carolina, shall be subject to payment of the soft drink tax at the rates provided for the sale, offer for sale, or distribution of such soft drinks. (1969, c. 1075, s. 3.)

§ 105-113.44. Definitions. — As used in this Article, unless the context otherwise requires:

(1) "Base products" means hot chocolate flavored drink mix, flavored milk shake bases, concentrate products to which milk or other liquid is added to complete a soft drink, and all like items or products as herein defined which will be taxed as syrups.

(2) "Bottled" means enclosed in any closed or sealed glass, metal, paper or other type of bottle, can, carton or container, regardless of the size of such container.

(3) "Bottled soft drink" means any complete, finished, ready-to-use, nonalcoholic drink, whether carbonated or not, such as soda water, ginger ale, Nu-Grape, Coca-Cola, lime-cola, Pepsi-Cola, bud-wine, near beer, fruit juice, vegetable juice, milk drinks when any flavoring or syrup is added, cider, bottled carbonated water and all bottled preparations commonly referred to as soft drinks of whatever kind or description.

(4) "Commissioner" means the North Carolina Commissioner of Revenue.

(5) "Crowns" means crowns, caps and lids bearing any tax indicia other than stamps evidencing the payment of the excise tax levied under this Article. "Crowns" shall also include waxed paper or plastic containers used by dairies upon which the tax indicia has been imprinted by the manufacturer thereof.

(6) "Distributor" includes any person who manufactures, bottles, compounds, mixes or purchases for sale to retail dealers or wholesale dealers any bottled soft drink, soft drink syrup or powder, or base product for mixing, making or compounding soft drinks.

(7) "Excise tax" means the soft drink tax levied under G.S. 105-113.5 [§ 105-113.45].

(8) "In this State" or "within this State" means within the exterior limits of the State of North Carolina and includes all territory within such limits owned by, leased by or ceded to the United States of America.

(9) "Natural fruit juice" means the natural liquid which results from the pressing of sound ripe fruit, and the liquid which results from the reconstitution of natural fruit juice concentrate by the restoration of water to dehydrated natural fruit juice.

(10) "Natural liquid milk" means natural liquid milk regardless of butterfat content, and the liquid milk product which results from the reconstitution of natural milk concentrate, regardless of butterfat

content, by the restoration of water to dehydrated or evaporated natural milk.

(11) "Natural vegetable juice" means the natural liquid which results from the pressing of sound ripe vegetables or the liquid which results from the reconstitution of natural vegetable juice concentrate by the restoration of water to dehydrated natural vegetable juice.

(12) "Person" includes any individual, firm, partnership, joint venture, association, corporation, estate, trust, receiver, syndicate or any other group or combination acting as a unit, the State or any of its political subdivisions, and the plural as well as the singular number.

(13) "Powders" means compressed powders, crystals, granules or tablets from which soft drinks can be made.

(14) "Retail dealer" includes every person, other than a distributor or wholesale dealer, who makes, mixes, compounds or manufactures any drink from a soft drink syrup or powder or base product, and sells or otherwise dispenses the same to the ultimate consumer, and every person, other than a distributor or wholesale dealer, who sells or otherwise dispenses any bottled soft drink to the ultimate consumer.

(15) "Selling" or "sale" means any sale, transfer, exchange, barter, gift or offer for sale and distribution, in any manner or by any means whatsoever.

(16) "Simple syrup" means the product resulting from the making, mixing, compounding or manufacturing by dissolving sugar and water or any other mixture that will create syrup to which may be added concentrates or extracts.

(17) "Soda fountain" includes all places where soft drinks are compounded for sale, including automatic vending machines.

(18) "Soft drink syrups and powders" includes the compound mixture or the basic ingredients, whether dry or liquid, practically and commercially usable in making, mixing or compounding soft drinks by the mixing thereof with carbonated or plain water, ice, fruit juice, milk or any other product suitable to make soft drinks, among such syrups being such products as Coca-Cola syrup, Chero-Cola syrup, Pepsi-Cola syrup, Dr. Pepper syrup, root beer syrup, Nu-Grape syrup, lemon syrup, vanilla syrup, chocolate syrup, cherry smash syrup, rock candy syrup, simple syrup, chocolate drink powder, malt drink powder, or any other prepared syrups or powders sold or used for the purpose of mixing soft drinks commercially at soda fountains, restaurants or similar places as well as those powder bases prepared for the purpose of domestically mixing soft drinks such as kool-aid, oh boy drink, tip-top, miracle aid and all other similar products. Concentrated natural frozen or unfrozen fruit juices or vegetable juices when used domestically are specifically excluded from this definition.

(19) "Stamp" means the North Carolina taxpaid stamp evidencing the payment of the excise tax levied by this Article, and which may be used as permitted by the Commissioner in lieu of taxpaid crowns.

(20) "Wholesale dealer" includes any person who sells bottled soft drinks, soft drink syrups or powders, or base products for mixing, compounding or making soft drinks to retail dealers or other wholesale dealers for resale purposes. (1969, c. 1075, s. 3.)

§ 105-113.45. Taxation rate. — (a) A soft drink excise tax is hereby levied and imposed on and after midnight, September 30, 1969, upon the sale, use, handling and distribution of all soft drinks, soft drink syrups and powders, base products and other items referred to in this section.

(b) The rate of tax on each bottled soft drink shall be one cent (1¢).

(c) The rate of tax on each gallon of soft drink syrup or simple syrup shall be

one dollar ($1.00), and on a fraction of a gallon the rate shall be an amount which represents one dollar ($1.00) multiplied by the same fraction of a gallon. The rate of tax on each ounce or fraction of an ounce of soft drink syrup or simple syrup shall be four fifths of a cent (4/5¢), and no exemption or refund shall be allowed on such syrup even though it may subsequently be diverted to some purpose other than the making of soft drinks.

(d) The rate of tax on dry soft drink powders and base products which are used to make soft drinks without being converted into syrup shall be one cent (1¢) per ounce or fraction thereof of the dry powder or base product weight. However, the tax on dry soft drink powder or base product which is to be converted into syrup shall be the same as that which would be due upon the syrup produced, if the syrup were being taxed according to the rates set out in subsection (c) above.

(e) The excise tax herein levied on syrups, powders and base products shall not apply to syrups, powders and base products used by persons in the manufacture of bottled soft drinks which are otherwise subject to tax under this Article. The Commissioner may by administrative rules or regulation, provide for the storage of such syrups, powders and base products when they are not for use in the manufacture of bottled soft drinks. (1969, c. 1075, s. 3.)

§ 105-113.46. Exemption of certain milk drinks. — All natural liquid milk drinks produced by farmers or dairies shall be exempt from the payment of the soft drink excise tax. Where a product other than the above is produced, such product is subject to the tax unless otherwise exempt under this Article. (1969, c. 1075, s. 3.)

§ 105-113.47. Natural fruit or vegetable juice or natural liquid milk drinks exempted from tax. — (a) All bottled soft drinks containing thirty-five percent (35%) or more of natural fruit or vegetable juice and all bottled natural liquid milk drinks containing thirty-five percent (35%) or more of natural liquid milk, are exempt from the excise tax imposed by this Article, except that this exemption shall not apply to any fruit or vegetable juice drink to which has been added any coloring, artificial flavoring or preservative. Sugar, salt or vitamins shall not be construed to be an artificial flavor or preservative.

(b) Any bottled soft drink for which exemption is claimed under this section must be registered with the Commissioner. No bottled soft drink shall be entitled to the exemption until registration has been accomplished by the filing of an application for exemption on such form as may be prescribed by the Commissioner, which form shall include an affidavit setting forth the complete and itemized formula by volume of the drink therein referred to, and the failure to submit such affidavit shall be prima facie evidence that such bottled soft drink is not exempt. All bottled soft drinks which are not so registered and do not have affixed thereto the proper stamps or crowns shall be subject to confiscation. The Commissioner or his duly authorized representative may at any time check the formulas or the manufacturing of such bottled soft drinks for which exemption is claimed under this section and in addition thereto, the Commissioner or his duly authorized representative may at any time take samples of any product for which exemption has been claimed, from any and all persons offering such product for sale for the purpose of ascertaining by analysis the contents thereof. The sample shall be clearly marked for identification and such sample may be turned over to any registered chemist designated by the Commissioner for the purpose of analysis. If such investigation establishes that such bottled soft drink contains less than thirty-five percent (35%) by volume of natural fruit juice, natural vegetable juice or natural liquid milk, or if any person engaged in selling, manufacturing, purchasing, consigning, using, shipping or distributing for the purpose of sale within this State who has applied for an exemption hereunder fails or refuses

to allow the Commissioner or his duly authorized representative to check the formulas or inspect the manufacturing of such bottled soft drinks, the excise tax imposed by this Article shall apply to all sales of such products and all such products offered for sale and not properly stamped shall be subject to confiscation until such person permits the Commissioner to examine the formulas or inspect the manufacturing of such bottled soft drinks.

(c) Except in accordance with proper judicial order or as otherwise provided by law, it shall be unlawful for the Commissioner or any deputy, agent, clerk or other officer or employee or any other person acting in a confidential relationship with the Commissioner to divulge or make known in any manner any formula or any particulars of any formula pertaining to any drink hereinabove referred to. However, such prohibition shall not be construed to prohibit the publication of whether or not such bottled soft drinks contain thirty-five percent (35%) or more of natural fruit or vegetable juice or thirty-five percent (35%) or more of natural liquid milk, nor shall it be construed to prohibit the inspection by the Attorney General or other legal representative of the State of the formula of any taxpayer who shall bring action to set aside or review the tax base thereon or against whom an action or proceeding has been instituted to recover any tax imposed by this Article.

(d) Where any product for which exemption is claimed under this section is found to contain less than thirty-five percent (35%) by volume of natural fruit juice, natural vegetable juice, or natural liquid milk, the excise tax imposed by this Article shall apply to all sales of such product, and all such products offered for sale and not properly stamped shall be subject to confiscation. (1969, c. 1075, s. 3.)

§ 105-113.48. Exemption of goods intended for out-of-state sale. — It shall not be necessary to pay any tax levied by this Article with respect to any bottled soft drinks, soft drink syrups and powders, base products and other items taxed under this Article manufactured or acquired for sale or distribution outside this State, or to affix taxpaid stamps or crowns thereto, provided the same are manufactured, acquired, stored, and distributed, and records are maintained, in accordance with the rules and regulations of the Commissioner. The Commissioner is hereby authorized to promulgate such rules and regulations with respect thereto as will exclude from the measure of excise tax levied pursuant to this Article the sales of such goods or articles of merchandise outside this State and at the same time protect the interests of this State in collecting all taxes lawfully due to the State. (1969, c. 1075, s. 3.)

§ 105-113.49. Exemption of coffee and tea. — All coffee and tea, whether in liquid, powder or natural form shall be exempt from the tax imposed by this Article. (1969, c. 1075, s. 3.)

§ 105-113.50. Soft drink licenses required. — (a) Distributors and wholesale dealers shall obtain for each place of business a continuing soft drink license for which a fee of twenty-five dollars ($25.00) shall be paid. For the purpose of this section, "place of business" means any place where soft drinks are manufactured by a distributor, or any place where unstamped bottled soft drinks, soft drink syrups and powders, base products and other items taxed under this Article are received or stored by a distributor or wholesale dealer.

(b) Out-of-state distributors and wholesale dealers may obtain appropriate distributors' or wholesale dealers' licenses upon compliance with the provisions of this Article and such regulations and administrative rules as may be issued by the Commissioner hereunder, for which a fee of twenty-five dollars ($25.00) shall be paid for each such soft drink license.

(c) Each retail dealer manufacturing or purchasing not previously taxed syrups, powders or base products shall secure a continuing soft drink license for which a fee of five dollars ($5.00) shall be paid for each place of business at

which such unstamped syrups, powders or base products are received or at which place such retail dealer manufactures them.

(d) Distributors, wholesale dealers and retail dealers licensed under this section shall file such reports with the Commissioner as he may require not later than the fifteenth day of each month showing transactions for the preceding month. (1969, c. 1075, s. 3.)

§ 105-113.51. Affixing of crowns and stamps to containers; crowns and stamps not transferable. — (a) Any bottled soft drink offered for sale shall within 24 hours of its manufacture or receipt in this State have affixed to it a North Carolina taxpaid stamp or a North Carolina taxpaid crown at the rate provided for in this Article.

(b) The distributor or dealer who first distributes, sells, uses, consumes or handles bottled soft drinks, syrups, powders, base products and other items subject to the soft drink excise tax is subject to the tax unless taxpaid stamps or crowns have previously been affixed. The distributor, wholesale dealer or retail dealer, or any person who is the original consignee of any bottled soft drink, soft drink syrup, powder, base product or other item subject to the soft drink excise tax manufactured or produced outside this State, or who brings such into this State, shall pay the excise tax.

(c) Taxpaid stamps shall be affixed to each individual container of soft drink syrups, powders, and base products by wholesale dealers or distributors within 48 hours after such syrups, powders, or base products are received or made by them and by retail dealers within 24 hours after such syrups, powders or base products are received by them, and in any event the containers must be stamped before such products are used in the preparation of soft drinks.

(d) The payment of the excise tax provided for in this Article shall be evidenced by the affixing of taxpaid stamps or crowns to the original containers and the stamps and crowns provided for in this Article shall not be transferable to any person other than their original purchaser.

(e) Notwithstanding any other provision of this Article, the excise tax levied upon powders, as herein defined, may be made and evidenced in accordance with rules and regulations of the Commissioner. (1969, c. 1075, s. 3; c. 1247.)

Editor's Note. — Session Laws 1969, c. 1247, added subsection (e) to this section as enacted by Session Laws 1969, c. 1075.

§ 105-113.52. Taxpaid stamps; rules and regulations; cancellation; discount. — (a) The Commissioner shall make arrangements with some manufacturer to manufacture the taxpaid stamps provided for in this Article. The Commissioner shall prescribe the form, design, denominations and such other matters as may be necessary with respect to said stamps. The Commissioner may sell such stamps directly to taxpayers and may also make arrangements for release of taxpaid stamps to taxpayers by the manufacturer. Said manufacturer shall furnish such bond as the Commissioner may deem advisable, in such penalty and upon such conditions as in the opinion of the Commissioner will adequately protect the State in the collection of the excise tax imposed by this Article. Such bond shall be executed by the manufacturer as principal and by an indemnity company licensed to do business under the insurance laws of this State, as surety. The costs of manufacture, transportation and distribution of said stamps shall be computed in accordance with administrative rules or regulations of the Commissioner and payment thereof pursuant to such rules and regulations of the Commissioner may be required in addition to the amount of taxes which said stamps evidence regardless of whether said stamps are released or distributed by the Commissioner or by the manufacturer pursuant to authorization from the Commissioner.

(b) Upon the sale of taxpaid stamps, the Commissioner shall allow a discount of five percent (5%) of the entire amount of any sale of fifty dollars

($50.00) or more of said stamps. On sales of stamps of less than fifty dollars ($50.00), no discount shall be allowed. Such discount shall apply only to the tax and not the manufacturer's price or transportation or distribution costs.

(c) When stamps are attached to bottled soft drinks, or to containers of soft drink powders or base products, no cancellation or obliteration of them shall be required, but stamps affixed to containers of syrup to be used at soda fountains shall be canceled by the person affixing them by writing or stamping with ink or indelible pencil across the stamps his initials or name and the date on which the stamps were affixed. When the container to which the stamp has been affixed has been emptied, the stamp must be obliterated by making at least three incisions crisscross through the stamp with a knife or other sharp instrument.

(d) Any person who makes use of any stamp to denote the payment of the tax imposed by this Article without canceling or obliterating such stamps if required to do so by this section shall be guilty of a misdemeanor and, upon conviction, shall be fined not more than one hundred dollars ($100.00) or be imprisoned for not more than 30 days for each offense. (1969, c. 1075, s. 3.)

§ 105-113.53. Stamps not required when crowns used. — If a distributor of bottled soft drinks either within or without the State shall use taxpaid crowns as hereinafter provided, such distributor shall be relieved of the duty of affixing taxpaid stamps to each individual bottle. Whenever the Commissioner deems it to be advantageous for the effective and efficient enforcement of this Article, he may require that such crowns be used in lieu of stamps. (1969, c. 1075, s. 3.)

§ 105-113.54. Taxpaid crowns; rules and regulations; discount on sale of crowns. — (a) The Commissioner shall prescribe the form, design, denominations and such other matters as may be necessary with respect to taxpaid crowns. The Commissioner shall make arrangements with one or more manufacturers to manufacture, sell and distribute such crowns and shall require of such persons manufacturing, selling and distributing such crowns a bond payable to the State of North Carolina in such penalty and upon such conditions as in the opinion of the Commissioner will adequately protect the State in the collection of the taxes levied by this Article. The bond shall be executed by the manufacturer as principal and by an indemnity company licensed to do business under the insurance laws of this State, as surety. The Commissioner shall promulgate administrative rules and regulations governing the purchase, sale and distribution of crowns and all purchasers of crowns shall be required to purchase crowns in accordance with administrative rules and regulations promulgated by the Commissioner.

(b) The price to be paid by purchasers of crowns shall be the manufacturer's price plus all transportation charges to the consignee at destination in addition to the tax represented by the crowns.

(c) The Commissioner shall allow to each purchaser of taxpaid crowns, whether for cash or credit, a discount of eight percent (8%) of the excise tax represented by such crowns. No compensation or refund shall be made for taxpaid soft drinks given as free goods or as advertising, or for losses sustained by spoilage or breakage incident to the production, sale and distribution of such drinks, or to the loss or destruction of any taxpaid stamps or crowns. (1969, c. 1075, s. 3.)

§ 105-113.55. Payment for stamps and crowns. — (a) Payment in full shall accompany application for purchase of stamps. However, a licensed distributor may purchase crowns on credit if such distributor has filed with the Commissioner a bond satisfactory to the Commissioner in an amount not less than one hundred twenty-five percent (125%) of the amount of credit authorized and prior to the date any such credit purchases are made. Such licensed distributor shall pay for such credit purchases of crowns on or before

the tenth day of the month next following the date of purchase, and the bond herein required shall be conditioned upon such payment. The bond shall be executed by the distributor as principal and by an indemnity company licensed to do business under the insurance laws of this State as surety.

(b) Except where credit purchases of crowns are made, payment for stamps and crowns must be made by cash, cashier's check, certified check or money order. Personal checks may be accepted in payment of monthly amount due on credit sales, pursuant to such regulations or administrative rules as the Commissioner may adopt. (1969, c. 1075, s. 3.)

§ 105-113.56. Provisions for refund; discount. — Whenever any person shall receive permission from the Commissioner to return any unused taxpaid crowns or stamps which have not been canceled and when such unused taxpaid crowns and stamps have been returned as the Commissioner shall direct, the Commissioner is authorized to make a refund for such crowns or stamps, less any discount which may have been allowed to the purchaser. (1969, c. 1075, s. 3.)

§ 105-113.56A. Alternate method of payment of tax. — Instead of paying the tax levied in this Article in the manner otherwise provided, any resident distributor or wholesale dealer, and any distributor or wholesale dealer having a commercial domicile in this State may pay the tax in the following manner, with respect to bottled soft drinks:

Beginning with sales made on and after October 1, 1969, of bottled soft drinks subject to the tax, sales reports shall be made to the Commissioner on or before the fifteenth day of each succeeding month, accompanied by payment of the tax due, determined as follows: For the first fifteen thousand gross of bottled soft drinks sold annually, seventy-two cents (72¢) per gross; for all in excess of fifteen thousand gross, one cent (1¢) per bottle. In addition, there shall be allowed a discount of eight percent (8%) of the said tax to be remitted.

All persons paying the tax in this manner shall be subject to such rules and regulations as the Commissioner may prescribe, including the requirement that such persons furnish such bond as the Commissioner may deem advisable, in such amount and upon such conditions as in the opinion of the Commissioner will adequately protect the State in the collection of the taxes levied by this Article. (1969, c. 1251, s. 1.)

§ 105-113.57. Records required of ingredients received. — Every person engaged in the business of making, mixing or compounding bottled soft drinks, soft drink syrups and powders, base products and other items taxed under this Article shall keep a distinct, legible and permanent record of all extracts, flavoring, sugar, syrup or other ingredients except water received by him that may be useful in making, mixing or compounding soft drinks, and he shall retain invoices on all such purchases for a period of not less than three years from the date thereof. Such records shall show the quantity of such commodities received, the date of receipt thereof and the name of the person from whom they were secured or received and shall be open at all times for inspection by the Commissioner or his duly authorized representative. (1969, c. 1075, s. 3.)

§ 105-113.58. Records of sale to be kept. — Every distributor, wholesale dealer and retail dealer shall keep an accurate account of all daily sales, sales slips, bills, invoices, delivery slips, statements, bills of lading, freight bills, credit memoranda and similar documents for a period of not less than three years from the date shown thereon. All such records shall be open at all times for inspection by the Commissioner or his duly authorized representative. (1969, c. 1075, s. 3.)

§ 105-113.59. Theoretical calculation of tax. — Upon the records required

to be kept pursuant to this Article and upon such other information as may be obtained, the Commissioner shall calculate the number or amount of soft drinks that are ordinarily manufactured, mixed or compounded from such ingredients in accordance with the standard or average formula used therefor by bottlers, mixers and compounders of soft drinks and the result thus obtained shall be prima facie evidence of the sale thereof. However, nothing contained in this section shall be construed to prevent any bottler, mixer or compounder of soft drinks from showing that he has actually not sold the whole or any part of the amount of soft drinks as determined by the above method of calculation. The Commissioner shall, in making the above provided calculation, allow as a deduction the reasonable average loss for waste and breakage, but not exceeding discount allowed on sale of stamps. (1969, c. 1075, s. 3.)

§ **105-113.60. Manufacturer as well as dealer subject to penalties.**—When any item, taxable under the provisions of this Article and to which a stamp or crown is required to be affixed, is found in the possession of any retail dealer without having the stamps or crowns affixed, the distributor or wholesale dealer selling such articles within this State shall be subject to the penalties provided in this Article, as well as the retail dealer in whose possession the goods are located. (1969, c. 1075, s. 3.)

§ **105-113.61. Criminal acts.**—(a) It shall be unlawful for any person willfully to:

(1) Remove, wash, restore, alter or otherwise prepare any adhesive stamp or crown with intent to use it or cause it to be used after it has already been used;

(2) Knowingly or willfully buy, sell, offer for sale or give away any such washed, restored or altered stamp or crown to any person;

(3) Knowingly use or have in his possession any washed, restored or altered stamps or crowns which have been removed from the articles to which they have been previously affixed;

(4) For the purpose of indicating the payment of any tax under this Article, reuse any stamp or crown that has theretofore been used for the purpose of denoting payment of the tax provided in this Article.

(b) It shall be unlawful for any person to prepare, buy, sell, offer for sale or have in his possession any counterfeit, or false stamps or crowns, or any stamps or crowns printed, fabricated or manufactured contrary to the provisions of this Article. Violation of subsection (b) of this section is hereby made a felony punishable by a fine of not more than five thousand dollars ($5,000) or imprisonment in the State prison for not more than five years, or both, in the discretion of the court. (1969, c. 1075, s. 3.)

§ **105-113.62. Criminal law penalties.**—Violation of any provision of this Article, except as otherwise specifically provided in this Article, is hereby made a misdemeanor, punishable by fine or imprisonment, or both, in the discretion of the court. (1969, c. 1075, s. 3.)

§ **105-113.63. Rules and regulations.**—The Commissioner is hereby authorized and directed to make all reasonable rules and regulations necessary for the efficient administration and enforcement of this Article, not inconsistent with the provisions of this Article. (1969, c. 1075, s. 3.)

§ **105-113.64. General administrative provisions of Revenue Act applicable.**—All provisions of Article 9 of Subchapter I of Chapter 105 of the General Statutes, not inconsistent herewith, are hereby made applicable to this Article. (1969, c. 1075, s. 3.)

§ **105-113.65. Tax with respect to October 1, 1969, inventory.**—Except as to bottled soft drinks held in inventory by a distributor or wholesale dealer who

shall have elected to come within the provisions of G.S. 105-113.56A with respect to payment of tax on bottled soft drinks, every person subject to the taxes levied by this Article who, on October 1, 1969, has on hand any article, goods or merchandise taxed by this Article or with respect to which a tax is computed under this Article shall file a complete inventory thereof as of the opening of business on October 1, 1969, within 20 days thereafter, and shall pay to the Commissioner at the time of filing such inventory a tax with respect thereto computed at the rates set forth in this Article. All the provisions of this Article relative to the collection, verification and administration of the taxes imposed by this Article shall, insofar as pertinent, be applicable to the tax imposed by this section, but the affixing of taxpaid stamps or taxpaid crowns as evidence of the payment of such tax by retail dealers shall not be necessary except as the Commissioner by regulation may require. However, the sale of any articles for resale shall not be permitted under this section until the appropriate taxes have been paid and the appropriate taxpaid stamps or crowns affixed unless the Commissioner permits otherwise. (1969, c. 1075, s. 3; c. 1251, s. 2.)

Editor's Note. — Session Laws 1969, c. 1251, substituted the above section for § 105-113.65 as enacted by Session Laws 1969, c. 1075.

§ **105-113.66. Federal Constitution and statutes.**—Any activities which this Article may purport to tax in violation of the Constitution of the United States or any federal statute are hereby expressly exempted from taxation under this Article. (1969, c. 1075, s. 3.)

§ **105-113.67. Effective date of this Article.**—This Article shall be in full force and effect on and after October 1, 1969. However, the Commissioner is authorized to do all things needful before October 1, 1969, including making rules and regulations, procuring the manufacture of stamps and crowns, and providing for sale of the same, in order to secure effective administration of this Article on and after October 1, 1969. (1969, c. 1075, s. 3.)

Article 2C.

Intoxicating Liquors Tax.

§ **105-113.68. Definitions.** — When used in this Article:

(1) The term "alcoholic beverage" means alcoholic beverages of any and all kinds which shall contain more than fourteen percent (14%) of alcohol by volume.

(2) The term "Chapter 18A" shall mean Chapter 18A of the General Statutes of North Carolina.

(3) "Fortified wines" shall mean any wine made by fermentation from grapes, fruits, or berries, to which nothing but pure brandy has been added, which brandy is made from the same type of grape, fruit or berry that is contained in the base wine to which it is added, and having an alcoholic content of over fourteen percent (14%) and not more than twenty-one percent (21%) of absolute alcohol, reckoned by volume, and approved by the State Board of Alcoholic Control as to identity, quality, and purity as provided in Chapter 18A.

(4) The word "license" shall mean a written or printed certificate which allows a person to engage in some phase of the liquor industry, and which may be issued by the State Commissioner of Revenue, by a municipality, or by a county, pursuant to the provisions of this Article. All annual licenses shall expire April 30 of each year.

(5) The word "liquor" or the phrase "intoxicating liquor" shall be construed to include alcohol, brandy, whiskey, rum, gin, beer, ale, porter, and wine, and in addition thereto any spirituous, vinous, malt

or fermented beverages, liquids, and compounds, whether medicated, proprietary, patented, or not, and by whatever name called containing one half of one percent (1/2 of 1%) or more of alcohol by volume, which are fit for use for beverage purposes.

(6) The term "malt beverages" shall mean beer, lager beer, malt liquor, ale, porter, and other brewed or fermented beverages containing one half of one percent (1/2 of 1%) of alcohol by volume but not more than five percent (5%) of alcohol by weight.

(7) The term "native wines" shall mean wine made from grapes, fruit, or berries and having only such alcoholic content as natural fermentation may produce.

(8) The word "permit" shall mean a written or printed authorization to engage in some phase of the liquor industry, which may be issued by the State Board of Alcoholic Control under the provisions of Chapter 18A. All annual permits shall expire on April 30 of each year.

(9) The term "person" shall mean any individual, firm, partnership, association, corporation, or other organizations, groups, or combination of persons acting as a unit.

(10) The term "sale" shall include any transfer, trade, exchange or barter in any manner or by any means whatsoever, for a consideration.

(11) The term "spirituous liquors" shall be deemed to include any alcoholic beverages containing an alcoholic content of more than twenty-one percent (21%) by volume.

(12) The term "unfortified wines" shall mean wine of an alcoholic content produced only by natural fermentation or by the addition of pure cane, beet or dextrose sugar and having an alcoholic content of not less than five percent (5%) and not more than fourteen percent (14%) of absolute alcohol, the percent of alcohol to be reckoned by volume, which wine has been approved as to identity, quality, and purity by the State Board of Alcoholic Control as provided in Chapter 18A.

All intoxicating liquors shall be taxed as provided in this Article whether or not meeting all criteria of the above definitions. (1971, c. 872, s. 2.)

Editor's Note. — Session Laws 1971, c. 872, s. 2, inserted this Article, which contains revenue provisions similar to those formerly appearing in repealed Chapter 18.

Section 5 of c. 872 provides: "This act shall become effective October 1, 1971, except that G.S. 18A-30 and 18A-33, relative to hours of sale and consumption, shall be effective upon the ratification of this act. Any license or permit required by this act, which has not been heretofore required by law, must be acquired on or before May 1, 1972."

Historical citations to sections of former Chapter 18 have been added to corresponding sections in this Article.

§ 105-113.69. Permit required to obtain license. — Before applying for any license under this Article, the applicant must first secure an appropriate permit from the State Board of Alcoholic Control, as provided by Chapter 18A. The State Board shall furnish to the Department of Revenue a list of all permits issued. (1949, c. 974, s. 6; 1951, c. 378, s. 4; 1963, c. 426, s. 12; 1971, c. 872, s. 2.)

§ 105-113.70. Resident manufacturers of malt beverages and unfortified wines.—The brewing or manufacture of malt beverages or unfortified wine shall be permitted in this State upon the payment of an annual license tax to the Commissioner of Revenue in the sum of five hundred dollars ($500.00) for a period ending on the next succeeding thirtieth day of April and annually thereafter. Persons licensed under this section may sell such beverages in barrels, bottles, or other closed containers only to persons licensed under the provisions of this Article to sell at wholesale, and no other license tax shall be levied upon the business taxed in this section. Provided, that pursuant to the rules and regulations of the State Board of Alcoholic Control, the sale of malt beverages and unfortified wine to nonresident wholesalers is authorized when

the purchase is not for resale in this State. The sale of malt, hops, and other ingredients used in the manufacture of malt beverages and unfortified wine is hereby permitted and allowed: Provided, that any person engaged in the business of manufacturing unfortified wines in this State shall be required to pay the following tax based on the number of gallons manufactured:

Where not more than 100 gallons are manufactured for sale	$ 5.00
Where 100 gallons and not more than 200 gallons are manufactured for sale	$ 10.00
Where 200 gallons and not more than 500 gallons are manufactured for sale	$ 25.00
Where 500 gallons and not more than 1,000 gallons are manufactured for sale	$ 50.00
Where 1,000 gallons and not more than 2,500 gallons are manufactured for sale	$ 200.00
Where 2,500 gallons or more are manufactured for sale	$ 250.00

When a licensed resident manufacturer of malt beverages procures a proper license under this section, it may receive the malt beverages that are manufactured by it at some point outside this State, but within the United States, for transshipment to dealers in this or other states, provided that such resident manufacturer is actually engaged in the manufacturing in this State of malt beverages. Such shipments of malt beverages for transshipment to other states shall be kept segregated by the resident manufacturer in its warehouse from any such North Carolina taxpaid beverages and shall comply with any and all rules and regulations promulgated by the Commissioner of Revenue and the State Board of Alcoholic Control.

Nothing in this Article shall be construed to impose any tax upon any resident citizen of this State who makes native wines for the use of himself, his family, and his guests from fruits, grapes, and berries cultivated or grown wild upon his own land. (1939, c. 158, s. 504; 1945, c. 903, s. 4; 1967, c. 162, s. 1; c. 867, s. 1; 1969, cc. 732, 1057; 1971, c. 872, s. 2.)

Opinions of Attorney General. — Mr. W.C. Cohoon, Chairman, Board of Alcoholic Control, 40 N.C.A.G. 20 (1969) rendered under similar provisions of former § 18-67.

§ 105-113.71. Malt beverage and unfortified wine bottler's license. — Any person who shall engage in the business of receiving shipments of malt beverages in barrels or other containers, and bottling the same for sale to others for resale, shall pay an annual license tax of two hundred fifty dollars ($250.00); and any person who shall engage in the business of bottling unfortified wine shall pay an annual license tax of two hundred fifty dollars ($250.00): Provided, however, that any person engaged in the business of bottling malt beverages and also unfortified wine shall pay an annual license tax of four hundred dollars ($400.00). No other license tax shall be levied upon the businesses taxed in this section, but licensees under this section shall be liable for the payment of the taxes imposed by G.S. 105-113.86 in the manner therein set forth. (1939, c. 158, s. 505; 1941, c. 339, s. 4; 1945, c. 903, s. 5; 1971, c. 872, s. 2.)

§ 105-113.72. Manufacturers and bottlers of fortified wines.—Any person, firm, or corporation authorized to do business in North Carolina may, subject to the laws of this State and the rules and regulations of the State Board of Alcoholic Control, engage in the business of manufacturing, producing and bottling of fortified wines, and is hereby authorized and permitted to manufacture, purchase, import, and transport brandy and other ingredients and equipment used in the manufacture of fortified wines; provided, that G.S. 18A-29 shall be applicable to the transportation of fortified wines, alcohol, and brandy used in the manufacture thereof.

The same annual license tax imposed upon manufacturers and bottlers of

unfortified wines in G.S. 105-113.70 and G.S. 105-113.71 shall be paid by the manufacturer and bottler of fortified wines. (1967, c. 614; 1971, c. 872, s. 2.)

§ 105-113.73. Malt beverage and unfortified wine wholesaler's license. — License to sell at wholesale, which shall authorize licensees to sell malt beverages in barrels, bottles, or other containers in quantities of not less than one case or container to a customer, shall be issued as a statewide license by the Commissioner of Revenue. The annual license under this section shall be one hundred fifty dollars ($150.00) and shall expire on the next succeeding thirtieth day of April. The license issued under this section shall be revocable at any time by the Commissioner of Revenue for failure to comply with any of the conditions of this Article with respect to the character of records required to be kept, reports to be made or payment of other taxes hereinafter set out.

Licensees to sell at wholesale unfortified wine shall pay an annual license tax of one hundred fifty dollars ($150.00): Provided, that a licensee to sell at wholesale malt beverages and unfortified wine shall pay an annual license tax of two hundred fifty dollars ($250.00).

If any wholesaler maintains more than one place of business or storage warehouse from which orders are received or beverages are distributed, a separate license shall be paid for each separate place of business or warehouse.

The owner or operator of every distributing warehouse selling, distributing, or supplying to retail stores malt beverages or unfortified wine shall be deemed a wholesale distributor within the meaning of this Article and shall be liable for the tax imposed in this section and shall comply with the conditions imposed in this Article upon wholesale distributors of beverages with respect to payment of taxes levied in this Article and bond for the payment of such taxes.

No county shall levy a tax on any business under the provisions of this section, nor shall any city or town, in which any person, firm, corporation or association taxed hereunder has its principal place of business levy and collect more than one fourth of the State tax levied under this section; nor shall any tax be levied or collected by any county, city or town on account of delivery and/or sale of malt beverages or unfortified wine. (1939, c. 158, s. 506; 1941, c. 339, s. 4; 1945, c. 903, s. 6; 1971, c. 872, s. 2.)

Privilege License Taxes on Out-of-Town Beer Wholesaler.—See opinion of Attorney General to Mrs. Mary W. Moss, Clerk and Tax Collector, Town of Creedmoor, 40 N.C.A.G. 864 (1970) rendered under similar provisions of former § 18-69.

§ 105-113.74. Fortified wine wholesaler's license.—Nothing in this Article or Chapter 18A shall prevent wholesale distributors from possessing, transporting, warehousing, or selling, as a wholesaler, in any county of the State, and the State Alcoholic Control Board shall approve and authorize the licensing of wholesale distributors, in any county, who qualify under the provisions of Chapter 18A; provided, that such sales are to persons, firms or corporations that have complied with the licensing provisions of this Article and Chapter 18A.

The same annual license tax imposed upon wholesalers of unfortified wines shall be paid by wholesalers of fortified wines, except that a resident wholesaler of both unfortified and fortified wine shall pay only the license tax rate applicable to unfortified wine. (1941, c. 339, s. 6; 1945, c. 903, s. 11; 1963, c. 460, s. 2; 1971, c. 872, s. 2.)

§ 105-113.75. Sales on railroad trains.—The sale of malt beverages and unfortified wine shall be permitted on railroad trains in this State to be sold only in dining cars, buffet cars, Pullman cars, or club cars, and for consumption on such cars upon payment to the Commissioner of Revenue of one hundred dollars ($100.00) for each railroad system over which such cars are operated in this State for an annual statewide license expiring on the next

succeeding thirtieth day of April. No other license tax shall be levied upon licensees under this section, but every licensee under this section shall make a report to the Commissioner of Revenue on or before the fifteenth day of each calendar month covering sales for the previous month and payment of the tax on such sales at the rate of tax levied in this Article. (1939, c. 158, s. 507; 1971, c. 872, s. 2.)

§ 105-113.76. Salesman's license.—License for salesmen, which shall authorize the licensee to offer for sale within the State or solicit orders for the sale within the State of malt beverages, or unfortified wine, or fortified wine, shall be issued by the Commissioner of Revenue upon the payment of an annual license tax of twelve dollars and fifty cents ($12.50) to the Commissioner of Revenue, such license to expire on the next succeeding thirtieth day of April. License to salesmen shall be issued only upon the recommendation of the vendor whom they represent, and no other license tax shall be levied under this section. (1939, c. 158, s. 508; 1945, c. 903, s. 7; 1971, c. 872, s. 2.)

§ 105-113.77. Retail malt beverage license.—Licenses issued for the retail sale of malt beverages shall be of two kinds:

(1) "On-premises" license, which shall be issued for bona fide restaurants, cafes, cafeterias, hotels, lunch stands, drugstores, filling stations, grocery stores, cold-drink stands, tearooms, or incorporated or chartered clubs. Such license shall authorize the licensee to sell at retail malt beverages for consumption on the premises designated in the license, and to sell malt beverages in original packages for consumption off the premises.

(2) "Off-premises" license, which shall authorize the licensee to sell at retail malt beverages for consumption only off the premises designated in the license, and only in the immediate container in which the beverage was received by the licensee.

In a municipality the governing board of such municipality shall determine whether an applicant for license is entitled to a "premises" license under the terms of this Article, and outside of municipalities such determination shall be by the board of commissioners of the county. (1939, c. 158, s. 509; 1971, c. 872, s. 2.)

Compulsory Issuance. — An "on premises" license to sell beer was not available, as a matter of right, to any citizen who might qualify under the provisions of former § 18-75 (see now § 105-113.80). Compulsory issuance thereof was in any event limited to the businesses enumerated in this section. McCotter v. Reel, 223 N.C. 486, 27 S.E.2d 149 (1943), decided under similar provisions of former § 18-72.

The word "premises" when applied to a drive-in restaurant must be held to include the entire private property area designed for use by patrons while being served. Davis v. City of Charlotte, 242 N.C. 670, 89 S.E.2d 406 (1955), decided under similar provisions of former § 18-72.

City Cannot Prohibit Curb Sales by "On Premises" Licensees. — A city ordinance prohibiting sale of wine and beer by car hop or curb service was enjoined insofar as it applied to plaintiffs holding valid "on premises" licenses issued pursuant to this section. Davis v. City of Charlotte, 242 N.C. 670, 89 S.E.2d 406 (1955), decided under similar provisions of former § 18-72.

§ 105-113.78. Retail unfortified wine license.—Licenses issued for the retail sale of unfortified wine shall be of two kinds:

(1) "On-premises" licenses shall be issued only to bona fide hotels, cafeterias, cafes, and restaurants which shall have a Grade A rating from the State Department of Health, and shall authorize the licensees to sell at retail for consumption on the premises designated in the license and to sell unfortified wine in original containers for consumption off the premises. Provided, no such license shall be issued except to such hotels, cafeterias, cafes, and restaurants where

prepared food is customarily sold and only to such as are licensed under the provisions of G.S. 105-62(a).

(2) "Off-premises" licenses shall authorize the licensee to sell unfortified wine at retail for consumption off the premises designated in the license, and all such sales shall be made in the immediate container in which the wine was purchased by the licensee. (1939, c. 158, s. 509½; 1941, c. 339, s. 4; 1945, c. 903, s. 8; 1967, c. 1110, s. 10; 1971, c. 872, s. 2.)

Effect of City Zoning Ordinance. — A restaurant owner's right to operate a restaurant being conceded, a city zoning ordinance could not set at nought a statewide statute permitting the sale of wines in such restaurants. Staley v. City of Winston-Salem, 258 N.C. 244, 128 S.E.2d 604 (1962), decided under similar provisions of former § 18-73.

§ 105-113.79. Annual municipal retail license tax.—(a) The annual license tax to sell at retail malt beverages for municipalities shall be:

(1) For "on-premises" license, fifteen dollars ($15.00);

(2) For "off-premises" license, five dollars ($5.00).

(b) The annual license tax to sell at retail unfortified wine shall be:

(1) "On-premises" license, fifteen dollars ($15.00);

(2) For "off-premises" license, ten dollars ($10.00).

(c) The rate of license tax levied in this section shall be for the first license issued to one person and for each additional license issued to one person an additional tax of ten percent (10%) of the base tax, such increase to apply progressively for each additional license issued to one person. (1939, c. 158, s. 510; 1943, c. 400, s. 6; 1945, c. 708, s. 6; 1971, c. 872, s. 2.)

§ 105-113.80. Application for retail or wholesale municipal license.—Every person making application for a license to sell at retail or wholesale malt beverages or unfortified wine, if the place where such sale is to be made is within a municipality, shall make application first to the governing board of such municipality, and the application shall contain:

(1) The name and residence of the applicant and the length of his residence within the State of North Carolina;

(2) The particular place for which the license is desired, designating the same by a street and number, if practicable; if not, by such other apt description as definitely locates it;

(3) The name of the owner of the premises upon which the licensed business is to be carried on;

(4) That the applicant intends to carry on the business authorized by the license for himself or under his immediate supervision and direction;

(5) A statement that the applicant is a citizen and resident of North Carolina and is not less than 21 years of age; that he has not been convicted of, or entered a plea of guilty or nolo contendere to, a felony or other crime involving moral turpitude within the past three years; or a violation of the liquor laws, either State or federal, within the past two years.

The application must be verified by the affidavit of the petitioner made before a notary public or other person duly authorized by law to administer oaths. If it appears from the statement of the applicant or otherwise that he has at any time been convicted of, or entered a plea of guilty or nolo contendere to, a felony or other crime involving moral turpitude within the past three years, or that he has, within the two years prior to the filing of the application, been adjudged guilty of violating the liquor laws, either State or federal, or that he has within two years prior to the filing of the application completed a sentence for violation of the liquor laws, such license shall not be granted. If it appears that any false statement is knowingly made in any part of the

application and a license received thereon, the license shall be revoked and the applicant subjected to the penalty provided for misdemeanors. Before issuing a license, the governing body of the municipality shall be satisfied that the statements required by subdivisions (1), (2), (3), (4), and (5) of this section are true.

Neither the State nor any city or county shall issue a license under this Article to any person, firm, or corporation who is not a citizen of the United States and who has not been a bona fide resident of the State of North Carolina for one year. Provided, that if the applicant is a corporation, the requirement as to residence shall not apply to the officers, directors, or stockholders of the corporation; however, such residence requirements shall apply to any officer, director, stockholder, agent, or employee who is also the manager and in charge of the premises for which the license is applied for, but the governing body of the county or municipality may, in its discretion, waive such requirement. No resident of the State shall obtain a license under this Article and employ or receive aid from a nonresident for the purpose of defeating this requirement. (1939, c. 158, s. 511; 1945, c. 708, s. 6; 1947, c. 1098, s. 1; 1963, c. 426, s. 3; c. 1188; 1971, c. 872, s. 2.)

§ **105-113.81. Annual county license to sell at retail.**—License to sell at retail shall be issued annually by the board of commissioners of the county, and application for such license shall be made in the same manner and contain the same information set out in the preceding section [G.S. 105-113.80] with respect to municipal license. If the application is for license to sell within a municipality, the application must also show that license has been granted the applicant by the governing board of such municipality. The granting of a license by the governing board of a municipality shall determine the right of an applicant to receive a county license upon compliance with the conditions of this Article.

The clerk of the board of commissioners of each county shall make prompt report to the Commissioner of Revenue of each license granted by the board of commissioners of each county. The county license fee shall be fixed at twenty-five dollars ($25.00) for an "on-premises" license and five dollars ($5.00) for an "off-premises" license for the sale of malt beverages, and twenty-five dollars ($25.00) for the sale of unfortified wine; the same shall be placed in the county treasury, for the use of the county. (1939, c. 158, s. 512; 1941, c. 339, s. 4; 1943, c. 400, s. 6; 1971, c. 872, s. 2.)

§ **105-113.82. Issuance of license mandatory.**—Except as herein provided, it shall be mandatory that the governing body of a municipality or county issue a license to any applicant when such person shall have complied with requirements of this Article and Chapter 18A: Provided, the governing board of any county or municipality which has reason to believe that any applicant for license has, during the preceding license year, committed any act or permitted any condition for which his license (or permit) was, or might have been, revoked under this Article or Chapter 18A, said governing board shall be authorized to hold a hearing concerning the issuance of license to the applicant at a designated time and place, of which the applicant shall be given 10 days' notice; at the hearing the applicant may appear, offer evidence, and be heard, and the governing body shall make findings of fact based on the evidence at the hearing and shall enter the findings in its minutes; if, from the evidence the governing body finds as a fact that during the preceding license year the applicant committed any act or permitted any condition for which his license (or permit) was, or might have been, revoked under this Article or Chapter 18A, the governing body may refuse to issue a license to said applicant. Provided, further, that the applicant may and shall have the right to appeal from an adverse decision to the superior court of said county where and when

the matter shall be heard, as by law now provided for the trial of civil actions; that said notice of appeal may be given at the time of the hearing or within 10 days thereafter, and said cause upon appeal shall be docketed at the next ensuing term of civil superior court in said county. And provided, further, that such governing bodies in the counties of Alamance, Alexander, Ashe, Avery, Chatham, Clay, Duplin, Granville, Greene, Haywood, Jackson, Macon, Madison, McDowell, Montgomery, Nash, Pender, Randolph, Robeson, Sampson, Transylvania, Vance, Watauga, Wilkes, Yadkin, or any municipality therein, the City of Greensboro in Guilford County and the Town of Aulander, shall be authorized in their discretion to decline to issue the "on-premises" licenses provided for in G.S. 105-113.78(1). (1939, c. 158, s. 513; c. 405; 1945, c. 708, s. €; cc. 934, 935, 1037; 1947, c. 932; 1971, c. 872, s. 2.)

§ 105-113.83. Annual State license to sell unfortified wine at retail.—Every person who intends to engage in the business of selling unfortified wines shall procure an annual State license for such business, which license shall in all cases be issued under the same restrictions, rules and regulations as set out in this Article for the issuance of license for the sale of malt beverages, and for which license the following schedule of taxes is hereby levied:

(1) For an "on-premises" license, twenty-five dollars ($25.00);

(2) For an "off-premises" license, five dollars ($5.00).

Such retail license shall authorize the sale of the unfortified wine only on the premises described in the license, and if the same person operates more than one place at which unfortified wine is sold at retail, he shall obtain a license for each such place and pay therefor the license tax provided in this section.

If the license issued to any person by any municipality or county to sell the beverages referred to in this Article shall be revoked by the proper officers of such municipality or county, or by any court, it shall be the duty of the Commissioner of Revenue to revoke the State license of such licensee; and in such event, the licensee shall not be entitled to a refund of any part of the license tax paid. It shall be unlawful for any wholesale licensee to make any sale or delivery of unfortified wine to any person except persons who have been licensed to sell such beverages at retail, as prescribed in this Article.

It shall be unlawful for any retail licensee to purchase any unfortified wine from any person except wholesale licensees maintaining a place of business within this State and duly licensed under the provisions of this Article. (1939, c. 158, s. 516; 1941, c. 339, s. 4; 1971, c. 872, s. 2.)

§ 105-113.84. Annual retail malt beverage State license; sale of "short-filled" packages by manufacturers to employees.—Every person who intends to engage in the business of retail sales of malt beverages shall also apply for and procure an annual State license from the Commissioner of Revenue.

Five dollars ($5.00) shall be charged for the first license issued to each licensee, and for each additional license issued to one person an additional tax of ten percent (10%) of the five dollars ($5.00) base tax shall be charged. That is to say, for the second license issued the tax shall be five dollars and fifty cents ($5.50) annually, for third license six dollars ($6.00) annually, and an additional fifty cents (50¢) per annum for each additional license issued to such person.

A resident manufacturer of malt beverages may sell "short-filled packages" to its employees for the sole use of said employees, members of their families, and bona fide guests in this State provided that such manufacturer sells only such "short-filled" packages on which the appropriate North Carolina taxes have been paid or will be paid, based upon the size of the bottle or container short filled. Any sale made to any employee of said manufacturer under this section shall not be construed as a retail or wholesale sale under any other provisions of this Article or Chapter 18A, and such manufacturer shall not be

required by reason of such sales to obtain a permit under Chapter 18A or license as provided by this Article. (1939, c. 158, s. 515; 1967, c. 162, s. 2; 1971, c. 872, s. 2.)

§ 105-113.85. Retail fortified wine licenses.—In any county or municipality in which the operation of alcoholic beverage control stores is authorized by law, it shall be legal to sell fortified wines for consumption on the premises in hotels and restaurants that have a Grade A rating from the State Board of Health, and it shall be legal to sell said wines in drugstores and grocery stores for off-premises consumption; such sales, however, shall be subject to the rules and regulations of the State Alcoholic Beverage Control Board. The local and State licenses taxes for retailers of fortified wines shall be the same as for retailers of unfortified wines. Application for the licenses for the sale of fortified wines shall be made in the same manner as for the licenses for the sale of unfortified wines. Provided, however, that retailers of both unfortified and fortified wine shall pay only the license tax rate applicable to unfortified wine. (1941, c. 339, s. 6; 1945, c. 903, s. 11; 1963, c. 460, s. 2; 1971, c. 872, s. 2.)

§ 105-113.86. Additional tax.—(a) In addition to the license taxes herein levied, a tax is hereby levied upon the sale of malt beverages of seven dollars and fifty cents ($7.50) per barrel of 31 gallons, or the equivalent of such tax in containers of more or less than 31 gallons, and in bottles or other containers of not more than six ounces, a tax of one and one-fourth cents ($1^1/_4$¢) per bottle or container, and in bottles or other containers of more than six ounces and not more than 12 ounces, a tax of two and one-half cents ($2^1/_2$¢) per bottle or container, and in bottles or containers of the capacity of one quart, or its equivalent, a tax of six and two-thirds cents ($6^2/_3$¢) per bottle or container: Provided that fruit cider of alcoholic content not exceeding that provided in this Article may be sold in bottles or other containers of not more than six ounces at a tax of five-eighths of a cent ($^5/_8$ths of 1¢) per bottle or container.

Wholesale distributors and importers may, at their option, pay the tax levied in this subsection at the rate of twenty-one one-hundredths of a cent (.21¢) per ounce when the beverages taxed herein contained in bottles of over six ounces.

(1) In addition to all other taxes levied in this Chapter, there is hereby levied an additional tax or surtax upon the sale of malt beverages of seven dollars and fifty cents ($7.50) per barrel of 31 gallons, or the equivalent of such tax in containers of more or less than 31 gallons, and in bottles or other containers of not more than six ounces, a tax of one and one-fourth cents ($1^1/_4$¢) per bottle or container, and in bottles or other containers of more than six ounces and not more than 12 ounces, a tax of two and one-half cents ($2^1/_2$¢) per bottle or container and in bottles or containers of the capacity of one quart, or its equivalent, a tax of six and two-thirds cents ($6^2/_3$¢) per bottle or container. Notwithstanding any provisions of subsection (p) of this section, none of the revenues collected pursuant to the tax imposed by this subsection shall be allocated or distributed to any county or municipality, but all of said revenue derived from the increase in tax rates imposed by this subsection shall be paid into the general fund of the State. Every person, firm, or corporation who owns or possesses any malt beverages on July 1, 1955, for the purpose of sale in this State shall file with the Commissioner of Revenue not later than July 20, 1955, a complete inventory of such beverages and pay to the Commissioner of Revenue the tax imposed by this subsection with respect to all such beverages on hand on said July 1, 1955. The Commissioner of Revenue shall prescribe the form and manner of making such inventory reports and the method of evidencing the payment of the tax herein imposed with respect to said inventory of said beverages.

Wholesale distributors and importers may, at their option, pay the tax levied in this subsection at the rate of twenty-one one-hundredths of a cent (.21¢) per ounce when the beverages taxed herein are contained in bottles of over six ounces.

(2) Notwithstanding any other provisions of subsection (a) of this section, as amended by Chapter 1313 of the 1955 Session Laws, the rate of the tax therein imposed in said subsection (a) with respect to malt beverages shall be one and one-half cents (1½¢) per bottle or container with respect to such beverages in bottles or other containers of exactly seven ounces.

Notwithstanding any other provisions of subdivision (a)(1) of this section, as enacted by Chapter 1313 of the 1955 Session Laws, the rate of additional tax or surtax therein imposed in said subdivision (a)(1) with respect to malt beverages shall be one and one-half cents (1½¢) per bottle or container with respect to such beverages in bottles or other containers of exactly seven ounces.

Except as herein provided, all provisions of this Article shall be applicable with respect to the taxes imposed by this subsection in the same manner and to the same extent that said provisions are applicable to other taxes imposed in this Article with respect to malt beverages.

The provisions of this subsection shall not be applicable with respect to beverages in bottles or containers in other than those of exactly seven ounces, and the provisions of this section, as amended by said Chapter 1313, above referred to, shall be applicable to said beverages in any other size containers, and the taxes therein imposed with respect to beverages in containers of more than six but not more than 12 ounces shall be applicable with respect to said beverages in containers of more than seven but not more than 12 ounces.

(b) Each licensed wholesale distributor and importer of malt beverages shall pay the excise tax levied by this Article on said beverages on or before the fifteenth day of the month following the calendar month in which they are first sold or disposed of within this State by said wholesale distributor and importer.

(c) Each of the licensees responsible for the payment of the excise tax levied by this Article shall, on or before the fifteenth of each month, file a report, verified on forms provided by the Commissioner of Revenue, showing, for the preceding calendar month, the exact quantities of malt beverages, by size and type of container:

(1) Constituting his beginning and ending inventory for the month;
(2) Shipped to him from inside this State and received by him in this State;
(3) Shipped to him from outside this State and received by him in this State;
(4) Sold or disposed of by him in this State;
(5) Sold by him in this State to army, navy, air force, and coast guard services of the United States and their organized personnel separately indicating those sales or transactions of malt beverages to which the excise tax is not applicable;
(6) Sold or disposed of by him to persons outside this State, separately indicating those sales or transactions of malt beverages to which the excise tax is not applicable.

The report, on forms prescribed by the Commissioner of Revenue, shall also show the amount of excise tax payable, after allowance for all proper deductions, for all such beverages sold or disposed of by him in this State, and shall include such additional information as the Commissioner of Revenue may require for the proper administration of this Article. Payment of the excise tax levied by this Article in the amount disclosed by the report shall accompany the report and shall be paid to the Commissioner of Revenue. Each wholesale

distributor and importer required to file a return shall keep complete and accurate books, papers, invoices, and other records as may be necessary to substantiate the accuracy of his report and the amount of excise tax due, and shall retain such records for a period of three years, subject to the use and inspection of the Commissioner of Revenue or his agents.

(d) Any person required by this section to retain books, papers, invoices, and other records who fails to produce the same upon demand by the Commissioner of Revenue or his agent, unless such nonproduction is due to providential or other causes beyond his control, shall be guilty of a misdemeanor.

(e) Each manufacturer, nonresident wholesaler, and foreign wholesaler licensed by the North Carolina Commissioner of Revenue to sell and/or deliver any malt beverages in North Carolina, at the time it sells and/or delivers such beverages to a licensed North Carolina wholesale distributor or importer, shall furnish to each such wholesale distributor or importer a sales ticket or invoice in duplicate, furnishing a third copy to the Commissioner of Revenue, with the following information written thereon:

(1) The name and address of the manufacturer, nonresident wholesaler, or foreign wholesaler making the delivery and/or sale;

(2) The name, address, and license number of the wholesale distributor or importer receiving the shipment, and/or making the purchase;

(3) The exact number of barrels, kegs, or cases delivered and/or purchased, specifying the size and type of container.

(f) Each manufacturer, nonresident wholesaler, or foreign wholesaler licensed by the Commissioner of Revenue to sell and/or deliver malt beverages, unfortified wine, and fortified wine in North Carolina shall prepare and file a monthly report, verified on forms provided by the Commissioner of Revenue, showing the exact number of barrels, kegs, or cases, specifying the size and type of container, of such beverages sold to licensed wholesale distributors or importers during the previous calendar month. This report must be filed with the Commissioner of Revenue on or before the fifteenth day of each calendar month following the month during which the sales are made. Each manufacturer, nonresident wholesaler, or foreign wholesaler shall retain copies of such sales records for a period of three years, subject to the use and inspection of the Commissioner of Revenue or his agents.

(g) Persons operating boats, dining cars, buffet cars or club cars upon or in which malt beverages are sold shall keep such records of the sales of such beverages in this State as the Commissioner of Revenue shall prescribe and shall submit monthly reports of such sales to the Commissioner of Revenue upon a form prescribed therefor by the Commissioner of Revenue and shall pay the excise tax levied under this Article at the time such reports are filed.

(h) On the total excise tax due upon the sale of malt beverages, unfortified wine, and fortified wine levied by this Article, the Commissioner of Revenue shall allow a discount of four percent (4%). Said discount shall constitute compensation allowed by the State of North Carolina to wholesale distributors and importers for spoilage and breakage and for expenses incurred in the preparation of monthly reports and the maintenance of books, papers and invoices, and bond required by this Article. Provided that no compensation or refund shall be made for taxpaid beverages given as free goods for advertising.

(i) In addition to the allowance of a discount on the excise tax due from wholesale distributors or importers, as provided in subsection (h) of this section, the wholesale distributor or importer shall not be required to pay the excise tax on any malt beverages, unfortified wine, and fortified wine, destroyed or spoiled or otherwise rendered unsalable in a major disaster, upon adequate proof of same. For the purposes of this subsection a major disaster shall be defined as the destruction, spoilage or unsalability of 50 or more cases, or their equivalent, of malt beverages or of 25 or more cases, or their equivalent, of unfortified wine and fortified wine.

The Commissioner of Revenue shall promulgate rules and regulations to relieve licensed resident manufacturers from the liability of paying the excise taxes levied under this section on malt beverages that are furnished free of charge to customers, visitors and employees on the manufacturers' licensed premises for consumption on said premises.

(j) The Commissioner of Revenue shall promulgate rules and regulations to relieve resident manufacturers, wholesale distributors, and importers from the liability of paying the excise tax levied and imposed on malt beverages that are intended to be sold and are thereafter sold to army, navy, air force and coast guard services of the United States and their organized personnel in this State; or which are intended to be shipped and are thereafter shipped out of this State by such resident manufacturers, wholesale distributors, or importers for resale outside of this State; or which are intended for use or consumption by or on ocean-going vessels that ply the high seas in interstate or foreign commerce in the transport of freight and/or passengers for hire exclusively, when delivered to an officer or agent of such vessel for use by or on such vessel.

Each manufacturer or bottler manufacturing beverages within or outside the State of North Carolina which are intended to be sold and are thereafter sold to the army, navy, air force, coast guard services, or any other military establishment in North Carolina shall identify such beverages by placing on the label, crown, can end, or kegs the phrase "For Military Use Only," any and all laws, regulations, and requirements to the contrary notwithstanding. Provided that all other malt beverages intended for sale in North Carolina shall bear no special identification other than proprietary crowns, lids, or stamps.

(k) If the excise tax levied and imposed in this section shall not be paid when due by the wholesale distributor or importer responsible therefor, there shall be added to the amount of the tax as a penalty a sum equivalent to ten percent (10%) thereof, and in addition thereto interest on the tax and penalty at the rate of one half of one percent (1/2 of 1%) per month or fraction of a month from the date the tax became due until paid. Nothing herein contained shall be construed to relieve any licensee otherwise liable from liability for payment of the excise tax.

(l) Any person who shall fail, neglect, refuse to comply with or violate any provisions of this section, for which no specific penalty is provided, or who shall refuse to permit the Commissioner of Revenue or his agents to examine his books, papers, invoices, and other records or his store of intoxicating liquors in and upon any premises where the same are manufactured, bottled, stored, sold, offered for sale, or held for sale, shall be guilty of a misdemeanor.

(m) The Commissioner of Revenue is hereby charged with the enforcement of the provisions of this section and hereby authorized and empowered to prescribe, adopt, promulgate, and enforce rules and regulations relating to any matter or thing pertaining to the administration and enforcement of the provisions of this section, and the collection of taxes, penalties, and interest imposed by this Article.

(n) The Commissioner of Revenue is hereby authorized to prescribe, adopt, promulgate, and enforce the rules and regulations relating to the transportation of malt beverages and unfortified wine through this State, and from points outside of this State to points within this State, and to prescribe, adopt, promulgate, and enforce rules and regulations reciprocal to those of, or laws of, any other state or territory affecting the transportation of beverages manufactured in this State.

(o) In addition to the license taxes herein levied, a tax is hereby levied upon the sale of unfortified wine at the rate of sixty cents (60¢) per gallon.

Each licensed wholesale distributor and importer of unfortified wine shall pay the excise tax levied by this Article on said beverages on or before the fifteenth day of the month following the calendar month in which they are first

sold or disposed of within the State by said licensed wholesale distributor or importer. The provisions of subsections (c) through (l) inclusive, of this section, shall also be applicable to the control of the sale of unfortified wine and fortified wine.

(p) From the taxes collected annually under subsection (a) an amount equivalent to forty-seven and one-half percent (47½%) thereof, and from the taxes collected annually under subsection (o) an amount equivalent to one half thereof shall be allocated and distributed, upon the basis herein provided, to counties and municipalities wherein such beverages may be licensed to be sold at retail under the provisions of this Article. The amount distributable to each county and municipality entitled to the same under the provisions of this subsection shall be determined upon the basis of population therein as shown by the latest federal decennial census. Where such beverages may be licensed to be sold at retail in both county and municipality, allocation of such amounts shall be made to both the county and the municipality on the basis of population. Where such beverages may be licensed to be sold at retail in a municipality in a county wherein the sale of such beverages is otherwise prohibited, allocation of such amounts shall be made to the municipality on the basis of population; provided, however, that where the sale of such beverages is prohibited within defined areas within a county or municipality, the amounts otherwise distributable to such county or municipality on the basis of population shall be reduced in the same ratio that such areas bear to the total area of the county or municipality, and the amount of such reduction shall be retained by the State: Provided, further, that if said area within a county is a municipality for which the population is shown by the latest federal decennial census, reduction of such amounts shall be based on such population rather than on area. The Commissioner of Revenue shall determine the amounts distributable to each county and municipality, for the period July 1, 1947, to September 30, 1947, inclusive, and shall distribute such amounts within 60 days thereafter; and the Commissioner of Revenue annually thereafter shall determine the amounts distributable to each county and municipality for each 12-month period ending September 30 and shall distribute such amounts within 60 days thereafter.

The taxes levied in this section are in addition to the taxes levied in Schedule E of the Revenue Act.

(q) Each nonresident manufacturer, nonresident wholesaler, and foreign wholesaler of malt beverages then licensed by the Commissioner of Revenue to sell and/or deliver such beverages in North Carolina shall, if required by the Commissioner of Revenue, on or before January 15, 1968, make an advance lump-sum excise tax payment, in cash or equivalent, to the Commissioner of Revenue, in an amount equal to each such nonresident manufacturer's, nonresident wholesaler's and foreign wholesaler's highest two months' tax liability for tax crowns, lids, and stamps during the 12-month period ending June 30, 1967. Each such advance lump-sum excise tax payment shall be credited to the account of such nonresident manufacturer, nonresident wholesaler, and foreign wholesaler by the Commissioner of Revenue, and, beginning on the first day of January, 1969, and on the first day of each month thereafter, a refund in the amount of one-twelfth of each advance lump-sum excise tax payment shall be made by the Commissioner of Revenue to such nonresident manufacturer, nonresident wholesaler, or foreign wholesaler until the total amount of such refunds equals the total amount of such advance lump-sum excise tax payment.

(r) As of the close of business on December 31, 1967, each nonresident manufacturer, nonresident wholesaler, and foreign wholesaler then licensed by the Commissioner of Revenue to sell and/or deliver in North Carolina malt beverages, unfortified wine, and fortified wine shall take an inventory of all North Carolina taxpaid crowns, lids, and stamps, affixed and unaffixed, in his

possession and control and shall submit the results of such inventory to the North Carolina Commissioner of Revenue no later than January 15, 1968, verified on forms provided by the Commissioner.

Upon receipt of each such verified inventory, the Commissioner of Revenue shall satisfy himself as to the accuracy of each such inventory and shall determine the total amount of tax payment represented thereby.

(s) Each nonresident manufacturer, nonresident wholesaler, and foreign wholesaler in possession of unaffixed taxpaid stamps as of the close of business on December 31, 1967, shall surrender such taxpaid stamps to the Commissioner of Revenue within 60 days thereafter and shall claim refund therefor.

(t) Each nonresident manufacturer, nonresident wholesaler, and foreign wholesaler may claim refunds on his monthly report due on or before January 15, 1968, for the full amount of tax paid by the affixation, before January 1, 1968, of stamps, crowns, or lids to the original containers of malt beverages, unfortified wine, and fortified wine, which containers are still in his possession and control on January 1, 1968. The Commissioner of Revenue shall provide for a refund in the amount of the tax paid:

(1) For said stamps, crowns, and lids affixed before January 1, 1968, to containers in the possession and control of such manufacturer or wholesaler on January 1, 1968;

(2) For tax stamps returned unused to the Commissioner within 60 days after January 1, 1968; and

(3) For tax crowns and lids as to which the nonresident manufacturer, nonresident wholesaler or foreign wholesaler has submitted satisfactory proof to the Commissioner, on or before January 15, 1968, that said tax crowns and lids were in his possession as unused inventory on January 1, 1968.

The total of the refunds provided for in this subsection shall be credited to the account of said nonresident manufacturer, nonresident wholesaler, or foreign wholesaler in the same manner as that provided in subsection (q) of this section and shall be refunded to said nonresident manufacturer, nonresident wholesaler, or foreign wholesaler in the same manner and in accordance with the schedule set forth in that subsection.

Each nonresident manufacturer, nonresident wholesaler, and foreign wholesaler shall, after determination of the amount of refund due him for his crown and lid inventory on January 1, 1968, thereafter be permitted to use the crowns and lids constituting that inventory on malt beverages, unfortified wine, and fortified wine, solely as closures, without such use indicating payment of the North Carolina excise tax.

(u) As of the close of business on December 31, 1967, each wholesale distributor and importer licensed to sell malt beverages, unfortified wine, and fortified wine shall take inventory of all such beverages in his possession and control having taxpaid crowns, lids, and stamps affixed thereto and shall submit, verified on forms provided by the Commissioner, the results of such verified inventory to the Commissioner of Revenue no later than January 15, 1968. Upon receipt of each such verified inventory, the Commissioner of Revenue shall satisfy himself as to the accuracy of each such inventory and shall determine the total amount of the tax payment represented thereby.

Each wholesale distributor and importer may claim credit or refund on his monthly report due on or before January 15, 1968, for the full amount of the tax represented by the inventory filed as required by this subsection. The Commissioner of Revenue shall provide for a credit or refund equal to the full amount of said tax to each wholesaler distributor or importer claiming same.

Each wholesale distributor or importer shall, after determination of the amount of credit or refund due him, thereafter be permitted to sell or otherwise dispose of all malt beverages, unfortified wine, and fortified wine to

which taxpaid crowns, lids, or stamps are affixed, which are in his possession and control as of the close of business on December 31, 1967, and which have been reported in the inventory required by this subsection; provided that said crowns, lids, or stamps shall not be considered evidence that the excise tax has been paid on the beverages to which they are affixed. (1939, c. 158, s. 517; c. 370, s. 1; 1941, c. 50, s. 7; c. 339, s. 4; 1943, c. 400, s. 6; cc. 564, 565; 1945, c. 708, s. 6; 1947, c. 1084, ss. 7-9; 1951, c. 1162, s. 1; 1955, c. 1313, s. 6; c. 1370; 1957, c. 1340, s. 11; 1963, c. 460, s. 3; c. 992, s. 2; 1967, c. 162, s. 3; c. 759, ss. 1-20; 1969, c. 1075, s. 1; cc. 1239, 1268; 1971, c. 872, s. 2.)

§ 105-113.87. Use of funds allocated to counties and municipalities.—The funds allocated to counties and/or municipalities under G.S. 105-113.86(p) may be used by said counties or municipalities as any other general or surplus funds of said unit may be used. (1947, c. 1084, s. 11; 1971, c. 872, s. 2.)

§ 105-113.88. By whom excise taxes payable.—The excise tax levied in G.S. 105-113.86 upon the sale of malt beverages shall be paid to the Commissioner of Revenue by the wholesale distributor or importer of such beverages, and the excise tax levied in G.S. 105-113.86 or G.S. 105-113.95 upon the sale of fortified and unfortified wine shall be paid to the Commissioner of Revenue by the wholesale distributor or importer of such beverages; provided that the excise tax levied in G.S. 105-113.86 shall be paid and collected on the same beverages only once. The Commissioner of Revenue shall require each wholesale distributor or importer to furnish bond in an indemnity company licensed to do business under the insurance laws of this State in such sums as the Commissioner of Revenue shall find adequate to cover the tax liability of each such wholesale distributor or importer, proportioned to the volume of business of each such wholesale distributor or importer, but in no event to be less than one thousand dollars ($1,000) or more than fifty thousand dollars ($50,000), or to deposit federal, State, county, or municipal bonds in required amounts; such county and municipal bonds to be approved by the Commissioner of Revenue. The Commissioner of Revenue may grant such extension of time for compliance with this condition as may be found reasonable. (1939, c. 158, s. 518; 1941, c. 339, s. 4; 1967, c. 759, s. 21; 1971, c. 872, s. 2.)

§ 105-113.89. Nonresident manufacturers and wholesale dealers to be licensed.—From and after April 30, 1939, every nonresident desiring to engage in the business of selling malt beverages, or unfortified wine, or fortified wine to wholesale dealers licensed under the provisions of this Article, shall apply to the Commissioner of Revenue for an annual license so to do. The Commissioner of Revenue may require every such applicant to execute, and deposit with the Commissioner a bond in a sum not to exceed two thousand dollars ($2,000), conditioned upon the faithful compliance by the applicant with the provisions of this Article, and particularly upon his making no sales of any malt beverages or unfortified wine or fortified wine to any person in this State except a duly licensed wholesale dealer. Upon the payment of a license tax of one hundred fifty dollars ($150.00), if the Commissioner is satisfied that said applicant is a bona fide manufacturer or distributor of malt beverages, or unfortified wine, or fortified wine, he shall then issue a license to such applicant which shall bear a serial number. Every holder of such nonresident license shall thereafter put the number of such license on every invoice for any quantity of beverages sold by such licensee to any wholesale dealer in North Carolina. Upon the failure of any such licensee to comply with all the provisions of this Article, the Commissioner of Revenue may revoke such license.

Any resident manufacturer licensed under G.S. 105-113.70 shall not be

required to post the bond required by this section. (1939, c. 158, s. 518½; 1945, c. 903, s. 9; 1971, c. 872, s. 2.)

§ 105-113.90. Resident wholesalers shall not purchase beverages for resale from unlicensed nonresidents.—It shall be unlawful for any resident wholesale distributor or bottler to purchase any malt beverages, or unfortified wine, or fortified wine for resale within this State from any nonresident who has not procured the license required in the preceding section. (1945, c. 708, s. 6; 1971, c. 872, s. 2.)

§ 105-113.91. Malt beverages and wine importer's license. — Any person who shall engage in the business of receiving shipments of malt beverages or wine (fortified or unfortified) and reselling the same in the same form and in the original containers to retailers or to other wholesalers described in this Article may procure from the Commissioner of Revenue an importer's license which will entitle such licensed importer to purchase the beverages described above directly from bottlers, manufacturers and wholesalers located in foreign countries or possessions or territories of the United States, hereinafter called "foreign wholesaler." The annual importer's license as provided for under this section shall be one hundred fifty dollars ($150.00) and shall expire on the next succeeding thirtieth day of April. The license issued under this section shall be revocable at any time by the Commissioner of Revenue for failure to comply with any of the conditions of this Article or any rules or regulations issued by the Commissioner with respect to the character of the records required to be kept, reports to be made, or payment of tax provided for under this Article.

It is the intent of this section to limit the purchase by licensed importers of malt beverages or wine (fortified or unfortified) to sales and shipments made by such foreign wholesalers from their location outside the continental United States directly to the licensed importer in this State.

The Commissioner of Revenue shall require each such importer to furnish bond in an indemnity company licensed to do business under the insurance laws of this State in such sums as the Commissioner of Revenue shall find adequate to cover the tax liability of each such importer but in no event to be less than two thousand dollars ($2,000). (1957, c. 1244; 1967, c. 759, s. 22; 1971, c. 872, s. 2.)

§ 105-113.92. Payment of tax by retailers.—The granting of a license by any municipality or county under this Article to any person to sell at retail malt beverages, or unfortified wine, or fortified wine shall not be a valid license for such sale at retail until such person shall have filed with the Commissioner of Revenue a bond in a surety company licensed by the Insurance Department to do business in this State in such sum as the Commissioner of Revenue may find to be sufficient to cover the tax liability of every such person, but in no event to be less than one thousand dollars ($1,000). The Commissioner of Revenue may waive the requirement of this section for indemnity bond with respect to any such person who may file a satisfactory contract or agreement with the Commissioner of Revenue that such person will purchase and sell malt beverages, or unfortified wine, or fortified wine only from wholesale distributors or bottlers licensed by the Commissioner of Revenue under this Article who pay the tax under G.S. 105-113.86 and G.S. 105-113.95 upon all such beverages sold to retail dealers in this State. The violation of the terms of any such contract or agreement between any such retail dealer and the Commissioner of Revenue by the purchase or sale of any malt beverages, or unfortified wine, or fortified wine from any one other than a licensed wholesale distributor or bottler under this Article shall automatically cancel the license of any such retail dealer and shall be prima facie evidence of intent to defraud; any person guilty of violation of any such

contract or agreement shall be guilty of a misdemeanor. (1939, c. 158, s. 519; 1971, c. 872, s. 2.)

§ 105-113.93. Tax on spirituous liquors.—(a) In lieu of taxes levied in Schedule E of the Revenue Laws on the sale of spirituous liquors, there is hereby levied a tax of ten percent (10%) on the retail price of spirituous distilled liquors of every kind that is sold in this State, including liquors sold in county or municipal A.B.C. stores. Provided, however, that in no event shall the amount paid under this section by county or municipal A.B.C. stores exceed one half of the net profits from liquors sold through such stores in any county or municipality. The taxes levied in this section shall be payable monthly, at the same time and in the same manner as taxes levied in Schedule E of the Revenue Laws, and the liability for such tax shall be subject to all the rules, regulations, and penalties provided in Schedule E and in other sections of the Revenue Laws for the payment or collection of taxes.

(b) In addition to the tax provided for in subsection (a) of this section, there is hereby levied an additional tax or surtax of two percent (2%) on the retail price of spirituous distilled liquors of every kind that is sold in this State, including liquors sold in county or municipal A.B.C. stores. The proviso contained in subsection (a) of this section shall not apply to the taxes levied under this subsection. (1939, c. 158, s. 519½; 1941, c. 339, s. 4; 1951, c. 1162, s. 2; 1955, c. 1313, s. 6; 1961, c. 826, s. 1; 1971, c. 872, s. 2.)

Taxes Payable Hereunder Not Deductible in Computing "Net Profit" for Purposes of Determining the Tax Ceiling.—See opinion of Attorney General to Honorable I.L. Clayton, Commissioner of Revenue of N.C., and Mr. W.C. Pickett, Jr., Director, Privilege License Beverage and Cigarette Tax Division, 41 N.C.A.G. 144 (1970) rendered under similar provisions of former § 18-85.

§ 105-113.94. Additional tax on spirituous liquors.—In addition to the taxes provided for in subsection (a) and (b) of G.S. 105-113.93, there is hereby levied an additional tax or surtax upon the retail sale of spirituous distilled liquors of every kind that are sold in this State, including liquors sold in county or municipal A.B.C. stores, at the rate of five cents (5¢) for each five ounces or fractional part thereof until July 1, 1970, and on and after July 1, 1970, at the rate of five cents (5¢) for each three and one-third ounces or fractional part thereof. The proviso contained in subsection (a) of G.S. 105-113.93 shall not apply to the taxes levied under this section.

The aforesaid additional tax or surtax shall be in addition to the "total prices" of alcoholic beverages established by the State Board of Alcoholic Control pursuant to G.S. 18A-15. The entire proceeds of the additional tax levied in this section shall be payable monthly at the same time, in the same manner and subject to the same rules, regulations, and penalties as apply to the taxes imposed under G.S. 105-113.93. (1969, c. 1075, s. 1; 1971, c. 872, s. 2.)

Taxes Payable Hereunder Not Deductible in Computing "Net Profit" for Purposes of Determining the Tax Ceiling.—See opinion of Attorney General to Honorable I.L. Clayton, Commissioner or Revenue of N.C., and Mr. W.C. Pickett, Jr., Director, Privilege License Beverage and Cigarette Tax Division, 41 N.C.A.G. 144 (1970) rendered under similar provisions of former § 18-85.2.

§ 105-113.95. Tax on fortified wines.—In addition to other taxes levied in this Article, there is hereby levied a tax upon the sale of fortified wines of seventy cents (70¢) per gallon. (1951, c. 1162, s. 3; 1955, c. 1313, s. 6; 1967, c. 759, s. 23; 1971, c. 872, s. 2.)

§ 105-113.96. Wine for sacramental purposes exempt from tax.—The tax levied in this Article upon the sale of unfortified wine shall not apply to sacramental wines received by ordained ministers of the gospel under the provisions of G.S. 18A-4. (1945, c. 708, s. 6; 1971, c. 872, s. 2.)

§ **105-113.97. Exemption of malt beverages sold to ocean-going vessels.**—The taxes levied in this Article upon the sale of malt beverages shall not apply to or be chargeable against any manufacturer, bottler, wholesaler, or distributor on any of such beverages sold and delivered for use or consumption by or on ocean-going vessels that ply the high seas in interstate or foreign commerce in the transport of freight and/or passengers for hire exclusively, when delivered to an officer or agent of such vessel for use of such vessel; provided, however, that sales of malt beverages made to officers, agents, members of the crew or passengers of such vessels for their personal use shall not be exempted from payment of such taxes. (1963, c. 992, s. 1; 1967, c. 759, s. 24; 1971, c. 872, s. 2.)

§ **105-113.98. Books, records, reports.**—Every person licensed under any of the provisions of this Article shall keep accurate records of purchase and sale of all beverages taxable under this Article, such records to be kept separate from all purchases and sales of merchandise taxable under this Article, including a separate file and record of all invoices. The Commissioner of Revenue or any authorized agent shall at any time during business hours have access to such records. The Commissioner of Revenue may also require regular or special reports to be made by every such person at such times and in such form as the Commissioner may require. (1939, c. 158, s. 520; 1945, c. 903, s. 1; 1971, c. 872, s. 2.)

§ **105-113.99. License shall be posted; not transferable.**—Each form of license required by this Article shall be kept posted in a conspicuous place at each place where the business taxable under this Article is carried on, and a separate license shall be required for each place of business. Licenses shall not be transferred to any other person, nor to any other location, except as expressly provided in this Article. (1939, c. 158, s. 522; 1971, c. 872, s. 2.)

§ **105-113.100. Persons engaged in more than one business to pay on each; shipments from outside State prohibited.**—(a) When any person, firm, or corporation is engaged in more than one business or trade which is made under the provisions of this Article subject to State license taxes, such person, firm, or corporation shall pay the license taxes prescribed in this Article for each separate business or trade.

(b) No person who does not have an appropriate permit and license shall have any intoxicating liquor mailed or shipped to him from outside this State. (1941, c. 339, s. 2; 1945, c. 635; c. 708, s. 6; 1969, c. 598, s. 1; 1971, c. 872, s. 2.)

§ **105-113.101. Administrative provisions.**—The Commissioner of Revenue and the authorized agents of the State Department of Revenue shall have and exercise all the rights, duties, powers, and responsibilities in enforcing this Article that are enumerated in the Revenue Laws in administering taxes levied in Schedule B of that law. Any person, firm, or corporation engaging in any activity for which a State, county, or municipal license is required under this Article without obtaining said license, or continuing any such activity after the expiration of any State, county or municipal license, granted under this Article, shall be subject to the same liability for criminal prosecution, and for penalties, as is prescribed in G.S. 105-109. (1939, c. 158, s. 523; 1945, c. 708, s. 6; 1971, c. 872, s. 2.)

§ **105-113.102. Rules and regulations.**—The Commissioner of Revenue shall, from time to time, initiate and prepare such regulations, not inconsistent with this Chapter and Chapter 18A or other provisions of law, as may be useful and necessary to implement the provisions of this Article, such regulations to become effective when approved by the Tax Review Board. All regulations and amendments thereto shall be published and made available by the Commissioner of Revenue.

The Commissioner of Revenue may, from time to time, make and prescribe such administrative rules, not inconsistent with law and the regulations approved by the Tax Review Board, as may be useful for the administration of his department and the discharge of his responsibilities.

References to rules and regulations of the Commissioner of Revenue in this Chapter and in any subsequent amendments or additions thereto (unless expressly provided to the contrary therein) shall be construed to mean those rules and regulations promulgated under the provisions of this section. (1955, c. 1350, s. 3; 1971, c. 872, s. 2.)

§ 105-113.103. Revocation of license upon revocation of permit.—Whenever the State Board of Alcoholic Control shall certify to the Commissioner of Revenue that any permit issued by said Board has been cancelled or revoked, the Commissioner of Revenue shall thereupon immediately revoke any license that has been issued under this Article to the person whose permit has been revoked by said Board; such revocation by the Commissioner shall not entitle the person whose license was revoked to any refund of taxes or license fees paid for or under said license. (1945, c. 903, s. 12; 1971, c. 872, s. 2.)

§ 105-113.104. Violation made misdemeanor; revocation of permits; forfeiture of license.—Except as otherwise expressly provided, whosoever violates any of the provisions of this Article, or any of the rules and regulations promulgated pursuant thereto, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine or by imprisonment, or by both fine and imprisonment, in the discretion of the court. If any licensee is convicted of the violation of the provisions of this Article, or any of the rules and regulations promulgated pursuant thereto, the court shall immediately declare his permit and license revoked, and shall notify the county commissioners accordingly; no permit or license shall thereafter be granted to him within a period of three years thereafter. Any licensee who sells or permits the sale on his premises or in connection with his business, or otherwise, of any intoxicating liquors not authorized under the terms of this Article, unless otherwise permitted by law, shall, upon conviction thereof, forfeit his license in addition to any punishment imposed by law for such offense. (1939, c. 158, s. 525; 1971, c. 872, s. 2.)

Article 3.

Schedule C. Franchise Tax.

§ 105-114. Nature of taxes; definitions.—The taxes levied in this Article upon persons and partnerships are for the privilege of engaging in business or doing the act named. The taxes levied in this Article upon corporations are privilege or excise taxes levied upon:

(1) Corporations organized under the laws of this State for the existence of the corporate rights and privileges granted by their charters, and the enjoyment, under the protection of the laws of this State, of the powers, rights, privileges and immunities derived from the State by the form of such existence; and

(2) Corporations not organized under the laws of this State for doing business in this State and for the benefit and protection which such corporations receive from the government and laws of this State in doing business in this State.

The term "corporation" as used in this Article shall, unless the context clearly requires another interpretation, mean and include not only corporations but also associations or joint-stock companies and every other form of organization for pecuniary gain, having capital stock represented by shares, whether with or without par value, and having privileges not possessed by

individuals or partnerships; and whether organized under, or without, statutory authority. The term "corporation" as used in this Article shall also mean and include any electric membership corporation organized under Chapter 117, and any electric membership corporation, whether or not organized under the laws of this State, doing business within the State.

When the term "doing business" is used in this Article, it shall mean and include each and every act, power or privilege exercised or enjoyed in this State, as an incident to, or by virtue of the powers and privileges acquired by the nature of such organizations whether the form of existence be corporate, associate, joint-stock company or common-law trust.

If the corporation is organized under the laws of this State, the payment of the taxes levied by this Article shall be a condition precedent to the right to continue in such form of organization; and if the corporation is not organized under the laws of this State, payment of said taxes shall be a condition precedent to the right to continue to engage in doing business in this State. The taxes levied in this Article or schedule shall be for the fiscal year of the State in which said taxes become due; except, that the taxes levied in G.S. 105-122 and 105-123 shall be for the income year of the corporation in which such taxes become due. For purposes of this Article the words "income year" shall mean an income year as defined in G.S. 105-135(9). (1939, c. 158, s. 201; 1943, c. 400, s. 3; 1945, c. 708, s. 3; 1965, c. 287, s. 16; 1967, c. 286; 1969, c. 541, s. 6.)

Editor's Note.—The 1969 amendment, substituted "§ 105-135(9)" for "§ 105-132" at the end of the section.

Section 105-132 has been transferred to § 105-135 in Division II, "Individual Income Tax," of Article 4 of this Chapter by Session Laws 1967, c. 1110, s. 3. See Editor's note to § 105-130.

Franchise Tax Not Ordinarily Included in Term "Privilege Tax".—While the term "privilege tax" includes franchise taxes as well as license taxes, a franchise is a special kind of privilege constituting a property right, which is ordinarily transferable and exclusive, and involves the use of public facilities. The word "privilege" is too broad, per se, as a classification for taxation, but is usually particularized into licenses and franchises in classifying businesses for taxation, and as used in our taxing statutes, the term "privilege tax" does not ordinarily include franchise taxes. Duke Power Co. v. Bowles, 229 N.C. 143, 48 S.E.2d 287 (1948).

Tax Measured by Amount of Business Transacted.—Whenever a tax is imposed upon a corporation directly by the legislature and is not assessed by assessors, and the amount depends on the amount of business transacted by the corporation, and the extent to which it has exercised the privileges granted in its charter, without reference to the value of its property or the nature of the investments made of it, it is a franchise tax. Worth v. Petersburg R.R., 89 N.C. 301 (1883).

Franchise taxes are imposed for the privilege of engaging in business in this State. The amount of the tax varies with the nature and magnitude of the privilege taxed, the relative financial returns to be expected of the business or activities under franchise, and the burden put on government in regulating, protecting and fostering the enterprise. Southern Bell Tel. & Tel. Co. v. Clayton, 266 N.C. 687, 147 S.E.2d 195 (1966).

Uniformity Required.—The rule of uniformity laid down in N.C. Const., Art. V, § 3 [now N.C. Const., Art. V, § 2], was intended to apply to taxes on franchises. Worth v. Petersburg R.R., 89 N.C. 301 (1883).

Legislature May Make Tax by State Exclusive. — The General Assembly may require a corporation to pay a license tax for the privilege of carrying on its business, and forbid counties or other municipalities to exact any other license tax or fee. Charlotte Bldg. & Loan Ass'n v. Commissioners of Mecklenburg County, 115 N.C. 410, 20 S.E. 526 (1894).

Cited in Standard Fertilizer Co. v. Gill, 225 N.C. 426, 35 S.E.2d 275 (1945).

§ 105-115. Franchise or privilege tax on railroads.—Every person, firm, or corporation, domestic or foreign, owning and/or operating a railroad in this State shall, in addition to all other taxes levied and assessed in the State, pay annually to the Commissioner of Revenue a franchise, license, or privilege tax for the privilege of engaging in such railroad business within the State of North Carolina as follows:

(1) Such person, firm or corporation shall during the month of June each year furnish to the Commissioner of Revenue a copy of the report and statement required to be made to the State Board of

Assessment by the Machinery Act in effect at the time such report is due, and such other and further information as the Commissioner of Revenue may require.

(2) The value upon which the tax herein levied shall be assessed by the Commissioner of Revenue and the measure of the extent to which every such railroad company is carrying on intrastate commerce within the State of North Carolina shall be the value of the total property, tangible and intangible, in this State, for each such railroad company, as assessed for ad valorem taxation during the calendar year in which such report is due.

(3) The franchise or privilege tax which every such railroad company shall pay for the privilege of carrying on or engaging in intrastate commerce within this State shall be seventy-five one-hundredths of one percent (75/100%) of the value ascertained as above by the Commissioner of Revenue, and tax shall be due and payable within 30 days after date of notice of such tax.

(4) If any such person, firm, or corporation shall fail, neglect, or refuse to make and deliver the report or statements provided for in this section, the Commissioner of Revenue shall estimate, from the reports and records on file with the State Board of Assessment, the value upon which the amount of tax due by such company under this section shall be computed, and shall assess the franchise or privilege tax upon such estimate, and shall collect the same, together with such penalties herein imposed for failure to make the report and statement.

(5) It is the intention of this section to levy upon railroad companies a license, franchise, or privilege tax for the privilege of engaging in intrastate commerce carried on wholly within this State, and not a part of interstate commerce; that the tax provided for in this section is not intended to be a tax for the privilege of engaging in interstate commerce, nor is it intended to be a tax on the business of interstate commerce, nor is it intended to be a tax having any relation to the interstate or foreign business or commerce in which any such railroad company may be engaged in addition to its business in this State.

(6) No county, city or town shall levy a license, franchise, or privilege tax on the business taxed under this section.

(7) In determining the franchise tax of any railroad company now leasing its properties, there shall be excluded from the value of its properties all railroad properties being operated by any lessee company upon which valuation the franchise tax is required to be paid by the operating company. (1939, c. 158, s. 202; 1945, c. 708, s. 3.)

Cross Reference. — As to allowance of tax paid on bank deposits under § 105-199 as credit on tax payable under this section and § 105-122, see § 105-122, subsection (d).

§ 105-116. Franchise or privilege tax on electric light, power, gas, water, sewerage, and other similar public service companies not otherwise taxed.—(a) Every person, firm or corporation, domestic or foreign, other than municipal corporations, engaged in the business of furnishing electricity, electric lights, current, power or piped gas, or owning and/or operating a water system subject to regulation by the North Carolina Utilities Commission, or owning and/or operating a public sewerage system, or owning and/or operating a street transportation system for the transportation of freight for hire, shall, within 30 days after the first day of January, April, July and October of each year, make and deliver to the Commissioner of Revenue, upon such forms and blanks as required by him, a report verified by the affirmation of the officer or authorized agent making such report and statement, containing the following information:

(1) The total gross receipts for the three months ending the last day of the month immediately preceding such return from such business within and without this State.
(2) The total gross receipts for the same period from such business within this State.
(3) The total gross receipts from the commodities or services described in this section sold to any other person, firm, or corporation engaged in selling such commodities or services to the public, and actually sold by such vendee to the public for consumption and tax paid to this State by the vendee, together with the name of such vendee, with the amount sold and the price received therefor.
(4) The total amount and price paid for such commodities or services purchased from others engaged in the above-named business in this State, and the name or names of the vendor.
(5) As to gas companies, the gross receipts derived from sales of piped gas to manufacturers which is to be used as an ingredient or component of a manufactured product.

(b) From the total gross receipts within this State there shall be deducted the gross receipts reported in subsection (a)(3) of this section: Provided, that this deduction shall not be allowed where the sale of such commodities was made to any person, firm, or corporation or municipality which is exempted by law from the payment of the tax herein imposed upon such commodities when sold or used by it.

(c) On every such person, firm or corporation there is levied an annual franchise or privilege tax of six percent (6%), payable quarterly, of the total gross receipts derived from such business within this State, after the deductions allowed as herein provided for, which said tax shall be for the privilege of carrying on or engaging in the business named in this State, and shall be paid to the Commissioner of Revenue at the time of filing the report herein provided for: Provided, the tax upon privately owned water companies shall be four percent (4%) of the total gross receipts derived from such business within this State: Provided further, the tax on gas companies shall be at the rate of four percent (4%) upon the first twenty-five thousand dollars ($25,000) of the total gross receipts from piped gas, and the tax on all gross receipts in excess of twenty-five thousand dollars ($25,000) from piped gas shall be at the rate of six percent (6%).

(d) Any person, firm, or corporation failing to file report and pay tax found to be due in accordance with the provisions of this section at the time herein provided for shall, in addition to all other penalties prescribed by this Article, pay an additional tax of ten percent (10%) and interest at the rate of six percent (6%) per annum on the total amount of tax due and additional tax incurred, which said additional tax shall in no case be less than two dollars ($2.00), and shall be added to the tax, together with interest accrued, and shall become an integral part of the tax.

(e) The report herein required of gross receipts within and without the State, shall include the total gross receipts for the period stated of all properties owned and operated by the reporting person, firm, or corporation on the first day of each calendar quarter year, whether operated by it for the previous annual period, or whether intermediately acquired by purchase or lease, it being the intent and purpose of this section to measure the amount of privilege or franchise tax in each calendar quarter year with reference to the gross receipts of the property operated for the previous calendar quarter year and to fix liability for the payment of the tax on the owner, operator, or lessor on the first day of January, April, July and October of each year.

(f) Companies taxed under this section shall not be required to pay the franchise tax imposed by G.S. 105-122 or G.S. 105-123 unless the tax levied by G.S. 105-122 or G.S. 105-123 exceeds the tax levied in this section, and no county shall impose a franchise, license or privilege tax upon the business taxed under this section.

(g) The Commissioner of Revenue shall ascertain the total gross receipts derived from the sale within any municipality of the commodities or services described in this section, except water and sewerage services, and out of the tax of six percent (6%) of gross receipts levied by this section, an amount equal to a tax of three percent (3%) of the gross receipts from sales within any municipality shall be distributed to such municipality: Provided, that out of the tax of four percent (4%) of the first twenty-five thousand dollars ($25,000) of gross receipts of gas companies an amount equal to a tax of three percent (3%) of the gross receipts from sales within any municipality, and out of the tax of six percent (6%) of gross receipts of gas companies in excess of twenty-five thousand dollars ($25,000) an amount equal to a tax of three percent (3%) of the gross receipts from sales within any municipality, shall be distributed to such municipality. If the gross receipts of any gas company from sales within and without any municipality exceed twenty-five thousand dollars ($25,000), receipts from sales without the municipality shall be allocated to the first twenty-five thousand dollars ($25,000) of total gross receipts. Provided, that in determining the amount to be distributed to a municipality pursuant to this subsection, "gross receipts" shall mean gross receipts less receipts from sales of piped gas to manufacturers for use as an ingredient or component part of a manufactured product.

As soon as practicable after the date on which each quarterly payment of taxes is due under this section, the Commissioner of Revenue shall certify to the State Disbursing Officer and to the State Treasurer the amount distributable to each municipality under this section. The State Disbursing Officer shall thereupon issue a warrant on the State Treasurer to each municipality in the amount so certified.

So long as there is a distribution to municipalities of the amount herein provided from the tax imposed by this section, no municipality shall impose or collect any greater franchise, privilege or license taxes, in the aggregate, on the businesses taxed under this section, than was imposed and collected on or before January 1, 1947. If any municipality shall have collected any privilege, license or franchise tax between January 1, 1947, and April 1, 1949, in excess of the tax collected by it prior to January 1, 1947, then upon distribution of the taxes imposed by this section to municipalities, the amount distributable to any municipality shall be credited with such excess payment. (1939, c. 158, s. 203; 1949, c. 392, s. 2; 1951, c. 643, s. 3; 1955, c. 1313, s. 2; 1957, c. 1340, s. 3; 1959, c. 1259, s. 3; 1963, c. 1169, s. 1; 1965, c. 517; 1967, c. 519, ss. 1, 3; c. 1272, ss. 1, 3; 1971, c. 298, s. 1; c. 833, s. 1.)

Editor's Note. — The first 1971 amendment rewrote the second paragraph of subsection (g).

The second 1971 amendment deleted from the introductory language of subsection (a) "street railway, street bus or similar" preceding "street transportation system," and deleted "or passengers" following "transportation of freight." The second 1971 amendment also deleted, at the end of subsection (c), "Provided further, the tax on street bus or similar street transportation system for the transportation of passengers for hire shall be at the rate of one and one-half percent (1½%)."

For brief comment on 1949 amendment which rewrote subsection (f) and added subsection (g), see 27 N.C.L. Rev. 482.

For history of subsection (f) prior to the 1949 amendment, see Duke Power Co. v. Bowles, 229 N.C. 143, 48 S.E.2d 287 (1948).

A former statute of similar import, but differently worded, was held not to apply to the operation of buses for hire within a city, even though operated on definite routes, unless used in connection with or in substitution for a street railway. Safe Bus v. Maxwell, 214 N.C. 12, 197 S.E. 567 (1938).

"Privilege or License Tax" Not Including Franchise Taxes. — The term "privilege or license tax," as used in subsection (f) prior to the 1949 amendment, did not include franchise taxes, it being apparent that the legislature would have used the term "franchise" eo nomine if it had intended to include franchise taxes within the limitation upon taxes to be imposed by cities or towns. Duke Power Co. v. Bowles, 229 N.C. 143, 48 S.E.2d 287 (1948).

§ 105-117. Franchise or privilege tax on Pullman, sleeping, chair, and

dining cars.—(a) Every person, firm, or corporation, domestic or foreign, engaged in the business of operating in this State any Pullman, sleeping, chair, dining or other similar cars, where an extra charge is made for the use or occupancy of same, shall annually, on or before the first day of August, make and deliver to the Commissioner of Revenue, upon such forms, blanks, and in such manner as may be required by him, a full, accurate, and true report and statement, verified by affirmation of the officer or authorized agent making such report, of the total gross receipts of such person, firm, or corporation from such business wholly within this State during the year ending the thirtieth day of June of the current year.

(b) Such person, firm, or corporation shall pay an annual privilege, license, or franchise tax of ten percent (10%) of the total gross receipts derived from such business wholly within this State; which said tax shall be paid for the privilege of carrying on or engaging in the business named in this State, and shall be paid to the Commissioner of Revenue at the time of filing the report and statements herein provided for.

(c) No county, city or town shall impose any franchise or privilege tax on the business taxed under this section. (1939, c. 158, s. 204; 1959, c. 1259, s. 3.)

Cited in Duke Power Co. v. Bowles, 229 N.C. 143, 48 S.E.2d 287 (1948).

§ **105-118. Franchise or privilege tax on express companies.**—(a) Every person, firm, or corporation, domestic or foreign, engaged in this State in the business of any express company as defined in this Chapter, shall, in addition to a copy of the report required by the Machinery Act then in effect, annually, on or before the first day of August, make and deliver to the Commissioner of Revenue a report and statement, verified by the affirmation of the officer or authorized agent making such report or statement, containing the following information as of the thirtieth day of June of the current year:

(1) The average amount of invested capital employed within and without the State in such business during the year ending the thirtieth day of June of the current year.

(2) The total net income earned on such invested capital from such business during the year ending the thirtieth day of June of the current year.

(3) The total number of miles of railroad lines or other common carriers over which such express companies operate in this State during the year ending the thirtieth day of June of the current year.

(b) Every such person, firm, or corporation, domestic or foreign, engaged in such express business within this State shall pay to the Commissioner of Revenue, at the time of filing the report required in this section, the following annual franchise or privilege tax for the privilege of engaging in such express business within this State:

(1) Where the net income of the average capital invested during the year ending the thirtieth day of June of the current year is six percent (6%) or less, fifteen dollars ($15.00) per mile of railroad lines over which operated.

(2) More than six percent (6%) and less than eight percent (8%), twenty-one dollars ($21.00) per mile of railroad lines over which operated.

(3) Eight percent (8%) and over, twenty-five dollars ($25.00) per mile of railroad lines over which operated.

(c) Every such person, firm, or corporation, domestic or foreign, who or which engages in such business without having had previous receipts upon which to levy the franchise or privilege tax, shall report to the Commissioner at the time of beginning in this State and pay for such privilege of engaging in business in this State a tax of seven dollars and fifty cents ($7.50) per mile of the railroad lines over which operated or proposed to operate.

(d) Counties shall not levy a franchise, privilege or license tax on the business taxed under this section; and municipalities may levy an annual franchise, privilege, or license tax on such express companies for the privilege of doing business within the municipal limits as follows:

Municipalities of less than 500 population	$ 5.00
Municipalities of 500 and less than 1,000 population	10.00
Municipalities of 1,000 and less than 5,000 population	20.00
Municipalities of 5,000 and less than 10,000 population	30.00
Municipalities of 10,000 and less than 20,000 population	50.00
Municipalities of 20,000 and over	75.00

(1939, c. 158, s. 205; 1959, c. 1259, s. 3.)

Constitutionality. — A tax upon express companies of $15.00 per mile of track over which they operate in this State, when the net income is six percent or less, levied under the provisions of the former statute, was held valid under the provisions of N.C. Const., Art. V, § 3 [now N.C. Const., Art. V, § 2]. Railway Express Agency v. Maxwell, 199 N.C. 637, 155 S.E. 553 (1930).

Where a tax levied on an express company under the provisions of the statute is $15.00 per mile of track over which it operates in this State, amounting to slightly in excess of 12 percent of its gross revenue exclusively derived from intrastate business, not taking into account large gross receipts from interstate business, it will not be held as a matter of law that the tax is unconstitutional as being confiscatory. Railway Express Agency v. Maxwell, 199 N.C. 637, 155 S.E. 553 (1930).

Question of Earnings within and without State Immaterial. — Where a statute imposes a tax upon express companies based upon the mileage of track in this State over which they operate, levying a tax of $15.00 per mile when the net income of the company is six percent or less, $18.00 when the net income does not exceed eight percent, and $21.00 per mile when the net income exceeds eight percent, and the State levies the minimum tax on an express company, which sues to recover the amount so paid, the question of the ratio of the company's net earnings in this and other states, and the amount of the net income are immaterial to the conclusion as to whether the tax is valid, the tax levied being constant regardless of income or the ratio between interstate and intrastate business, and the validity of the higher rate of taxes levied by the statute is not directly presented for decision. Railway Express Agency v. Maxwell, 199 N.C. 637, 155 S.E. 553 (1930).

§ 105-119. Franchise or privilege tax on telegraph companies.—(a) Every person, firm or corporation, domestic or foreign, engaged in operating the apparatus necessary for communication by telegraph between points within this State, shall annually, on or before the first day of August, make and deliver to the Commissioner of Revenue, upon such forms and in such manner as required by him, a report verified by the affirmation of the officer or authorized agent making such report and statement, containing the following information:

(1) The total gross receipts from business within and without this State for the entire calendar year next preceding due date on such return.

(2) The total gross receipts for the same period from business within this State.

(b) On every such person, firm or corporation there is hereby levied an annual franchise or privilege tax of six percent (6%) of the total gross receipts derived from business within this State. Such gross receipts shall include all charges for services, all rentals, fees, and all other similar charges from business which both originates and terminates in the State of North Carolina, whether such business in the course of transmission goes outside this State or not. The tax herein levied shall be for the privilege of carrying on or engaging in the business named in this State, and shall be paid to the Commissioner of Revenue at the time of filing the report herein provided for.

(c) The report herein required shall include the total gross receipts for the period stated of all properties, owned, leased, controlled and/or over which operated by such person, firm or corporation in this State.

(d) Any person, firm or corporation failing to file report and pay tax found to be due in accordance with the provisions of this section at the time herein

provided for shall, in addition to all other penalties prescribed in this Article, pay an additional tax of ten percent (10%) and interest at the rate of six percent (6%) per annum on the total amount of tax due and additional tax incurred, which said additional tax shall in no case be less than two dollars ($2.00), and shall be added to the tax, together with interest accrued, and shall become an integral part of the tax.

(e) Counties shall not levy a franchise, privilege, or license tax on the business taxable under this section, and municipalities may levy the following license tax:

Less than 5,000 population	$10.00
5,000 and less than 10,000 population	15.00
10,000 and less than 20,000 population	20.00
20,000 population and over	50.00

(1939, c. 158, s. 206; 1951, c. 643, s. 3; 1957, c. 1340, s. 3; 1959, c. 1259, s. 3.)

Cited in Duke Power Co. v. Bowles, 229 N.C. 143, 48 S.E.2d 287 (1948).

§ 105-120. Franchise or privilege tax on telephone companies.—(a) Every person, firm, or corporation, domestic or foreign, owning and/or operating a telephone business for the transmission of messages and/or conversations to, from, through, in or across this State, shall within 30 days after the first day of January, April, July and October of each year, make and deliver to the Commissioner of Revenue a quarterly return, verified by the affirmation of the officer or authorized agent making such return, showing the total amount of gross receipts of such telephone company for the three months ending the last day of the month immediately preceding such return, and pay, at the time of making such return, the franchise, license or privilege tax herein imposed.

(b) An annual franchise or privilege tax of six percent (6%), payable quarterly, on the gross receipts of such telephone company, is herein imposed for the privilege of engaging in such business within this State. Such gross receipts shall include all rentals, other similar charges, and all tolls received from business which both originates and terminates in the State of North Carolina, whether such business in the course of transmission goes outside of this State or not: Provided, where any city or town in the State has heretofore sold at public auction to the highest bidder the right, license and/or privilege of engaging in such business in such city or town, based upon a percentage of gross revenue of such telephone company, and is now collecting and receiving therefor a revenue tax not exceeding one percent of such revenues, the amount so paid by such operating company, upon being certified by the treasurer of such municipality to the Commissioner of Revenue, shall be from time to time credited by the Commissioner of Revenue to such telephone company upon the tax imposed by the State under this section of this Chapter.

(c) Any such person, firm or corporation, domestic or foreign, who or which fails, neglects, or refuses to make the return, and/or pay the tax at the time provided for in this section, shall pay an additional tax of ten percent (10%) and interest at the rate of six percent (6%) per annum on the total amount of tax due and additional tax incurred, which said additional tax shall not be less than two dollars ($2.00) in any case, and shall be added to the tax, together with the interest accrued, and shall become an integral part of the tax.

(d) The Commissioner of Revenue shall ascertain the total gross receipts derived from local business conducted within each municipality in this State by persons, firms or corporations taxed under this section, and out of the tax levied by this section, an amount equal to a tax of three percent (3%) of the gross receipts from local business conducted within any municipality shall be distributed to such municipality. When a person, firm or corporation taxed under this section properly receives a credit on said taxes under the proviso in subsection (b) because of payments made to a municipality, such municipality's

distributive share of the taxes levied by this section shall be reduced by the amount of the credit properly received by said person, firm or corporation. If the credit received under the proviso is greater than the municipality's distributive share of the taxes levied under this section, no distribution to such municipality shall be made.

As soon as practicable after the date on which each quarterly payment of taxes is due under this section, the Commissioner of Revenue shall certify to the State Disbursing Officer and to the State Treasurer the amount distributable to each municipality under this section. The State Disbursing Officer shall thereupon issue a warrant on the State Treasurer to each municipality in the amount so certified.

In determining what constitutes local business conducted within a municipality for the purposes of this subsection, all business originating within a municipality, except long-distance calls, shall be construed as local business.

The Department of Revenue is hereby authorized and empowered to require any and all persons, firms or corporations taxed under this section to file additional reports disclosing the gross receipts derived from local business as herein defined and the gross receipts from long-distance business.

If the records of the corporation taxed under this section do not readily disclose allocation to municipalities of revenues from local business as above defined, the Commissioner of Revenue shall prescribe some practicable method of allocating such local revenues.

(e) Nothing in this section shall be construed to authorize the imposition of any tax upon interstate commerce.

(f) Counties, cities and towns shall not levy any franchise, license, or privilege tax on the business taxed under this section. (1939, c. 158, s. 207; 1949, c. 392, s. 2; 1959, c. 1259, s. 3; 1967, c. 1272, ss. 2, 4; 1971, c. 298, s. 2.)

Editor's Note. — The 1971 amendment rewrote the second paragraph of subsection (d).

For brief comment on 1949 amendment which inserted subsection (d), see 27 N.C.L. Rev. 482.

The word rentals, considered in its context, means local exchange rentals. Southern Bell Tel. & Tel. Co. v. Clayton, 266 N.C. 687, 147 S.E.2d 195 (1966).

And Interstate Tolls Are Excluded. — The legislature used the word "include" in subsection (b) in the sense of "shall consist of." It was used, not to broaden the tax base, but to exclude from the base interstate tolls. Southern Bell Tel. & Tel. Co. v. Clayton, 266 N.C. 687, 147 S.E.2d 195 (1966).

"Rentals" Is Limited to Rentals of Telephones. — The word "rentals" as used in subsection (b) of this section, imposing a tax upon the gross receipts of telephone companies, refers to the "rentals" of telephones pursuant to the company's public utility services for which the franchise tax is imposed, and does not include rentals charged electric power companies and others for the use of its poles, this being consonant with the history of the statute and its purport. Southern Bell Tel. & Tel. Co. v. Clayton, 266 N.C. 687, 147 S.E.2d 195 (1966).

And other Revenues Were Not Intended to Be Taxed. — Had the legislature intended to tax the telephone companies upon receipts other than revenues obtained from the services they were obligated to furnish the public, it would have specifically imposed the tax upon gross receipts from any and all sources whatsoever except those expressly exempted. Southern Bell Tel. & Tel. Co. v. Clayton, 266 N.C. 687, 147 S.E.2d 195 (1966).

Free Telephone Service to Municipality Violative of Subsection (f). — The furnishing to a municipality of telephone service free or at a reduced rate in return for the use of municipal streets, alleys and roads for pole lines and underground conduits by the telephone company is in violation of subsection (f) of this section. It is in the public interest that each municipality bill the utility company for the service it renders, and the utility company furnish telephone service to the municipality at the regular and applicable rates. State v. Wilson, 252 N.C. 640, 114 S.E.2d 786 (1960).

Applied in In re Carolina Tel. & Tel. Co., 1 N.C. App. 133, 160 S.E.2d 128 (1968).

Cited in Wood v. Carolina Tel. & Tel. Co., 228 N.C. 605, 46 S.E.2d 717, 3 A.L.R.2d 1 (1948).

§ 105-120.1. Franchise or privilege tax on street bus or similar street transportation system for the transportation of passengers for hire.—(a) Every person, firm or corporation, domestic or foreign, other than municipal

corporations, owning and/or operating a street railway, street bus or similar street transportation system for the transportation of passengers for hire shall on or before the first day of June of each year pay to the Commissioner of Revenue an annual franchise or privilege tax in the amount of twenty-five dollars ($25.00).

(b) Businesses taxed under this section shall not be required to pay the franchise tax imposed by G.S. 105-122 or G.S. 105-123 and no county, city or town shall impose a franchise, license or privilege tax upon the business taxed under this section. (1971, c. 833, s. 1.)

§ 105-121: Repealed by Session Laws 1945, c. 752, s. 1.

Editor's Note. — The repealed section related to franchise or privilege taxes on insurance companies. For present law relating to taxes thereon, see §§ 105-228.3 to 105-228.10.

§ 105-121.1. Mutual burial associations.—An annual franchise or privilege tax on all domestic mutual burial associations shall be due and payable to the Commissioner of Revenue on or before the first day of April of each year. The amount of this franchise or privilege tax shall be based on the membership of such associations according to the following schedule:

Membership less than 3,000	$15.00
Membership of 3,000 to 5,000	20.00
Membership of 5,000 to 10,000	25.00
Membership of 10,000 to 15,000	30.00
Membership of 15,000 to 20,000	35.00
Membership of 20,000 to 25,000	40.00
Membership of 25,000 to 30,000	45.00
Membership of 30,000 or more	50.00

(1943, c. 60, s. 2.)

§ 105-122. Franchise or privilege tax on domestic and foreign corporations.—(a) Every corporation, domestic and foreign, incorporated, or, by an act, domesticated under the laws of this State or doing business in this State, except as otherwise provided in this Article or schedule, shall, on or before the fifteenth day of the third month following the end of its income year, annually, make and deliver to the Commissioner of Revenue in such form as he may prescribe a full, accurate and complete report and statement signed by either its president, vice-president, treasurer, assistant treasurer, secretary or assistant secretary, containing such facts and information as may be required by the Commissioner of Revenue as shown by the books and records of the corporation at the close of such income year.

There shall be annexed to the return required by this subsection the affirmation of the officer signing the return in the following form: "Under penalties prescribed by law, I hereby affirm that to the best of my knowledge and belief this return, including any accompanying schedules and statements, is true and complete. If prepared by a person other than taxpayer, his affirmation is based on all information of which he has any knowledge."

(b) Every such corporation taxed under this section shall determine the total amount of its issued and outstanding capital stock, surplus and undivided profits; no reservation or allocation from surplus or undivided profits shall be allowed other than for definite and accrued legal liabilities, except as herein provided; taxes accrued, dividends declared and reserves for depreciation of tangible assets as permitted for income tax purposes shall be treated as deductible liabilities. There shall also be treated as a deductible liability reserves for the entire cost of any air cleaning device or sewage or waste treatment plant, including waste lagoons, and pollution abatement equipment purchased or constructed and installed which reduces the amount of air or water pollution resulting from the emission of air contaminants or the discharge of sewage and industrial wastes or other polluting materials or

substances into the outdoor atmosphere or streams, lakes, or rivers, upon condition that the corporation claiming such deductible liability shall furnish to the Commissioner a certificate from the Board of Water and Air Resources certifying that said Board has found as a fact that the air cleaning device, waste treatment plant or pollution abatement equipment purchased or constructed and installed as above described has actually been constructed and installed and that such plant or equipment complies with the requirements of said Board with respect to such devices, plants or equipment, that such device, plant or equipment is being effectively operated in accordance with the terms and conditions set forth in the permit, certificate of approval, or other document of approval issued by the Board of Water and Air Resources and that the primary purpose thereof is to reduce air or water pollution resulting from the emission of air contaminants or the discharge of sewage and waste and not merely incidental to other purposes and functions. The cost of constructing facilities of any private or public utility built for the purpose of providing sewer service to residential and outlying areas shall be treated as deductible for the purposes of this section; the deductible liability allowed by this section shall apply only with respect to such pollution abatement plants or equipment constructed or installed on or after January 1, 1955. Treasury stock shall not be considered in computing the capital stock, surplus and undivided profits as the basis for franchise tax, but shall be excluded proportionately from said capital stock, surplus and undivided profits as the case may be upon the basis and to the extent of the cost thereof.

Every corporation doing business in this State which is a parent, subsidiary, or affiliate of another corporation shall add to its capital stock, surplus and undivided profits all indebtedness owed to or endorsed or guaranteed by a parent, subsidiary or affiliated corporation as a part of its capital used in its business and as a part of the base for franchise tax under this section. The term "indebtedness" as used in this paragraph shall include all loans, credits, goods, supplies or other capital of whatsoever nature furnished by a parent, subsidiary, or affiliated corporation. The terms "parent," "subsidiary," and "affiliate" as used in this paragraph shall have the meaning specified in G.S. 105-130.6. If any part of the capital of the creditor corporation is capital borrowed from a source other than a parent, subsidiary or affiliate, the debtor corporation, which is required under this paragraph to include in its tax base the amount of debt by reason of being a parent, subsidiary, or affiliate of the said creditor corporation, may deduct from the debt thus included a proportionate part determined on the basis of the ratio of such borrowed capital as above specified of the creditor corporation to the total assets of the said creditor corporation. Further, in case the creditor corporation as above specified is also taxable under the provisions of this section, such creditor corporation shall be allowed to deduct from the total of its capital, surplus and undivided profits the amount of any debt owed to it by a parent, subsidiary or affiliated corporation to the extent that such debt has been included in the tax base of said parent, subsidiary or affiliated debtor corporation reporting for taxation under the provisions of this section.

(c) (1) After ascertaining and determining the amount of its capital stock, surplus and undivided profits, as provided herein, every corporation permitted to allocate and apportion its net income for income tax purposes under the provisions of Article 4 of this Chapter shall apportion said capital stock, surplus and undivided profits to this State through use of the fraction computed for apportionment of its business income under said Article.

Provided, that although a corporation is authorized by the Tax Review Board to apportion its business income by use of an alternative formula or method, the corporation may not use such alternative formula or method for apportioning its capital stock,

surplus and undivided profits unless specifically authorized to do so by order of the Tax Review Board.

Provided, further, that a corporation which is required to pay an income tax to this State on its entire net income shall apportion its entire capital stock, surplus and undivided profits to this State.

(2) If any corporation believes that the method of allocation or apportionment hereinbefore described as administered by the Commissioner of Revenue has operated or will so operate as to subject it to taxation on a greater portion of its capital stock, surplus and undivided profits than is reasonably attributable to business within the State, it shall be entitled to file with the Tax Review Board a petition setting forth the facts upon which its belief is based and its argument with respect to the application of the allocation formula. This petition shall be filed in such form and within such time as the Tax Review Board may prescribe. The Board shall grant a hearing thereon. At least three members of the Tax Review Board shall attend any hearing pursuant to such petition. In such cases the Tax Review Board's membership shall be augmented by the addition of the Commissioner of Revenue, who shall sit as a member of said Board with full power to participate in its deliberations and decisions with respect to petitions filed under the provisions of this section. An informal record containing in substance the evidence, contentions and arguments presented at the hearing shall be made. All members of the augmented Tax Review Board shall consider such evidence, contentions and arguments, and the decision thereon shall be made by a majority vote of the augmented Board. If the Board shall find that the application of the allocation formula subjects the corporation to taxation on a greater portion of its capital stock, surplus and undivided profits than is reasonably attributable to its business within this State:

a. If the corporation shall employ in its books of account a detailed allocation of receipts and expenditures which reflects more clearly than the applicable allocation formula or alternative formulas prescribed by this section the portion of the capital stock, surplus and undivided profits attributable to the business within this State, application for permission to base the return upon the taxpayer's books of account shall be considered by the Tax Review Board. The Board shall be authorized to permit such separate accounting method in lieu of applying the applicable allocation formula if the Board deems such method proper as best reflecting the portion of the capital stock, surplus and undivided profits attributable to this State.

b. If the corporation shall show that any other method of allocation than the applicable allocation formula or alternative formulas prescribed by this section reflects more clearly the portion of the capital stock, surplus and undivided profits attributable to the business within this State, application for permission to base the return upon such other method shall be considered by the Tax Review Board. The application shall be accompanied by a statement setting forth in detail, with full explanations, the method the taxpayer believes will more nearly reflect the portion of its capital stock, surplus and undivided profits attributable to the business within this State. If the Board shall conclude that the allocation formula and the alternative formulas prescribed by this section allocate to this State a greater portion of the capital stock, surplus and undivided profits of

the corporation than is reasonably attributable to business within this State, it shall determine the allocable portion by such other method as it shall find best calculated to assign to this State for taxation the portion reasonably attributable to its business within this State.

There shall be a presumption that the appropriate allocation formula reasonably attributes to this State the portion of the corporation's capital stock, surplus and undivided profits reasonably attributable to its business in this State and the burden shall rest upon the corporation to show the contrary. The relief herein authorized shall be granted by the Board only in cases of clear, cogent and convincing proof that the petitioning taxpayer is entitled thereto. No corporation shall use any alternative formula or method other than the applicable allocation formula provided by statute in making a franchise tax report or return to this State except upon order in writing of the Board and any return in which any alternative formula or other method other than the applicable allocation formula prescribed by statute is used without the permission of the Board, shall not be a lawful return.

When the Board determines, pursuant to the provisions of this Article, that an alternative formula or other method more accurately reflects the portion of the capital stock, surplus and undivided profits allocable to North Carolina and renders its decision with regard thereto, the corporation shall allocate its capital stock, surplus and undivided profits for future years in accordance with such determination and decision of the Board so long as the conditions constituting the basis upon which the decision was made remain unchanged or until such time as the business method of operation of the corporation changes. Provided, however, that the Commissioner of Revenue may, in his discretion, with respect to any subsequent year, require the corporation to furnish information relating to its property, operations and activities.

A corporation which proposes to do business in this State may file a petition with the Board setting forth the facts upon which it contends that the applicable allocation formula will allocate a greater portion of the corporation's capital stock, surplus and undivided profits to North Carolina than will be reasonably attributable to its proposed business within the State. Upon a proper showing in accordance with the procedure described above for determination by the Board, the Board may authorize such corporation to allocate its capital stock, surplus and undivided profits to North Carolina on the basis prescribed by the Board under the provisions of this section for such future years as the conditions constituting the basis upon which the Board's decision is made remain unchanged and the business operations of the corporation continue to conform to the statement of proposed methods of business operations presented by the corporation to the Board.

When the Commissioner of Revenue asserts liability under the formula adjustment decision of the Tax Review Board, an aggrieved taxpayer may pay the tax under protest and bring a civil action for recovery under the provisions of G.S. 105-241.4.

(3) The proportion of the total capital stock, surplus and undivided profits of each such corporation so allocated shall be deemed to be the proportion of the total capital stock, surplus and undivided profits of each such corporation used in connection with its business in this State and liable for annual franchise tax under the provisions of this section.

(d) After determining the proportion of its total capital stock, surplus and undivided profits as set out in subsection (c) of this section, which amount so determined shall in no case be less than the total assessed value (including total gross valuation returned for taxation of intangible personal property) of all the real and personal property in this State of each such corporation as herein specified nor less than its total actual investment in tangible property in this State, every corporation taxed under this section shall annually pay to the Commissioner of Revenue, at the time the report and statement are due, a franchise or privilege tax, which is hereby levied, at the rate of one dollar and fifty cents ($1.50) per one thousand dollars ($1,000) of the total amount of capital stock, surplus and undivided profits as herein provided. The tax imposed in this section shall in no case be less than ten dollars ($10.00) and shall be for the privilege of carrying on, doing business, and/or the continuance of articles of incorporation or domestication of each such corporation in this State: Provided, that the basis for the franchise tax on all corporations, eighty percent (80%) of whose outstanding capital stock is owned by persons or corporations to whom or to which such stock was issued prior to January 1, 1935, in part payment or settlement of their respective deposits in any closed bank of the State of North Carolina, shall be the total assessed value of the real and tangible personal property of such corporation in this State for the calendar year next preceding the date on which report and statement is due under the provisions of this section. Assessed value of tangible property including real estate shall be the assessed ad valorem valuation for the calendar year next preceding the due date of the franchise tax return. Assessed value of intangible property, except for bank deposits subject to tax under the provisions of G.S. 105-199, shall be the total gross valuation required to be reported for intangible tax purposes on April 15 coincident with or next preceding the due date of the franchise tax return. Assessed value of bank deposits subject to tax under the provisions of G.S. 105-199 shall be the average balance determined under such section for the calendar year next preceding the due date of the franchise tax return. The term "total actual investment in tangible property" as used in this section shall be construed to mean the total original purchase price or consideration to the reporting taxpayer of its tangible properties, including real estate, in this State plus additions and improvements thereto less reserve for depreciation as permitted for income tax purposes, and also less any indebtedness incurred and existing by virtue of the purchase of any real estate and any permanent improvements made thereon. In computing "total actual investment in tangible personal property" there shall also be deducted reserves for the entire cost of any air cleaning device or sewage or waste treatment plant, including waste lagoons, and pollution abatement equipment purchased or constructed and installed which reduces the amount of air or water pollution resulting from the emission of air contaminants or the discharge of sewage and industrial wastes or other polluting materials or substances into the outdoor atmosphere or into streams, lakes, or rivers, upon condition that the corporation claiming such deduction shall furnish to the Commissioner a certificate from the Board of Water and Air Resources certifying that said Board has found as a fact that the air cleaning device, waste treatment plant or pollution abatement equipment purchased or constructed and installed as above described has actually been constructed and installed and that such device, plant or equipment complies with the requirements of said Board with respect to such devices, plants or equipment, that such device, plant or equipment is being effectively operated in accordance with the terms and conditions set forth in the permit, certificate of approval, or other document of approval issued by the Board of Water and Air Resources and that the primary purpose thereof is to reduce air or water pollution resulting from the emission of air contaminants or the discharge of sewage and waste and not merely incidental to other purposes and functions.

The cost of constructing facilities of any private or public utility built for the purpose of providing sewer service to residential and outlying areas shall be treated as deductible for the purposes of this section; the deductible liability allowed by this section shall apply only with respect to such pollution abatement plants or equipment constructed or installed on or after January 1, 1955.

In determining the total tax payable by any corporation under this section there shall be allowed as credit on such tax the amount of intangible tax paid on bank deposits under the provisions of G.S. 105-199 to the extent that such deposits have been concurrently included in the alternative assessed value tax base pursuant to the provisions of this subsection except that the minimum tax herein provided shall not be less than ten dollars ($10.00). In determining the total tax payable by any corporation under G.S. 105-115 there shall be allowed as credit on such tax the amount of intangible tax paid during the preceding franchise tax year on bank deposits under the provisions of G.S. 105-199.

(e) Any corporation which changes its income year and files a "short period" income tax return pursuant to G.S. 105-142 shall file a franchise tax return in accordance with the provisions of this section in the manner and as of the date specified in subsection (a) of this section. Such corporation shall be entitled to deduct from the total franchise tax computed (on an annual basis) on such return the amount of franchise tax previously paid which is applicable to the period subsequent to the beginning of the new income year.

(f) The report, statement and tax required by this section shall be in addition to all other reports required or taxes levied and assessed in this State.

(g) Counties, cities and towns shall not levy a franchise tax on corporations taxed under this section.

(h) Any corporation whose franchise tax return is due July 15, 1968, or August 15, 1968, the following credit shall be allowed from the total net franchise tax computed on such return. For any corporation whose franchise tax return is due July 15, 1968, the allowable credit shall be an amount equal to two twelfths of the total net franchise tax computed on such return. For any corporation whose franchise tax return is due August 15, 1968, the allowable credit shall be an amount equal to one twelfth of the total net franchise tax computed on such return.

Notwithstanding any other provisions of this Article, the taxes levied in G.S. 105-122 and 105-123 for the State's fiscal year, July 1, 1967, through June 30, 1968, shall be for that period and also for the period beginning on July 1, 1968, and ending on the last day of each corporation's then current income year provided the income tax return for such current income year is due before July 15, 1969. (1939, c. 158, s. 210; 1941, c. 50, s. 4; 1943, c. 400, s. 3; 1945, c. 708, s. 3; 1947, c. 501, s. 3; 1951, c. 643, s. 3; 1953, c. 1302, s. 3; 1955, c. 1100, s. 2½; c. 1350, s. 17; 1957, c. 1340, s. 3; 1959, c. 1259, s. 3; 1963, c. 1169, s. 1; 1967, c. 286; c. 892, ss. 10, 11; c. 1110, s. 2.)

Cross Reference. — See note to § 105-114.

Editor's Note. — For brief comment on the 1953 amendment, see 31 N.C.L. Rev. 435, 441 (1953).

Power of Legislature. — It is within the legislative power of taxation, in respect to corporations, to levy any two or more of the following taxes simultaneously: (1) on the franchise (including corporate dividends); (2) on the capital stock; (3) on the tangible property of the corporation, and (4) on the shares of the capital stock in the hands of the stockholders. The tax on the two subjects last named is imperative. Board of Comm'rs v. Blackwell Durham Tobacco Co., 116 N.C. 441, 21 S.E. 423 (1895).

Equity Capital of Wholly-Owned Subsidiary Not "Indebtedness" That Parent Corporation May Deduct from Franchise Tax Base. — See opinion of Attorney General to Mr. W.B. Matthews, North Carolina Revenue Department, 41 N.C.A.G. 332 (1971).

Foreign corporations do business here by comity of the State, and the latter may impose a license tax as a condition upon which such corporations may do business here under the protection of our laws, where such is not an interference with interstate commerce, or the tax is not otherwise invalid. Pittsburgh Life &

Trust Co. v. Young, 172 N.C. 470, 90 S.E. 568 (1916).

Tax Is on Privilege of Existence. — By the express terms of Laws 1931, c. 427, s. 210, which was superseded by this section, the corporation was liable for the annual franchise tax for each year during which it enjoyed the privilege of the continuance of its charter. It was immaterial whether or not the corporation exercised its privilege of doing or carrying on the business authorized by its charter or certificate of incorporation; it was liable so long as it enjoyed the privilege granted by the State of "being" a corporation. Stagg v. George E. Nissen Co., 208 N.C. 285, 180 S.E. 658 (1935).

Corporation Not Relieved of License Tax on Carrying on Particular Business. — The franchise tax imposed upon every corporation doing business in the State is a tax upon the privilege of being a corporation, and its payment does not relieve it, or its lessee, from the payment of a tax imposed upon the privilege of carrying on the particular kind of business for which the corporation was chartered. Cobb v. Commissioners of Durham County, 122 N.C. 307, 30 S.E. 338 (1898).

Effect of Business Corporation Act on Section. — It is illogical to assume that the legislature intended by the Business Corporation Act to void regulations permitting computation of taxes on the cash receipt basis and thereby outlaw that method of accounting, or to invalidate an accepted method of determining capital and surplus for franchise tax returns required by this section. Watson v. Watson Seed Farms, Inc., 253 N.C. 238, 116 S.E.2d 716 (1961).

A textile finishing plant engaged in processing by mechanical and chemical means, for a fee on a contractual basis, unfinished textile goods owned by others into finished textile goods with qualities and characteristics different from those of the unfinished material is engaged in manufacturing within the purview of this section for the purpose of computing its franchise tax liability. Sayles Biltmore Bleacheries, Inc. v. Johnson, 266 N.C. 692, 147 S.E.2d 177 (1966).

Quoted in Duke Power Co. v. Bowles, 229 N.C. 143, 48 S.E.2d 287 (1948).

Cited in In re Vanderbilt University, 252 N.C. 743, 114 S.E.2d 655 (1960); Southern Bell Tel. & Tel. Co. v. Clayton, 266 N.C. 687, 147 S.E.2d 195 (1966).

§ 105-123. New corporations.—(a) No corporation shall be permitted to do business in this State without paying the franchise tax levied in this Article. When a corporation is incorporated, domesticated or commences business in this State, it shall on or before the sixtieth day following the date of its incorporation, domestication or commencement of business in this State make and deliver to the Commissioner of Revenue in such form as he may prescribe a full, accurate and complete return and statement signed by either its president, vice-president, treasurer, assistant treasurer, secretary or assistant secretary containing such facts and information as may be required by the Commissioner of Revenue in the administration of the tax levied under this Article. There shall be annexed to the return the affirmation of the officer signing the same, which shall be in the form prescribed in G.S. 105-122.

Every corporation subject to the provisions of this section shall pay a franchise tax of ten dollars ($10.00) which shall be due at the time the return is due and which shall be for the period from date of incorporation, domestication or commencement of business in this State through the last day of the then current income year. In no case shall such period exceed 53 weeks.

(b) Any corporation failing to file the return or pay the tax provided for in subsection (a) of this section within the time specified shall be subject to all penalties and remedies as by law prescribed. (1939, c. 158, s. 211; 1945, c. 708, s. 3; 1967, c. 286; c. 1110, s. 2.)

§ 105-124: Repealed by Session Laws 1959, c. 1259, s. 9.

§ 105-125. Corporations not mentioned.—None of the taxes levied in this Article shall apply to charitable, religious, fraternal, benevolent, scientific or educational corporations, not operating for a profit; nor to banking and insurance companies; nor to mutual ditch or irrigation associations, mutual or cooperative telephone associations or companies, mutual canning associations, cooperative breeding associations, or like organizations or associations of a purely local character deriving receipts solely from assessments, dues, or fees collected from members for the sole purpose of meeting expenses; nor to cooperative marketing associations operating solely for the purpose of

marketing the products of members or other farmers, which operations may include activities which are directly related to such marketing activities, and turning back to them the proceeds of sales, less the necessary operating expenses of the association, including interest and dividends on capital stock on the basis of the quantity of product furnished by them; nor to production credit associations organized under the act of Congress known as the Farm Credit Act of 1933; nor to business leagues, boards of trade, clubs organized and operated exclusively for pleasure, recreation and other nonprofitable purposes, civic leagues operated exclusively for the promotion of social welfare, or chambers of commerce and merchants' associations not organized for profit, and no part of the net earnings of which inures to the benefit of any private stockholder, individual or other corporations:

Provided, that each such corporation must, upon request by the Commissioner of Revenue, establish in writing its claim for exemption from said provisions. The provisions of G.S. 105-122 and 105-123 shall apply to electric light, power, gas, water, Pullman, sleeping and dining car, express, telegraph, telephone, motor bus, and truck corporations to the extent and only to the extent that the franchise taxes levied in G.S. 105-122 and 105-123 exceed the franchise taxes levied in other sections of this Article or schedule; except that the provisions of G.S. 105-122 and G.S. 105-123 shall not apply to businesses taxed under G.S. 105-120.1. The exemptions in this section shall apply only to those corporations specially mentioned, and no other.

Provided, that any corporation doing business in North Carolina which in the opinion of the Commissioner of Revenue of North Carolina qualifies as a "regulated investment company" under the provisions of United States Code Annotated Title 26, § 851, or as a "real estate investment trust" under the provisions of United States Code Annotated Title 26, § 856, and which files with the North Carolina Department of Revenue its election to be treated as a "regulated investment company" or as a "real estate investment trust," shall in determining its basis for franchise tax be allowed to deduct the aggregate market value of its investments in the stocks, bonds, debentures, or other securities or evidences of debt of other corporations, municipalities, governmental agencies or governments. (1939, c. 158, s. 213; 1951, c. 937, s. 3; 1955, c. 1313, s. 1; 1957, c. 1340, s. 3; 1963, c. 601, s. 3; c. 1169, s. 1; 1967, c. 1110, s. 2; 1971, c. 820, s. 3; c. 833, s. 1.)

Editor's Note. — The first 1971 amendment, effective for taxable years beginning on and after Jan. 1, 1971, in the third paragraph, substituted "corporation doing business in North Carolina" for "North Carolina corporation," inserted "or as a 'real estate investment trust' under the provisions of United States Code Annotated Title 26, § 856," and inserted "or as a 'real estate investment trust.'"

The second 1971 amendment, effective July 1, 1971, deleted "street railway" following "power" and added the exception clause in the second sentence of the second paragraph.

For brief comment on the 1951 amendment which added the last paragraph, see 29 N.C.L. Rev. 415.

An educational institution of another state which engages in the business of renting real estate in this State is exempt from franchise taxes under this section when no part of its net earnings inures to the benefit of any individual or private stockholder, and its business here is carried on solely in its capacity of a nonprofit educational institution. In re Vanderbilt University, 252 N.C. 743, 114 S.E.2d 655 (1960).

§ **105-126:** Repealed by Session Laws 1959, c. 1259, s. 9.

§ **105-127. When franchise or privilege taxes payable.**—(a) Every corporation, domestic or foreign, from which a report is required by law to be made to the Commissioner of Revenue, shall, unless otherwise provided, pay to said Commissioner annually the franchise tax as required by G.S. 105-122 and 105-123.

(b) It shall be the duty of the Commissioner of Revenue to mail to the registered address, last listed with the Commissioner of Revenue, of every such

corporation, report forms to be used in complying with the provisions of this Article or schedule, which forms shall contain a copy of so much of this and other sections of this Article as relates to penalties for failure to pay said taxes.

(c) It shall be the duty of the treasurer or other officer having charge of any such corporation, domestic or foreign, upon which a tax is herein imposed, to transmit the amount of the tax due to the Commissioner of Revenue within the time provided by law for payment of same.

(d) Individual stockholders in any corporation, joint-stock association, limited partnership, or company paying a tax on its entire capital stock shall not be required to list or pay ad valorem taxes on the shares of stock owned by them.

(e) Corporations in the State legally holding shares of stock in other corporations, upon which the tax has been paid to the State by the corporation issuing the same, shall not be required to list or pay an ad valorem tax on said shares of stock. (1939, c. 158, s. 215.)

§ **105-128. Power of attorney.**—The Commissioner of Revenue shall have the authority to require a proper power of attorney of each and every agent for any taxpayer under this Article. (1939, c. 158, s. 217.)

§ **105-129. Extension of time for filing returns.**—(a) The return required by this Article or schedule shall be due on or before the dates specified unless written application for extension of time in which to file, containing reasons therefor, is made to the Commissioner of Revenue on or before due date of such return. The Commissioner of Revenue for good cause may extend the time for filing any return under this Article or schedule, provided interest at the rate of six percent (6%) per annum from date return is due is paid upon the total amount of tax due.

(b) : Repealed by Session Laws 1959, c. 1259, s. 9. (1939, c. 158, s. 216; 1955, c. 1350, s. 17; 1959, c. 1259, s. 9.)

§ **105-129.1. Reimbursement of certain manufacturers authorized.**—(a) Any person, firm, or corporation who shall buy within this State any piped gas from a gas company authorized to do business in this State and shall use such piped gas in this State as an ingredient or component part of a manufactured product shall be reimbursed in the amount equivalent to the franchise tax on the gross receipts for such piped gas. This reimbursement to be made upon the following conditions and in the following manner:

(1) On or before the last day of January, April, July and October of each year the manufacturer entitled to a reimbursement under this section shall apply to the Commissioner of Revenue for such reimbursement. Such application shall be made upon such forms as the Commissioner of Revenue shall prescribe and shall be for gas purchased during the three-month period ending on the last day of the month preceding the month in which the application for reimbursement is required to be filed.

(2) The Commissioner of Revenue is hereby authorized to prescribe such rules and regulations as to how claims shall be filed and the information that shall be submitted with said claims and the records required to support said claims.

(3) If, upon filing such application, the Commissioner of Revenue shall be satisfied that the same is filed with the time limits prescribed herein and is made in good faith and that the gas upon which said reimbursement is requested has been or will be used as an ingredient or component part of a manufactured product, he shall issue the applicant a warrant upon the State Treasurer for the reimbursement.

(4) Any applicant for a reimbursement may seek administrative review or appeal from the decision of the Commissioner of Revenue under the provisions of G.S. 105-241.2, 105-241.3 and 105-241.4.

(5) The Commissioner of Revenue is hereby authorized and directed, if at any time in his opinion there is reason to doubt the accuracy of the facts set forth in any application for reimbursement to refer the matter to any agent of the Department of Revenue, and such person so designated shall make a careful investigation of all the facts and circumstances relating to said application in the use of the gas therein referred to, and shall have a right to have access to the books and records of any retailer or distributor of gas products for the purpose of obtaining the necessary information concerning such matters, and shall make due report thereof to the Commissioner of Revenue.

(b) Any person making a false application or affidavit for the purpose of securing a reimbursement to which he is not entitled under the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be fined not exceeding five hundred dollars ($500.00) or imprisoned not exceeding two years, in the discretion of the court. (1967, c. 519, s. 2.)

Article 4.

Schedule D. Income Tax.

Division I. Corporation Income Tax.

§ 105-130. Short title.—This Division of the income tax Article shall be known and may be cited as the Corporation Income Tax Act. (1939, c. 158, s. 300; 1967, c. 1110, s. 3.)

Editor's Note. — Session Laws 1967, c. 1110, s. 3, applicable to all taxable years beginning on or after Jan. 1, 1967, extensively revised and amended this Article, dividing it into three Divisions: I. Corporation Income Tax, containing §§ 105-130 to 105-130.21; II. Individual Income Tax, containing §§ 105-133 to 105-159; and III. Income Tax—Estates, Trusts, and Beneficiaries, containing §§ 105-160 to 105-163. In Division I, § 105-130, which formerly provided that this Article should be known as the income tax Article of the Revenue Act, was rewritten, and new §§ 105-130.1 to 105-130.21 were added, applicable only to corporations and incorporating many of the provisions governing corporations formerly appearing in §§ 105-131 to 105-159.

Section 16, c. 1110, Session Laws 1967, provides; "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

For discussion of changes made in this Article by the Session Laws of 1947, see 25 N.C.L. Rev. 467; by the Session Laws of 1949, see 27 N.C.L. Rev. 482.

§ 105-130.1. Purpose.—The general purpose of this Division is to impose a tax for the use of the State government upon the net income of every domestic corporation and of every foreign corporation doing business in this State.

The tax imposed upon the net income of corporations in this Division is in addition to all other taxes imposed under this Subchapter. (1939, c. 158, s. 301; 1967, c. 1110, s. 3.)

§ 105-130.2. Definitions.—For the purpose of this Division, and unless otherwise required by the context:

(1) The word "corporation" includes joint-stock companies or associations and insurance companies.

(2) The words "domestic corporation" mean any corporation organized under the laws of this State.

(3) The words "fiscal year" mean an income year, ending on the last day of any month other than December. A corporation which pursuant to the provisions of the Federal Internal Revenue Code of 1954 has elected to compute its income tax liability to the United States on the basis of an annual period varying from 52 to 53 weeks shall compute its taxable income for the purposes of this division on the basis of the same period used by such corporation in accordance with the Federal Internal Revenue Code of 1954 in computing its tax liability to the United States for such income year.

(4) The words "foreign corporation" mean any corporation other than a domestic corporation.

(5) The words "income year" or "taxable year" mean the calendar year or the fiscal year upon the basis of which the net income is computed under this division; provided, that if no fiscal year has been established, they mean the calendar year, except that in the case of a return made for a fractional part of a year under the provisions of this division or under rules or regulations prescribed by the Commissioner of Revenue, the words "income year" or "taxable year" mean the period for which such return is made.

(6) The word "taxpayer" includes any corporation subject to the tax imposed by this division. (1939, c. 158, s. 302; 1941, c. 50, s. 5; 1955, c. 1331, s. 2; 1957, c. 1340, s. 4; 1963, c. 1169, s. 2; 1967, c. 1110, s. 3.)

§ 105-130.3. Corporations.—Every corporation doing business in this State shall pay annually an income tax equivalent to six percent (6%) of its net income or the portion thereof allocated and apportioned to this State. The net income or net loss of such corporation shall be the same as "taxable income" as defined in the Internal Revenue Code in effect on the effective date of this Division, subject to the adjustments provided in G.S. 105-130.5.

If the entire business of the corporation is done within this State or if the corporation is not taxable in another state within the meaning of subsection (b) of G.S. 105-130.4, the tax shall be measured by the entire net income of the corporation for the income year.

If the business of the corporation is taxable both within and without this State, its entire net income or net loss shall be allocated and apportioned in accordance with the provisions of G.S. 105-130.4. (1939, c. 158, s. 311; 1941, c. 50, s. 5; 1943, c. 400, s. 4; 1945, c. 752, s. 3; 1953, c. 1302, s. 4; 1955, c. 1350, s. 18; 1957, c. 1340, s. 4; 1959, c. 1259, s. 4; 1963, c. 1169, s. 2; c. 1186; 1967, c. 1110, s. 3.)

Every corporation doing business in North Carolina is required to pay an annual income tax equivalent to 6% of its net taxable income. Gulf Oil Corp. v. Clayton, 267 N.C. 15, 147 S.E.2d 522 (1966) (decided under §§ 105-134 and 105-140 prior to the 1967 amendments thereto).

Income Tax and Franchise Tax Distinguished. — A comparison of Article 3 of this Chapter, relating to franchise taxes, and Article 4, relating to income taxes, indicates a clear legislative intent to differentiate between these two types of taxes, for a clear distinction has been made by the General Assembly between an excise tax imposed on domestic and foreign corporations for the privilege of transacting business within the State, and an income tax on net corporate income, which is based on a past fact of earned net profits. The statutes under which these taxes were assessed in the instant case in precise words preclude a contention that it was the legislative intent that the taxes assessed and paid here were excise or privilege taxes. ET & WNC Transp. Co. v. Currie, 248 N.C. 560, 104 S.E.2d 403 (1958), construing § 105-134 prior to the 1957 amendment.

The incidence of the tax on a foreign corporation is that part of its net income earned within North Carolina by reason of its interstate business, and reasonably attributable to its interstate business done or performable within the borders of North Carolina, and not upon its franchise to engage in interstate business in North Carolina. ET & WNC Transp. Co. v. Currie, 248 N.C. 560, 104 S.E.2d 403 (1958), construing § 105-134 prior to the 1957 amendment.

§ 105-130.4. Allocation and apportionment of income for corporations.—(a) As used in this section, unless the context otherwise requires:

(1) "Business income" means income arising from transactions and activity in the regular course of the corporation's trade or business and includes income from tangible and intangible property if the acquisition, management, and/or disposition of the property constitute integral parts of the corporation's regular trade or business operations.

(2) "Commercial domicile" means the principal place from which the trade or business of the taxpayer is directed or managed.

(3) "Compensation" means wages, salaries, commissions and any other form of remuneration paid to employees for personal services.

(4) "Excluded corporation" means any corporation engaged in the business of dealing in securities, any loan company, or any other corporation, which receives more than fifty percent (50%) of its ordinary gross income from investments in and/or dealing in intangible property.

(5) "Nonbusiness income" means all income other than business income.

(6) "Public utility" means any corporation which is subject to control of North Carolina Utilities Commission and/or Federal Communications Commission, Interstate Commerce Commission, Federal Power Commission and Federal Aviation Agency and which owns or operates for public use any plant, equipment, property, franchise, or license for the transmission of communications, transportation of goods or persons, or the production, storage, transmission, sale, delivery or furnishing of electricity, water, steam, oil, oil products, or gas.

(7) "Sales" means all gross receipts of the corporation except receipts from any casual sale of property and except receipts allocated under subsections (c) through (h) of this section.

(8) "Casual sale of property" means the sale of any property which was not purchased, produced or acquired primarily for sale in the corporation's regular trade or business.

(9) "State" means any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, and any foreign country or political subdivision thereof.

(b) A corporation having income from business activity which is taxable both within and without this State shall allocate and apportion its net income or net loss as provided in this section. For purposes of allocation and apportionment, a corporation is taxable in another state if (i) in that state it is subject to a net income tax, or any tax measured by net income, or (ii) that state has jurisdiction to subject the corporation to a tax measured by net income regardless of whether, in fact, that state exercises such jurisdiction.

(c) Rents and royalties from real or tangible personal property, gains and losses, interest, dividends less the portion deductible under G.S. 105-130.7, patent and copyright royalties and other kinds of income, to the extent that they constitute nonbusiness income, less related expenses shall be allocated as provided in subsections (d) through (h) of this section.

(d) (1) Net rents and royalties from real property located in this State are allocable to this State.

(2) Net rents and royalties from tangible personal property are allocable to this State:

a. If and to the extent that the property is utilized in this State, or

b. In their entirety if the corporation's commercial domicile is in this State and the corporation is not organized under the laws of, or is not taxable in, the state in which the property is utilized.

(3) The extent of utilization of tangible personal property in a state is determined by multiplying the rents and royalties by a fraction, the numerator of which is the number of days of physical location of the property in the state during the rental or royalty period in the income year and the denominator of which is the number of days of physical location of the property everywhere during all rental or royalty periods in the income year. If the physical location of the property during the rental or royalty period is unknown or unascertainable by the corporation, tangible personal property is utilized in the state in which the property was located at the time the rental or royalty payer obtained possession.

(e) (1) Gains and losses from sales or other disposition of real property located in this State are allocable to this State.

(2) Gains and losses from sales or other disposition of tangible personal property are allocable to this State if

a. The property had a situs in this State at the time of the sale, or

b. The corporation's commercial domicile is in this State and the corporation is not taxable in the state in which the property had a situs.

(3) Gains and losses from sales or other disposition of intangible personal property are allocable to this State if the corporation's commercial domicile is in this State.

(f) Interest and net dividends are allocable to this State if the corporation's commercial domicile is in this State subject to the following limitations:

(1) Net dividends received by a corporation from another corporation in which the recipient corporation owns fifty (50%) or more per centum of the paying corporation's voting stock, shall be allocated to this State if the paying corporation is subject to income tax in this State. In such case, the net amount of such dividends received by the recipient corporation from the paying corporation is allocable to this State by use of the same percentage figure used in determining the portion of the paying corporation's dividends deductible under the provisions of G.S. 105-130.7.

(2) For purposes of this section, the net amount of dividends shall mean gross dividend income received less related expenses and less that portion of such dividends deductible under the provisions of G.S. 105-130.7.

(g) (1) Royalties or similar income received from the use of patents, copyrights, secret processes and other similar intangible property are allocable to this State:

a. If and to the extent that the patent, copyright, secret process or other similar intangible property is utilized in this State, or

b. If and to the extent that the patent, copyright, secret process or other similar intangible property is utilized in a state in which the taxpayer is not taxable and the taxpayer's commercial domicile is in this State.

(2) A patent, secret process or other similar intangible property is utilized in a state to the extent that it is employed in production, fabrication, manufacturing, processing, or other use in the state or to the extent that a patented product is produced in the state. If the basis of receipts from such intangible property does not permit allocation to states or if the accounting procedures do not reflect states of utilization, the intangible property is utilized in the state in which the taxpayer's commercial domicile is located.

(3) A copyright is utilized in a state to the extent that printing or other publication originates in the state. If the basis of receipts from copyright royalties does not permit allocation to states or if the accounting procedures do not reflect states of utilization, the copyright is utilized in the state in which the taxpayer's commercial domicile is located.

(h) The income less related expenses from any other nonbusiness activities or investments not otherwise specified in this section is allocable to this State if the business situs of the activities or investments are located in this State.

(i) All business income of corporations other than public utilities and excluded corporations shall be apportioned to this State by multiplying the income by a fraction, the numerator of which is the property factor plus the

payroll factor plus the sales factor, and the denominator of which is three. Provided, that where less than three of the said factors exist, the denominator of the fraction shall be the same as the number of existing factors.

(j) (1) The property factor is a fraction, the numerator of which is the average value of the corporation's real and tangible personal property owned or rented and used in this State during the income year and the denominator of which is the average value of all the corporation's real and tangible personal property owned or rented and used during the income year.

(2) Property owned by the corporation is valued at its original cost. Property rented by the corporation is valued at eight times the net annual rental rate. Net annual rental rate is the annual rental rate paid by the corporation less any annual rental rate received by the corporation from subrentals. Any property under construction or any property which had not been actually used or operated in the corporation's business during the income year and any property the income from which constitutes nonbusiness income shall be excluded in the computation of the property factor.

(3) The average value of property shall be determined by averaging the values at the beginning and end of the income year, but in all cases the Commissioner of Revenue may require the averaging of monthly or other periodic values during the income year if reasonably required to reflect properly the average value of the corporation's property. A corporation which ceases its operations in this State before the end of its income year because of its intention to dissolve or to relinquish its certificate of authority, or because of a merger or consolidation, or for any other reason whatsoever shall use the real estate and tangible personal property values as of the first day of the income year and the last day of its operations in this State in determining the average value of property, but the Commissioner may require averaging of monthly or other periodic values during the income year if reasonably required to reflect properly the average value of the corporation's property.

(k) (1) The payroll factor is a fraction, the numerator of which is the total amount paid in this State during the income year by the corporation as compensation, and the denominator of which is the total compensation paid everywhere during the income year. All compensation paid to general executive officers and all compensation paid in connection with nonbusiness income shall be excluded in computing the payroll factor. General executive officers shall include the chairman of the board, president, vice-presidents, secretary, treasurer, comptroller, and any other officers serving in similar capacities.

(2) Compensation is paid in this State if:

a. The individual's service is performed entirely within the State; or

b. The individual's service is performed both within and without the State, but the service performed without the State is incidental to the individual's service within the State; or

c. Some of the service is performed in this State and (i) the base of operations or, if there is no base of operations, the place from which the service is directed or controlled is in this State, or (ii) the base of operations or the place from which the service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this State.

(l) (1) The sales factor is a fraction, the numerator of which is the total sales

of the corporation in this State during the income year, and the denominator of which is the total sales of the corporation everywhere during the income year. Notwithstanding any other provision under this division, the receipts from any casual sale of property shall be excluded from both the numerator and the denominator of the sales factor. Where a corporation is not taxable in another state on its business income but is taxable in another state only because of nonbusiness income, all sales shall be treated as having been made in this State.

(2) Sales of tangible personal property are in this State if the property is received in this State by the purchaser. In the case of delivery of goods by common carrier or by other means of transportation, including transportation by the purchaser, the place at which the goods are ultimately received after all transportation has been completed shall be considered as the place at which the goods are received by the purchaser. Direct delivery into this State by the taxpayer to a person or firm designated by a purchaser from within or without the State shall constitute delivery to the purchaser in this State.

(3) Other sales are in this State if:

a. The receipts are from real or tangible personal property located in this State; or

b. The receipts are from intangible property and are received from sources within this State; or

c. The receipts are from services and the income-producing activities are in this State.

(m) All business income of a railroad company shall be apportioned to this State by multiplying the income by a fraction, the numerator of which is the "railway operating revenue" from business done within this State and the denominator of which is the "total railway operating revenue" from all business done by the company as shown by its records kept in accordance with the standard classification of accounts prescribed by the Interstate Commerce Commission.

"Railway operating revenue" from business done within this State shall mean "railway operating revenue" from business wholly within this State, plus the equal mileage proportion within this State of each item of "railway operating revenue" received from the interstate business of the company. "Equal mileage proportion" shall mean the proportion which the distance of movement of property and passengers over lines in this State bears to the total distance of movement of property and passengers over lines of the company receiving such revenue. "Interstate business" shall mean "railway operating revenue" from the interstate transportation of persons or property into, out of, or through this State. If the Commissioner of Revenue shall find, with respect to any particular company, that its accounting records are not kept so as to reflect with exact accuracy such division of revenue by State lines as to each transaction involving interstate revenue, the Commissioner of Revenue may adopt such regulations, based upon averages, as will approximate with reasonable accuracy the proportion of interstate revenue actually earned upon lines in this State. Provided, that where a railroad is being operated by a partnership which is treated as a corporation for income tax purposes and pays a net income tax to this State, or if located in another state would be so treated and so pay as if located in this State, each partner's share of the net profits shall be considered as dividends paid by a corporation for purposes of this division and shall be so treated for inclusion in gross income, deductibility, and separate allocation of dividend income.

(n) All business income of a telephone company shall be apportioned to this State by multiplying the income by a fraction, the numerator of which is gross

operating revenue from local service in this State plus gross operating revenue from toll services performed wholly within this State plus the proportion of revenue from interstate toll services attributable to this State as shown by the records of the company plus the gross operating revenue in North Carolina from other service less the uncollectible revenue in this State, and the denominator of which is the total gross operating revenue from all business done by the company everywhere less total uncollectible revenue. Provided, that where a telephone company is required to keep its records in accordance with the standard classification of accounts prescribed by the Federal Communications Commission the amounts in such accounts shall be used in computing the apportionment fraction as provided in this subsection.

(o) All business income of a motor carrier of property shall be apportioned by multiplying the income by a fraction, the numerator of which is the number of vehicle miles in this State and the denominator of which is the total number of vehicle miles of the company everywhere. The words "vehicle miles" shall mean miles traveled by vehicles owned or operated by the company hauling property for a charge or traveling on a scheduled route.

(p) All business income of a motor carrier of passengers shall be apportioned by multiplying the income by a fraction, the numerator of which is the number of vehicle miles in this State and the denominator of which is the total number of vehicle miles of the company everywhere. The words "vehicle miles" shall mean miles traveled by vehicles owned or operated by the company carrying passengers for a fare or traveling on a scheduled route.

(q) All business income of a telegraph company shall be apportioned by multiplying the income by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor and the denominator of which is three.

The property factor shall be as defined in subsection (j) of this section, the payroll factor shall be as defined in subsection (k) of this section, and the sales factor shall be as defined in subsection (l) of this section.

(r) All business income of an excluded corporation and of all other public utilities shall be apportioned by multiplying the income by the sales factor as determined under subsection (l) of this section.

(s) (1) If any corporation believes that the method of allocation or apportionment as administered by the Commissioner of Revenue has operated or will so operate as to subject it to taxation on a greater portion of its income than is reasonably attributable to business or earnings within the State, it shall be entitled to file with the Tax Review Board a petition setting forth the facts upon which its belief is based and its argument with respect to the application of the allocation formula. This petition shall be filed in such form and within such time as the Tax Review Board may prescribe. The Board shall grant a hearing thereon. At least three members of the Tax Review Board shall attend any hearing pursuant to such petition. In such cases, the Tax Review Board's membership shall be augmented by the addition of the Commissioner of Revenue who shall sit as a member of said Board with full power to participate in its deliberations and decisions with respect to petitions filed under the provisions of this section. An informal record containing in substance the evidence, contentions and arguments presented at the hearing shall be made. All members of the augmented Tax Review Board shall consider such evidence, contentions and arguments and the decisions thereon shall be made by a majority vote of the augmented Board.

(2) If the corporation shall employ in its books of account a detailed allocation of receipts and expenditures which reflects more clearly than the applicable allocation formula prescribed by this section the income attributable to the business within this State, application for

permission to base the return upon the taxpayer's books of account shall be considered by the Tax Review Board. The Board shall be authorized to permit such separate accounting method in lieu of applying the applicable allocation formula if the Board deems such method proper as best reflecting the income and earnings attributable to this State.

(3) If the corporation shall show that any other method of allocation than the applicable allocation formula prescribed by this section reflects more clearly the income attributable to the business within this State, application for permission to base the return upon such other method shall be considered by the Tax Review Board. The application shall be accompanied by a statement setting forth in detail, with full explanations, the method the corporation believes will more nearly reflect its income from business within this State. If the Board shall conclude that the allocation formula prescribed by this section allocates to this State a greater portion of the net income of the corporation than is reasonably attributable to business or earnings within this State, it shall determine the allocable net income by such other method as it shall find best calculated to assign to this State for taxation the portion of the corporation's net income reasonably attributable to its business or earnings within this State.

(4) There shall be a presumption that the appropriate allocation formula reasonably attributes to this State the portion of the corporation's income earned in this State, and the burden shall rest upon the corporation to show the contrary. The relief herein authorized shall be granted by the Board only in cases of clear, cogent and convincing proof that the petitioning corporation is entitled thereto. No corporation shall use any alternative formula or method other than the applicable allocation formula provided by statute in making a report or return of its income to this State except upon order in writing of the Board, and any return in which any alternative formula or other method, other than the applicable allocation formula prescribed by statute, is used without permission of the Board shall not be a lawful return.

When the Board determines, pursuant to the provisions of this subsection, that an alternative formula or other method more accurately reflects the income allocable to North Carolina and renders its decision with regard thereto, the corporation shall allocate its net income for future years in accordance with such determination and decision of the Board so long as the conditions constituting the basis upon which the decision was made remain unchanged or until such time as the business method of operation of the corporation changes. Provided, however, that the Commissioner of Revenue may, in his discretion, with respect to any subsequent year, require the corporation to furnish information relating to its property, operations, and activities.

(5) A corporation which proposes to do business in this State may file a petition with the Board setting forth the facts upon which it contends that the applicable allocation formula will allocate a greater portion of the corporation's future income to North Carolina than will be reasonably attributable to its proposed business or contemplated earnings within the State. Upon a proper showing in accordance with the procedure described above for determinations by the Board, the Board may authorize such corporation to allocate income from its future business to North Carolina on the basis prescribed by the Board under the provisions of this section for such future years if the conditions constituting the basis upon which the Board's decision is

made remain unchanged and the business operations of the corporation continue to conform to the statement of proposed methods of business operation presented by the corporation to the Board.

(6) When the Commissioner of Revenue asserts liability under the formula adjustment decision of the Tax Review Board, an aggrieved corporation may pay the tax and bring a civil action for recovery under the provisions of Article 9. (1939, c. 158, s. 311; 1941, c. 50, s. 5; 1943, c. 400, s. 4; 1945, c. 752, s. 3; 1953, c. 1302, s. 4; 1955, c. 1350, s. 18; 1957, c. 1340, s. 4; 1959, c. 1259, s. 4; 1963, c. 1169, s. 2; c. 1186; 1967, c. 1110, s. 3.)

Editor's Note. — A number of the cases in the following note were decided under provisions similar to this section appearing in § 105-134 prior to the 1967 amendment thereto.

For note on constitutionality of income allocation formulae under former § 105-134 as applied to corporations, see 9 N.C.L. Rev. 470.

For note as to allocation of interstate corporate income, etc., under former § 105-134, see 36 N.C.L. Rev. 156 (1958).

For case construing the early income tax laws, see Hans Rees' Sons v. North Carolina ex rel. Maxwell, 283 U.S. 123, 51 S. Ct. 385, 75 L. Ed. 879 (1931).

Purpose of Apportionment. — The imposition of the income tax upon a base which reasonably represents the proportion of the trade or business carried on within the State is designed to meet the due process requirement that a state show a sufficient nexus between such a tax and the transaction within a state for which the tax is an exaction, and the proscriptions of the Commerce Clause of the federal Constitution which permit a state to tax only that part of a corporation's net income from multistate operations which is attributable to earnings within the taxing state. Gulf Oil Corp. v. Clayton, 267 N.C. 15, 147 S.E.2d 522 (1966).

"Compensation". — Article 4 of the Revenue Act was extensively revised in 1967 and this new section dealing with the payroll factor clarified the provisions of former § 105-134 so as to make it plain that "compensation" to be included means "wages, salaries, commissions and any other form of remuneration paid to employees for personal services." Myrtle Desk Co. v. Clayton, 8 N.C. App. 452, 174 S.E.2d 619 (1970).

The State has the right to collect nondiscriminatory income taxes imposed on a foreign corporation if the taxes are imposed solely on that part of the corporation's income earned within the State in its interstate business, and reasonably attributable to its interstate business done or performed within the borders of this State. American Bakeries Co. v. Johnson, 259 N.C. 419, 131 S.E.2d 1 (1963).

Burden of Showing Statutory Assessment Unconstitutional. — Where the Commissioner of Revenue assessed an income tax against a foreign corporation operating a manufacturing plant in this State in accordance with the provisions of § 311 of the Revenue Act of 1929, without regard to its intangible property, the Commissioner's assessment was upheld upon appeal where the corporation failed to show that such method of allocation was unconstitutional in its application to the corporation. State ex rel. Maxwell v. Kent-Coffey Mfg. Co., 204 N.C. 365, 168 S.E. 397 (1933).

Method of Apportionment Not Intrinsically Arbitrary Will Be Sustained. — In determining the amount of income of a foreign corporation subject to taxation by a state the difficulty of making an exact apportionment is apparent and hence, when the state has adopted a method not intrinsically arbitrary, it will be sustained until proof is offered of an unreasonable and arbitrary application in particular cases. American Bakeries Co. v. Johnson, 259 N.C. 419, 131 S.E.2d 1 (1963).

But Evidence May Be Received to Show Arbitrary Application in Particular Case. — When there are different taxing jurisdictions, each competent to lay a tax with respect to what lies within, and is done within, its own borders, and the question is necessarily one of apportionment, evidence may always be received which tends to show that a state has applied a method, which, albeit fair on its face, operates so as to reach profits which are in no just sense attributable to transactions within its jurisdiction. American Bakeries Co. v. Johnson, 259 N.C. 419, 131 S.E.2d 1 (1963).

If Result Unjust, Additional Factors May Be Added to Formula. — If the apportionment formula produces an unjust result, differing and additional factors may be added. Clark Equip. Co. v. Johnson, 261 N.C. 269, 134 S.E.2d 327 (1964).

By Action of Tax Review Board. — When a complaining taxpayer establishes by evidence, clear, cogent and convincing, an inequitable result, the Tax Review Board may, in cases where the corporation keeps its books in such manner as to establish the income earned in this State, use the company's separate bookkeeping and accounting system to ascertain that portion of the income earned in

North Carolina. Clark Equip. Co. v. Johnson, 261 N.C. 269, 134 S.E.2d 327 (1964).

But Taxpayer May Also Pay under Protest and Sue for Refund. — A taxpayer contending that an additional assessment of income tax is invalid is not required to proceed under provisions such as subsection (s) of this section, but may pay the tax under protest, make proper demand for refund and, upon refusal, bring suit under § 105-267. Sayles Biltmore Bleacheries, Inc. v. Johnson, 266 N.C. 692, 147 S.E.2d 177 (1966).

The purpose of provisions such as subsection (s) of this section was not to provide either a substitute for, or an alternative to, § 105-267, but to afford relief from the apportionment formula of this section when it operates to tax a greater portion of a corporation's income than is reasonably attributable to business in this State. Gulf Oil Corp. v. Clayton, 267 N.C. 15, 147 S.E.2d 522 (1966).

It was not the intention of the legislature, when it amended the predecessor of this section in 1953, to require a corporation to secure a ruling from the augmented Tax Review Board before it might have the superior court determine the legality of a tax assessment against specific items of its income earned outside of North Carolina, no part of which, it contends, is allocable to North Carolina. Gulf Oil Corp. v. Clayton, 267 N.C. 15, 147 S.E.2d 522 (1966).

Tax on Foreign Corporation Doing Exclusively Interstate Business. — An income tax imposed under former § 105-134 on a foreign corporation doing an exclusively interstate business as a motor carrier of freight did not impose a burden on interstate commerce in contravention of the United States Constitution, since no tax would be imposed if such corporation should have no net income earned in North Carolina by reason of its interstate business, and the tax was imposed only upon that portion of its net income which was reasonably attributable to its interstate business done within the borders of the State, without any discrimination against the taxpayer either in the admeasurement of the tax or the means for enforcing it, and the tax not being upon the franchise to engage in business. ET & WNC Transp. Co. v. Currie, 248 N.C. 560, 104 S.E.2d 403 (1958), construing § 105-134 as it stood before the 1957 amendment.

In the collection of income taxes under former § 105-134 from a foreign corporation doing an exclusively interstate business in North Carolina there was no violation of the "due process of law" provision of the Fourteenth Amendment to the federal Constitution or of the "law of the land" provision of N.C. Const., Art. I, § 19. ET & WNC Transp. Co. v. Currie, 248 N.C. 560, 104 S.E.2d 403 (1958), construing § 105-134 as it stood before the 1957 amendment.

Apportionment of Income of Unitary Business. — The fact that the corporate enterprise is a unitary one, in the sense that the ultimate gain is derived from the entire business, does not mean that for the purpose of taxation the activities which are conducted in different jurisdictions are to be regarded as component parts of a single unit so that the entire net income may be taxed in one state regardless of the extent to which it may be derived from the conduct of the enterprise in another state. American Bakeries Co. v. Johnson, 259 N.C. 419, 131 S.E.2d 1 (1963).

Although a unitary business (a concern that is carrying on one kind of business, the component parts of which are too closely connected and necessary to each other to justify division or separate consideration, as independent units) may produce an income which must be allocated to two or more states in which its activities are carried on, such business may not be split up arbitrarily and conventionally in applying the tax laws; there must be some logical reference to the production of income. American Bakeries Co. v. Johnson, 259 N.C. 419, 131 S.E.2d 1 (1963).

In apportioning the income of a unitary business to determine how much of it is subject to state taxation the formula used must give adequate weight to the essential elements responsible for the earning of the income. American Bakeries Co. v. Johnson, 259 N.C. 419, 131 S.E.2d 1 (1963).

Mutual Dependency of Interrelated Activities Sustains Apportionment Formula. — In allocating for taxation by this State a part of the net income of a unitary business operating in this State and several other states, it is not required that its equipment appropriately employed in this State be equally productive with that employed in the other states, but the mutual dependency of the interrelated activities in furtherance of the entire business sustains an apportionment formula which results in a reasonable approximation of its income earned here, it being required only that the formula not be intrinsically arbitrary or produce an unreasonable result. Virginia Elec. & Power Co. v. Currie, 254 N.C. 17, 118 S.E.2d 155 (1961).

Taxation of Dividends Received by Foreign Corporation from Foreign Subsidiary. — For purposes of taxation in a parent-subsidiary relationship, where the corporate separation is maintained and the subsidiary conducts its own business, the subsidiary, not the parent, is doing the business. American Bakeries Co. v. Johnson, 259 N.C. 419, 131 S.E.2d 1 (1963).

The mere fact that a foreign corporation engaged in business in this and other states, owns a subsidiary corporation in another state,

which subsidiary does no business in North Carolina and owns no property in this State but is engaged in a similar business to that of the parent corporation, does not of itself require the parent corporation to prorate the dividends received from such subsidiary to all the states in which the parent corporation does business. American Bakeries Co. v. Johnson, 259 N.C. 419, 131 S.E.2d 1 (1963).

There was no legal basis for requiring a foreign corporation to pay income taxes to the State on the dividends received from its subsidiary, where the subsidiary was neither a customer nor a retail outlet of the parent corporation, and the dividends were paid out of earnings of the subsidiary no part of which was earned from business conducted or transacted in the State. American Bakeries Co. v. Johnson, 259 N.C. 419, 131 S.E.2d 1 (1963).

Taxation of Dividends Received by Domesticated Corporation from Foreign Subsidiary. — Where the separate entities of the domesticated parent and its foreign, dividend-paying subsidiary (engaged in a similar business outside of North Carolina) are maintained—each transacting its own business as a distinct corporation and dealing with the other as if no parent-subsidiary relation existed—North Carolina cannot tax the subsidiary's dividends even though they are included in the parent's ultimate gains. Gulf Oil Corp. v. Clayton, 267 N.C. 15, 147 S.E.2d 522 (1966).

The test for determining whether income of a foreign subsidiary may be taxed in this State is not solely whether the business of a foreign subsidiary is similar to that in which the domesticated parent is engaging in North Carolina or elsewhere, or whether it has had business transactions with the parent elsewhere in the world. Conceding both similarity of businesses and intercorporate transactions outside the State, yet the dividend income which the subsidiary pays the parent cannot be constitutionally allocated to North Carolina and prorated for income taxation unless (1) it is attributable to business activities within this jurisdiction or (2) the activities of the corporations are so interrelated as to make it impossible to identify the various sources of the taxpayer's total earnings with reasonable certainty. Gulf Oil Corp. v. Clayton, 267 N.C. 15, 147 S.E.2d 522 (1966).

§ 105-130.5. Adjustments to federal taxable income in determining State net income.—(a) The following additions to federal taxable income shall be made in determining State net income:

(1) Taxes based on or measured by net income by whatever name called and excess profits taxes;

(2) Interest deemed excessive under G.S. 105-130.6 and interest paid in connection with income exempt from taxation under this division;

(3) The contributions deduction allowed by the Internal Revenue Code;

(4) Interest income earned on bonds and other obligations of other states or their political subdivisions, less allowable amortization on any bond acquired on or after January 1, 1963;

(5) The amount by which gains have been offset by the capital loss carry-over allowed under the Internal Revenue Code. All gains recognized on the sale or other disposition of assets must be included in determining State net income or loss in the year of disposition;

(6) The net operating loss deduction allowed by the Internal Revenue Code; and

(7) Special deductions allowable under §§ 241 to 247, inclusive, of the Internal Revenue Code.

(8) Depreciation or amortization claimed for federal income tax purposes in connection with facilities for the handicapped as such facilities are defined in subdivision (10) of subsection (b) of this section, provided the cost of such facilities has been previously deducted for State income tax purposes.

(b) The following deductions from federal taxable income shall be made in determining State net income:

(1) Interest upon the obligations of the United States or its possessions, to the extent included in federal taxable income: Provided, interest upon the obligations of the United States shall not be an allowable deduction unless interest upon obligations of the State of North Carolina or any of its political subdivisions is exempt from income taxes imposed by the United States;

(2) Interest received by a corporation on indebtedness owed to it by its parent, subsidiary, or an affiliated corporation which in the determination of the income or net loss of such subsidiary or affiliated corporation was not allowed as a deduction under the provisions of G.S. 105-130.6;

(3) The deductible portion of dividends from stock issued by any corporation as provided under G.S. 105-130.7;

(4) Losses in the nature of net economic losses sustained by the corporation in any or all of the five preceding years pursuant to the provisions of G.S. 105-130.8. Provided, a corporation required to allocate and apportion its net income under the provisions of G.S. 105-130.4 shall deduct its allocable net economic loss only from total income allocable to this State pursuant to the provisions of G.S. 105-130.8;

(5) Contributions or gifts made by any corporation within the income year to the extent provided under G.S. 105-130.9;

(6) Amortization in excess of depreciation allowed for federal income tax purposes on the cost of any sewage or waste treatment plant as provided in G.S. 105-130.10;

(7) Depreciation of emergency facilities acquired prior to January 1, 1955. Any corporation shall be permitted to depreciate any emergency facility, as such is defined in § 168 of the Internal Revenue Code, over its useful life, provided such facility was acquired prior to January 1, 1955, and no amortization has been claimed on such facility for State income tax purposes; and

(8) The amount of losses realized on the sale or other disposition of assets not allowed under § 1211 (a) of the Internal Revenue Code. All losses recognized on the sale or other disposition of assets must be included in determining State net income or loss in the year of disposition.

(9) With respect to a shareholder of a regulated investment company, the portion of undistributed capital gains of such regulated investment company included in such shareholder's federal taxable income and on which the federal tax paid by the regulated investment company is allowed as a credit or refund to the shareholder under § 852 of the Internal Revenue Code.

(10) The entire amount of the cost of renovation to an existing building or facility owned by a taxpayer in order to permit physically handicapped persons to enter and leave such building or facility or to have effective use of the accommodations and facilities therein. The deduction shall be taken in the year the renovation is completed, and shall be made in lieu of any depreciation or amortization of the cost of such renovation. "Building or facility" shall mean only a building or facility, or such part thereof as is intended to be used, and is actually used, by the general public. If such building or facility is owned by more than one owner, the cost of renovation shall be apportioned among or between the owners as their interests may appear. The minimum renovation required in order to entitle a taxpayer to claim the deduction herein provided shall include one or more of the following: the provision of ground level or ramped entrances, free movement between public use areas, and washroom and toilet facilities accessible to and usable by physically handicapped persons.

(c) The following other adjustments to federal taxable income shall be made in determining State net income:

(1) In determining State net income, no deduction shall be allowed for annual amortization of bond premiums applicable to any bond acquired prior to January 1, 1963. The amount of premium paid on any

such bond shall be deductible only in the year of sale or other disposition.

(2) Federal taxable income must be increased or decreased to account for any difference in the amount of depreciation, amortization, or gains or losses applicable to property which has been depreciated or amortized by use of a different basis or rate for State income tax purposes than used for federal income tax purposes prior to the effective date of this division.

(3) No deduction shall be allowed for any direct or indirect expense applicable to dividend income fully deductible under G.S. 105-130.7 (5).

(d) No gain or loss shall be recognized to a corporation from the sale or exchange by it of property within the 12-month period beginning on the date of the adoption by said corporation of a plan of complete liquidation if such gain or loss would not be recognized to such corporation for federal income tax purposes under the provisions of § 337 of the Federal Internal Revenue Code of 1954, including amendments, if any. (1967, c. 1110, s. 3; 1969, cc. 1113, 1124; 1971, c. 820, s. 1; c. 1206, s. 1.)

Editor's Note.—The first 1971 amendment, effective for taxable income years beginning on and after Jan. 1, 1971, added subdivision (9) in subsection (b).

The second 1971 amendment, effective Jan. 1, 1972, added subdivision (8) in subsection (a), and added subdivision (10) in subsection (b).

§ **105-130.6. Subsidiary and affiliated corporations.**—The net income of a corporation doing business in this State which is a parent, subsidiary or affiliate of another corporation shall be determined by eliminating all payments to or charges by a parent, subsidiary or affiliated corporation in excess of fair compensation in all intercompany transactions of any kind whatsoever. If the Commissioner of Revenue shall find as a fact that a report by such corporation does not disclose the true earnings of such corporation on its business carried on in this State, the Commissioner may require that such corporation file a consolidated return of the entire operations of the parent corporation and of its subsidiaries and affiliates, including its own operations and income, and shall determine the true amount of net income earned by such corporation in this State as provided herein. The combined net income of such corporation and of its parent, subsidiaries and affiliates shall be apportioned to this State by use of the applicable apportionment formula required to be used by such corporation under G.S. 105-130.4. In such cases there shall be included in the apportionment formula the property, payrolls and sales of all corporations for which the return is made. For the purposes of this section, a corporation shall be deemed a subsidiary of another corporation hereby designated the parent corporation, when, directly or indirectly, it is subject to control by such other corporation by stock ownership, interlocking directors, or by any other means whatsoever exercised by the same or associated financial interests, whether such control is direct or through one or more subsidiary, affiliated, or controlled corporations, and a corporation shall be deemed an affiliate of another corporation when both are directly or indirectly controlled by the same parent corporation or by the same or associated financial interests by stock ownership, interlocking directors, or by any other means whatsoever, whether such control be direct or through one or more subsidiary, affiliated or controlled corporations. Upon such finding by the Commissioner of Revenue, the consolidated return authorized by this section may be required whether the parent or controlling corporation or interests or its subsidiaries or affiliates, other than the taxpayer, are or are not doing business in this State.

If such consolidated return is required and is not filed within 60 days after demand, said parent, subsidiary or affiliated corporation shall be subject to the penalty provided in this act for failure to file return and, in addition, shall be

subject to the penalty provided in G.S. 105-230, and in such event the provisions of G.S. 105-236 shall apply.

Such parent, subsidiary or affiliated corporation shall incorporate in its return required under this section such information as the Commissioner of Revenue may reasonably require for the determination of the net income taxable under this division, and shall furnish such additional information as the Commissioner may reasonably require. If the return does not contain the information therein required or such additional information is not furnished within 30 days after demand, the corporation shall be subject to a penalty of one hundred dollars ($100.00) for each day's omission, in addition to the penalty provided in G.S. 105-230.

If the Commissioner finds that the determination of the income of a parent, subsidiary or affiliated corporation under a consolidated return as herein provided will produce a greater or lesser figure than the amount of income earned in this State, he may readjust the determination by reasonable methods of computation to make it conform to the amount of income earned in this State; and if the corporation contends the figure produced is greater than the earnings in this State, it shall within 30 days after notice of such determination, file with the Commissioner a statement of its objections and of an alternative method of determination with such detail and proof as the Commissioner may require, and the Commissioner shall consider the same in determining the income earned in this State. In making such determination, the findings and conclusions of the Commissioner shall be presumed to be correct and shall not be set aside unless shown to be plainly wrong. (1939, c. 158, s. 318½; 1941, c. 50, s. 5; 1943, c. 400, s. 4; 1945, c. 708, s. 4; 1959, c. 1259, ss. 4, 8; 1967, c. 1110, s. 3; 1971, c. 1223, s. 1.)

Editor's Note. — The 1971 amendment deleted a former second sentence, concerning excessive interest payments.

Session Laws 1971, c. 1223, s. 2, provides: "This act shall become effective with respect to taxable income years beginning on and after January 1, 1971."

Taxation of Dividends Received by Domesticated Corporation from Foreign Subsidiary.—See same catchline in note to § 105-130.4.

§ **105-130.7. Deductible portion of dividends.**—Dividends from stock issued by any corporation shall be deducted to the extent herein provided.

(1) As soon as may be practicable after the close of each calendar year, the Commissioner of Revenue shall determine from each corporate income tax return filed with him during such year, and due from the filing corporation during such year, the proportion of the entire net income or loss of the corporation allocable to this State under the provisions of G.S. 105-130.4, except as provided herein; if a corporation has a net income in North Carolina and a net loss from all sources wherever located, or if a corporation has a net loss in North Carolina and a net income from all sources wherever located, the Commissioner shall require the use of the allocation fraction determined under the provisions of G.S. 105-130.4. A corporation which is a stockholder in any such corporation shall be allowed to deduct the same proportion of the dividends received by it from such corporation during its income year ending at or after the end of such calendar year. No deduction shall be allowed for any part of any dividend received by such corporation from any corporation which filed no income tax return with the Commissioner of Revenue during such calendar year.

(2) Dividends received by a corporation from stock in any insurance company of this State taxed under the provisions of G.S. 105-228.5 shall be deductible by such corporation, and a proportionate part of any dividends received from stock in any for-

eign insurance corporation shall be deductible, such part to be determined on the basis of the ratio of premiums reported for taxation in this State to total premiums collected both in and out of this State.

(3) Dividends received by a corporation from stock in any bank or trust company in this State taxed under the provisions of Article 8C of this Chapter shall be deductible.

(4) A corporation shall be allowed to deduct such proportionate part of dividends received by it from a regulated investment company or a real estate investment trust, as defined in G.S. 105-130.12, as represents and corresponds to income received by such regulated investment company or real estate investment trust which would not be taxed by this State if received directly by the corporation.

(5) Notwithstanding the provisions of subdivisions (1) through (4) of this section, a corporation which, at the close of its taxable year, has its commercial domicile within North Carolina shall be allowed to deduct all dividends received from corporations in which it owns more than fifty percent (50%) of the outstanding voting stock.

(6) Notwithstanding any other provisions of this division, a corporation which is a shareholder in a holding company having its commercial domicile in North Carolina shall be allowed as a deduction an amount equal to those dividends received by it from such holding company, multiplied by a fraction, the numerator of which shall be the dividends received by such holding company attributable to North Carolina, and the denominator of which shall be the gross dividends received by such holding company. For purposes of this section, "dividends attributable to North Carolina" shall be the amount of dividend income received by the holding company on stock owned in other corporations equal to the total of the proportion of each of such corporation's dividends as shall be determined deductible by the Commissioner under subdivisions (1) through (4) of this section; provided that a holding company having its commercial domicile in North Carolina which owns more than fifty percent (50%) of the outstanding voting stock of one or more holding companies as defined in this subdivision shall be permitted a deduction for all dividends received from such holding companies and all other corporations in which it owns more than fifty percent (50%) of the outstanding voting stock. A shareholder of such a holding company shall determine the deductible portion of its dividends received from such holding company as hereinabove provided except that the amounts received from a subsidiary holding company as "dividends attributable to North Carolina" shall be determined as though the subsidiary corporation of the subsidiary holding company had paid the dividends directly to the parent holding company.

For the purposes of this section and unless the context clearly requires a different meaning, "holding company" shall mean any corporation having its commercial domicile in North Carolina whose ordinary gross income consists of fifty percent (50%) or more of dividend income received from corporations in which it owns more than fifty percent (50%) of the outstanding voting stock, and "subsidiary" shall mean any corporation, more than fifty percent (50%) of whose outstanding voting stock is owned by another corporation. (1939, c. 158, s. 322; 1941, c. 50, s. 5; 1943, c. 400, s. 4; c. 668; 1945, c. 708, s. 4; c. 752, s. 3; 1947, c. 501, s. 4; c. 894; 1949, c. 392, s. 3; 1951, c. 643, s. 4; c. 937, s. 4; 1953, c. 1031, s. 1; c. 1302, s. 4; 1955, c.

1100, s. 1; c. 1331, s. 1; cc. 1332, 1342; c. 1343, s. 1; 1957, c. 1340, ss. 4, 8; 1959, c. 1259, s. 4; 1961, c. 201, s. 1; c. 1148; 1963, c. 1169, s. 2; 1965, c. 1048; 1967, c. 1110, s. 3; 1969, c. 1124.)

Editor's Note. — The 1969 amendment, effective for taxable years beginning on and after Jan. 1, 1969, added subdivisions (5) and (6).

Taxation of Dividends Received by Domesticated Corporation from Foreign Subsidiary.—See same catchline in note to § 105-130.4.

§ **105-130.8. Net economic loss.** — Net economic losses sustained by a corporation in any or all of the five preceding income years shall be allowed as a deduction to such corporation subject to the following limitations:

(1) The purpose in allowing the deduction of a net economic loss of a prior year or years is that of granting some measure of relief to the corporation which has incurred economic misfortune or which is otherwise materially affected by strict adherence to the annual accounting rule in the determination of net income. The deduction herein specified does not authorize the carrying forward of any particular items or category of loss except to the extent that such loss or losses shall result in the impairment of the net economic situation of the corporation so as to result in a net economic loss as hereinafter defined.

(2) The net economic loss for any year shall mean the amount by which allowable deductions for the year other than prior year losses shall exceed income from all sources in the year including any income not taxable under this Division.

(3) Any net economic loss of a prior year or years brought forward and claimed as a deduction in any income year may be deducted from net income of the year only to the extent that such carry-over loss from the prior year or years shall exceed any income not taxable under this Division received in the same year in which the deduction is claimed, except that in the case of a corporation required to allocate and apportion to North Carolina its net income, as defined in this Division, only such proportionate part of the net economic loss of a prior year shall be deductible from total income allocable to this State as would be determined by the use of the allocation and apportionment provisions of G.S. 105-130.4 for the year of such loss.

(4) A net economic loss carried forward from any year shall first be applied to, or offset by, any income taxable or nontaxable of the next succeeding year before any portion of such loss may be carried forward to a succeeding year.

(5) For purposes of this section, any income item deductible in determining State net income under the provisions of G.S. 105-130.5 and any nonbusiness income not allocable to this State under the provisions of G.S. 105-130.4 shall be considered as income not taxable under this Division.

(6) No loss shall either directly or indirectly be carried forward more than five years. (1939, c. 158, s. 322; 1941, c. 50, s. 5; 1943, c. 400, s. 4; c. 668; 1945, c. 708, s. 4; c. 752, s. 3; 1947, c. 501, s. 4; c. 894; 1949, c. 392, s. 3; 1951, c. 643, s. 4; c. 937, s. 4; 1953, c. 1031, s. 1; c. 1302, s. 4; 1955, c. 1100, s. 1; c. 1331, s. 1; cc. 1332, 1342; c. 1343, s. 1; 1957, c. 1340, ss. 4, 8; 1959, c. 1259, s. 4; 1961, c. 201, s. 1; c. 1148; 1963, c. 1169, s. 2; 1965, c. 1048; 1967, c. 1110, s. 3.)

Editor's Note. — The cases in the following note were decided under § 105-147 prior to the amendment thereof by Session Laws 1967, c. 1110.

Carry-Over Provisions Enacted as a Matter of Grace.—The General Assembly was under no constitutional or other legal compulsion to permit a net economic loss or losses deduction for a corporation from taxable income in a subsequent year or years. It

enacted the carry-over provisions purely as a matter of grace, gratuitously conferring a benefit but limiting such benefit to the net economic loss of the taxpayer after deducting therefrom the allocable portion of such taxpayer's nontaxable income. Aberfoyle Mfg. Co. v. Clayton, 265 N.C. 165, 143 S.E.2d 113 (1965).

The General Assembly was under no constitutional compulsion to allow any deduction whatever from income otherwise taxable in this State, because of a "net economic loss" in a prior year. Dayco Corp. v. Clayton, 269 N.C. 490, 153 S.E.2d 28 (1967).

Determination of Deduction of Loss for Prior Years.—This section requires the inclusion of nontaxable income in arriving at an allowable deduction for carry-over purposes to be deducted from taxable income in a succeeding year. Dayton Rubber Co. v. Shaw, 244 N.C. 170, 92 S.E.2d 799 (1956), decided prior to the 1963 amendment to former § 105-147.

The 1957 amendment to subdivision (9)d of former § 105-147 (predecessor of this section) enlarges the time for a loss carry-over and permits a taxpayer, in computing its income tax for the year 1957, to bring forward losses for the prior five years as a credit against income. Royle & Pilkington Co. v. Currie, 250 N.C. 726, 110 S.E.2d 339 (1959), decided prior to the 1963 amendment to former § 105-147.

As to process provided for determining amount of deduction allowable to corporation on account of a "net economic loss" in a prior year, see Dayco Corp. v. Clayton, 269 N.C. 490, 153 S.E.2d 28 (1967).

Out-of-State Dividends and Capital Gains Received by Foreign Corporation Must Be Deducted.—Dividends received by a foreign corporation from shares of stock owned by it in nonsubsidiary corporations and capital gains received by it from the sale of shares of stock in such nonsubsidiary corporations, even though such income is derived from out-of-state transactions and is not taxable here, must be deducted from the amount of loss carry-over claimed by the corporation against its income taxable by this State in succeeding years, since the income derived from dividends and capital gains is "income not taxable under this Division." Dayco Corp. v. Clayton, 269 N.C. 490, 153 S.E.2d 28 (1967).

As Must Nonrecognized Gain on Liquidation of Subsidiaries.—Plaintiff's gain in the amount of $4,120,418.65 realized from the sale of its two wholly-owned subsidiaries constituted "income from all sources in the year including any income not taxable under this division"; consequently, plaintiff was not entitled to any net economic losses deduction as sought in its complaint. Aberfoyle Mfg. Co. v. Clayton, 265 N.C. 165, 143 S.E.2d 113 (1965).

Deduction by Successor Corporation of Loss Sustained by Submerged Corporation.—Whether a successor corporation is entitled to deduct from its gross income an economic loss sustained by another corporation depends upon whether the successor corporation is for practical purposes the same and is engaged in continuing the business of the kind and character conducted by the corporation whose loss is claimed as a deduction. Good Will Distributors (Northern), Inc. v. Shaw, 247 N.C. 157, 100 S.E.2d 334 (1957); Good Will Distributors, Inc. v. Currie, 251 N.C. 120, 110 S.E.2d 880 (1959).

Where a corporation surviving a merger seeks to establish its right to deduct from its gross income an economic loss of one of its submerged corporations for a prior year as a carry-over under this section, and it appears from the facts alleged that the submerged corporation had a profit in the months of the fiscal year prior to the merger and that it had deducted its prior economic loss from such net income, leaving a balance on the loss side, and further, that as far as the facts alleged disclosed, to allow the surviving corporation to make such deduction would result in reducing the surviving corporation's income tax liability which had accrued on the date of the merger, such deduction by the surviving corporation was disallowed. Good Will Distributors (Northern), Inc. v. Shaw, 247 N.C. 157, 100 S.E.2d 334 (1957).

The enactment of loss carry-over legislation by the General Assembly was purely a matter of grace. The provision should not be construed to give a "windfall" to a taxpayer who happens to have merged with other corporations. Its purpose is not to give a merged taxpayer a tax advantage over others who have not merged. Good Will Distributors, Inc. v. Currie, 251 N.C. 120, 110 S.E.2d 880 (1959).

The forgiveness of an indebtedness by an officer-stockholder constitutes a contribution to capital and does not constitute income of the corporation. Foreman Mfg. Co. v. Johnson, 261 N.C. 504, 135 S.E.2d 205 (1964).

Hence, the forgiveness of such indebtedness does not offset a net operating loss of a corporation for a taxable year, and the corporation is entitled to carry forward such loss. Foreman Mfg. Co. v. Johnson, 261 N.C. 504, 135 S.E.2d 205 (1964).

§ 105-130.9. Contributions.—Contributions shall be allowed as a deduction to the extent and in the manner provided as follows:

(1) Contributions or gifts made by any corporation within the income year to corporations, trusts, community chests, funds, foundations or

associations organized, and operated exclusively for religious, charitable, literary, scientific, or educational purposes or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or contributions or gifts made by any corporation within the income tax year to posts or organizations of war veterans, or auxiliary units or societies of any such posts or organizations, if such posts, organizations, units, or societies are organized in the United States or any of its possessions, and if no part of their net earnings inures to the benefit of any private shareholder or individual, or the organization known as Alcoholics Anonymous or any local chapter thereof, or to a cemetery company owned and operated exclusively for the benefit of its members, or any corporation chartered solely for burial purposes as a cemetery corporation and not permitted by its charter to engage in any business not necessarily incident to that purpose, if such company or corporation is not operated for profit and no part of the net earnings of such company or corporation inures to the benefit of any private shareholder or individual: Provided, the amount allowed as a deduction hereunder shall be limited to an amount not in excess of five per centum (5%) of the corporation's net income as computed without the benefit of this subdivision or subdivision (2) of this section; and, provided further, that contributions made to North Carolina donees by corporations allocating a part of their total net income outside this State shall not be allowed under this subdivision, but shall be allowed under subdivision (3) of this section.

(2) Contributions by any corporation to the State of North Carolina, any of its institutions, instrumentalities, or agencies, any county of this State, its institutions, instrumentalities, or agencies, any municipality of this State, its institutions, instrumentalities, or agencies, and contributions or gifts by any corporation to educational institutions located within North Carolina, no part of the net earnings of which inures to the benefit of any private stockholder or dividend. For the purpose of this subdivision, the words "educational institution" shall mean only an educational institution which normally maintains a regular faculty and curriculum and normally has a regularly organized body of students in attendance at the place where the educational activities are carried on. The words "educational institution" shall be deemed to include all of such institution's departments, schools and colleges, a group of "educational institutions" and an organization (corporation, trust, foundation, association or other entity) organized and operated exclusively to receive, hold, invest and administer property and to make expenditures to or for the sole benefit of an "educational institution" or group of "educational institutions."

(3) Corporations allocating a part of their total net income outside North Carolina under the provisions of G.S. 105-130.4 shall deduct from total income allocable to North Carolina contributions made to North Carolina donees qualified under subdivisions (1) and (2) of this section or made through North Carolina offices or branches of other donees qualified under the above-mentioned subdivisions of this section; provided, such deduction for contributions made to North Carolina donees qualified under subdivision (1) of this section shall be limited in amount to five percent (5%) of the total income allocated to North Carolina as computed without the benefit of this deduction for contributions. (1939, c. 158, s. 322; 1941, c. 50, s. 5; 1943, c. 400, s. 4; c. 668; 1945, c. 708, s. 4; c.

752, s. 3; 1947, c. 501, s. 4; c. 894; 1949, c. 392, s. 3; 1951, c. 643, s. 4; c. 937, s. 4; 1953, c. 1031, s. 1; c. 1302, s. 4; 1955, c. 1100, s. 1; c. 1331, s. 1; cc. 1332, 1342; c. 1343, s. 1; 1957, c. 1340, ss. 4, 8; 1959, c. 1259, s. 4; 1961, c. 201, s. 1; c. 1148; 1963, c. 1169, s. 2; 1965, c. 1048; 1967, c. 1110, s. 3; 1969, c. 1175, s. 1.)

Editor's Note. — The 1969 amendment, effective July 1, 1969, added the last sentence of subdivision (2).

§ **105-130.10. Amortization of air cleaning devices and waste treatment facilities.**—In lieu of any depreciation allowance, at the option of the corporation, a deduction shall be allowed for the amortization of the cost of any air cleaning device, sewage or waste treatment plant, including waste lagoons, and pollution abatement equipment purchased or constructed and installed which reduces the amount of air or water pollution resulting from the emission of air contaminants or the discharge of sewage, industrial waste, or other polluting materials or substances into the outdoor atmosphere or streams, lakes, rivers, or coastal waters, based on a period of 60 months. The deduction provided herein shall apply also to the facilities or equipment of private or public utilities built and installed primarily for the purpose of providing sewer service to residential and outlying areas. The deduction provided for in this section shall be allowed by the Commissioner of Revenue only upon the condition that the corporation claiming such allowance shall furnish to the Commissioner a certificate from the Board of Water and Air Resources certifying that said Board has found as a fact that the air cleaning device, waste treatment plant, or other pollution abatement equipment purchased or constructed and installed as above described has actually been constructed and installed and that such construction, plant or equipment complies with the requirements of said Board with respect to such devices, construction, plants or equipment, that such device, plant or equipment is being effectively operated in accordance with the terms and conditions set forth in the permit, certificate of approval, or other document of approval issued by the Board of Water and Air Resources, and that the primary purpose thereof is to reduce air or water pollution resulting from the emission of air contaminants or the discharge of sewage and waste and not merely incidental to other purposes and functions. The deduction herein provided for shall also be allowed as to plants or equipment constructed or installed after January 1, 1955, but only with respect to the undepreciated value of such plants or equipment. (1939, c. 158, s. 322; 1941, c. 50, s. 5; 1943, c. 400, s. 4; c. 668; 1945, c. 708, s. 4; c. 752, s. 3; 1947, c. 501, s. 4; c. 894; 1949, c. 392, s. 3; 1951, c. 643, s. 4; c. 937, s. 4; 1953, c. 1031, s. 1; c. 1302, s. 4; 1955, c. 1100, s. 1; c. 1331, s. 1; cc. 1332, 1342; c. 1343, s. 1; 1957, c. 1340, ss. 4, 8; 1959, c. 1259, s. 4; 1961, c. 201, s. 1; c. 1148; 1963, c. 1169, s. 2; 1965, c. 1048; 1967, c. 1110, s. 3; 1969, c. 817.)

Editor's Note. — The 1969 amendment rewrote this section so as to make it applicable to air cleaning devices.

§ **105-130.11. Conditional and other exemptions.**—(a) The following organizations shall be exempt from taxation under this Division except as provided in subsection (b) of this section:

(1) Fraternal beneficiary societies, orders or associations

a. Operating under the lodge system or for the exclusive benefit of the members of a fraternity itself operating under the lodge system, and

b. Providing for the payment of life, sick, accident, or other benefits to the members of such society, order or association, or their dependents;

(2) Every bank or banking association, trust company or any

combination of such facilities or services subject to taxation under Article 8C of this Chapter; and building and loan associations, and savings and loan associations subject to capital stock tax and/or excise tax under Article 8D of this Chapter; and any cooperative banks without capital stock organized and operated for mutual purposes and without profit, and electric and telephone membership corporations organized under Chapter 117 of the General Statutes;

(3) Cemetery corporations and corporations organized for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual;

(4) Business leagues, chambers of commerce, merchants' associations, or boards of trade not organized for profit, and no part of the net earnings of which inures to the benefit of any private stockholder or individual;

(5) Civic leagues or organizations not organized for profit, but operated exclusively for the promotion of social welfare;

(6) Clubs organized and operated exclusively for pleasure, recreation, and other nonprofitable purposes, no part of the net earnings of which inures to the benefit of any private stockholder or member;

(7) Farmers' or other mutual hail, cyclone, or fire insurance companies, mutual ditch or irrigation companies, mutual or cooperative telephone companies, or like organizations of a purely local character the income of which consists solely of assessments, dues and fees collected from members for the sole purpose of meeting expenses;

(8) Farmers', fruit growers', or like organizations organized and operated as sales agents for the purpose of marketing the products of members and turning back to them the proceeds of sales, less the necessary selling expenses, on the basis of the quantity of product furnished by them;

(9) Mutual associations formed under G.S. 54-111 through 54-128 to conduct agricultural business on the mutual plan and marketing associations organized under G.S. 54-129 through 54-158.

Nothing in this subdivision shall be construed to exempt any cooperative, mutual association or other organization from an income tax on net income which has not been refunded to patrons on a patronage basis and distributed either in cash, stock, certificates, or in some other manner that discloses to each patron the amount of his patronage refund. Provided, in arriving at net income for purposes of this subdivision, no deduction shall be allowed for dividends paid on capital stock. Patronage refunds made after the close of the taxable year and on or before the fifteenth day of the ninth month following the close of such year shall be considered as made on the last day of such taxable year to the extent the allocations are attributable to income derived before the close of such year; provided, that no stabilization or marketing organization, which handles agricultural products for sale for producers on a pool basis, shall be deemed to have realized any net income or profit in the disposition of a pool or any part of a pool until all of the products in that pool shall have been sold and the pool shall have been closed; provided, further, that a pool shall not be deemed closed until the expiration of at least 90 days after the sale of the last remaining product in that pool. Such cooperatives and other organizations shall file an annual information return with the Commissioner of Revenue on forms to be furnished by the Commissioner and shall include therein the names and

addresses of all persons, patrons and/or shareholders, whose patronage refunds amount to ten dollars ($10.00) or more; and

(10) Insurance companies paying the tax on gross premiums as specified in G.S. 105-228.5.

(b) Organizations described in subdivision (1), (3), (4), (5), (6), (7), (8) or (9) of subsection (a) of this section shall be subject to the tax provided for in G.S. 105-130.3 to the following extent:

Gross income derived by any organization from any trade or business the conduct of which is not substantially related (aside from the need of the organization for income) to the exercise or performance of those functions constituting the basis for its exemption in subsection (a) of this section, less all deductions allowed by this Division directly connected with carrying on such trade or business and less one thousand dollars ($1,000); provided, this paragraph shall not apply to interest, royalties, dividends or rents; provided further, this paragraph shall not apply to any trade or business (i) in which substantially all the work in carrying on such trade or business is performed for the organization without compensation; or (ii) which is the selling of merchandise, substantially all of which is given to it; (iii) which is carried on by an organization described in G.S. 105-130.11(a)(3) primarily for the convenience of its members, students, patients or employees. Provided further, this paragraph shall not apply to net income derived from research (i) performed by a college, university or hospital; or (ii) performed for the United States, its instrumentalities or any state or political subdivision thereof; or (iii) performed by an organization operated primarily for the purpose of carrying on fundamental research, the results of which are freely available to the general public. (1939, c. 158, s. 314; 1945, c. 708, s. 4; c. 752, s. 3; 1949, c. 392, s. 3; 1951, c. 937, s. 1; 1955, c. 1313, s. 1; 1957, c. 1340, s. 4; 1959, c. 1259, s. 4; 1963, c. 1169, s. 2; 1967, c. 1110, s. 3.)

Income realized by an educational institution of another state from the rental of real estate owned by it in this State is exempt from income taxes under this section, when such income is placed in the general fund of such educational institution and is used exclusively for educational purposes. In re Vanderbilt University, 252 N.C. 743, 114 S.E.2d 655 (1960), decided under former § 105-138.

§ 105-130.12. Regulated investment companies and real estate investment trusts.—Any organization or trust which, in the opinion of the Commissioner of Revenue of North Carolina, qualifies as either a "regulated investment company" under the provisions of United States Code Annotated Title 26, § 851, or as a "real estate investment trust" under the provisions of United States Code Annotated Title 26, § 856, and which files with the North Carolina Department of Revenue its election to be treated as a "regulated investment company," or as a "real estate investment trust" shall be taxed under this Division upon only that part of its net income which is not distributed or declared for distribution to shareholders during the income year or by the time required by law for the filing of the return for the income year including the period of any extension of time granted for filing such return. (1963, c. 1169, s. 2; 1967, c. 1110, s. 3; 1971, c. 820, s. 2.)

Editor's Note. — The 1971 amendment, effective for taxable income years beginning on and after Jan. 1, 1971, deleted "(i), with respect to a regulated investment company, within 30 days after the end of the income year and (ii), with respect to a real estate investment trust" preceding "by the time," added "including the period of any extension of time granted for filing such return" at the end of the section, and deleted a proviso relating to amounts distributed to nonresident shareholders.

§ 105-130.13. Special corporations.—A corporation electing to be taxed under subchapter S of chapter 1 of the Internal Revenue Code shall compute its State taxable income in the same manner as corporations not electing to be

taxed under subchapter S of chapter 1 of the Internal Revenue Code. (1967, c. 1110, s. 3.)

§ **105-130.14. Corporations filing consolidated returns for federal income tax purposes.**—Any corporation electing or required to file a consolidated income tax return with the Internal Revenue Service shall not file a consolidated return with the Commissioner of Revenue, unless specifically directed to do so in writing by the Commissioner, and shall determine its State net income as if a separate return had been filed for federal purposes. (1967, c. 1110, s. 3.)

§ **105-130.15. Basis of return of net income.**—(a) The net income of a corporation shall be computed in accordance with the method of accounting regularly employed in keeping the books of such corporation, but such method of accounting must be consistent with respect to both income and deductions, but if in any case such method does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner of Revenue does clearly reflect the income, but shall follow as nearly as practicable the federal practice, unless contrary to the context and intent of this Division.

The Commissioner may in his discretion adopt the rules and regulations and any guidelines administered or established by the Internal Revenue Service unless contrary to any provisions of this Division.

(b) Change of Income Year.—

(1) A corporation may change the income year upon which it reports for income tax purposes without prior approval by the Commissioner of Revenue if such change in income year has been approved by or is acceptable to the Federal Commissioner of Internal Revenue and is used for filing income tax returns under the provisions of the Internal Revenue Code of 1954.

If a corporation desires to make a change in its income year other than as provided above, it may make such change in its income year with the approval of the Commissioner of Revenue, provided such approval is requested at least 30 days prior to the end of its new income year.

A corporation which has changed its income year without requesting the approval of the Commissioner of Revenue as provided in the first paragraph of this subdivision shall submit to the Commissioner of Revenue notification of any change in the income year after the change has been approved by the Federal Commissioner of Internal Revenue or his agent where application for permission to change is required by the Federal Commissioner of Internal Revenue with such notification stating that such approval has been received. Where application for change of the income year is not required by the Federal Commissioner of Internal Revenue, notification of the change of income year shall be submitted to the Commissioner of Revenue with the short period return.

(2) A return for a period of less than 12 months (referred to in this subsection as "short period") shall be made when the corporation changes its income year. In such a case, the return shall be made for the short period beginning on the day after the close of the former taxable year and ending at the close of the day before the day designated as the first day of the new taxable year, except that a corporation changing to, or from, a taxable year varying from 52 to 53 weeks shall not be required to file a short period return if such change results in a short period of 359 days or more, or less than seven days. Short period income tax returns shall be filed within

the same period following the end of such short period as is required for full year returns under the provisions of G.S. 105-130.17.

(c) Any foreign corporation not domesticated in this State shall not use the installment method of reporting income to this State unless such corporation files a bond with the Commissioner of Revenue in such amount and with such sureties as the Commissioner shall deem necessary to secure the payment of any taxes which were deferred with respect to any installment transaction.

(d) Notwithstanding any other provision of this Division, any corporation which uses the installment method of reporting income to this State and which is planning to withdraw from this State, merge, or consolidate its business, or terminate its business in this State by any other means whatsoever, shall be required to make a report for income tax purposes, to the Commissioner of Revenue, of any unrealized or unreported income from installment sales made while doing business in this State and to pay any tax which may be due on such income. The manner and form for making such report and paying the tax shall be as prescribed by the Commissioner. (1939, c. 158, s. 318; 1943, c. 400, s. 4; 1945, c. 708, s. 4; 1949, c. 392, s. 3; 1955, c. 1313, s. 1; 1957, c. 1340, s. 4; 1963, c. 1169, s. 2; 1967, c. 1110, s. 3.)

§ **105-130.16. Returns.**—Every corporation doing business in this State shall file with the Commissioner of Revenue an income tax return under affirmation, showing therein specifically the items of gross income and the deductions allowed by this Division, and such other facts as the Commissioner may require for the purpose of making any computation required by this Division.

The return of a corporation shall be signed by either its president, vice-president, treasurer, assistant treasurer, secretary or assistant secretary. There shall be annexed to the return the affirmation of the officer signing the same, which shall be in the form prescribed in G.S. 105-130.17 of this division, and the same penalties prescribed in G.S. 105-236 shall apply to any person making wilful misstatements in said returns.

When the Commissioner of Revenue has reason to believe that any corporation so conducts its trade or business in such manner as to either directly or indirectly distort its true net income and the net income properly attributable to the State, whether by the arbitrary shifting of income, through price fixing, charges for service, or otherwise, whereby the net income is arbitrarily assigned to one or another unit in a group of taxpayers carrying on business under a substantially common control, he may require such facts as he deems necessary for the proper computation of the entire net income and the net income properly attributable to the State, and in determining same the Commissioner of Revenue shall have regard to the fair profit which would normally arise from the conduct of the trade or business.

When any corporation liable to taxation under this Division conducts its business in such a manner as to either directly or indirectly benefit the members or stockholders thereof or any person interested in such business by selling its products or goods or commodities in which it deals at less than the fair price which might be obtained therefor, or where a corporation, a substantial portion of whose capital stock is owned either directly or indirectly by another corporation, acquires and disposes of the products of the corporation so owning a substantial portion of its stock in such a manner as to create a loss or improper net income for either of said corporations, or where a corporation, owning directly or indirectly a substantial portion of the stock of another corporation, acquires and disposes of the products of the corporation of which it so owns a substantial portion of the stock in such manner as to create a loss or improper net income for either of said corporations, the Commissioner of Revenue may determine the amount of taxable income of any such corporations for the calendar or fiscal year, having due regard to the

reasonable profits which, but for such arrangement or understanding, might or could have been obtained by the corporation or corporations liable to taxation under this Division from dealing in such products, goods or commodities. (1939, c. 158, s. 326; 1941, c. 50, s. 5; 1943, c. 400, s. 4; 1945, c. 708, s. 4; 1951, c. 643, s. 4; 1957, c. 1340, s. 4; 1967, c. 1110, s. 3.)

§ **105-130.17. Time and place of filing returns.**—(a) Returns shall be in such form as the Commissioner of Revenue may from time to time prescribe, and shall be filed with the Commissioner at his office, or at any branch office which he may establish. The Commissioner shall cause to be prepared blank forms for the said returns, and shall cause them to be distributed throughout the State, and shall furnish them upon request; but failure to receive or secure the form shall not relieve any corporation from the obligation of making any return herein required.

(b) Except as provided in (c), the return of a corporation reporting on a calendar year basis shall be filed on or before the fifteenth day of March next following, and the return of a corporation reporting on a fiscal year basis shall be filed on or before the fifteenth day of the third month following the close of the fiscal year.

(c) In the case of mutual associations formed under G.S. 54-111 through 54-128 to conduct agricultural business on the mutual plan and marketing associations organized under G.S. 54-129 through 54-158, which are required to file under subsection (a)(9) of G.S. 105-130.11, a return made on the basis of a calendar year shall be filed on or before the fifteenth day of the September following the close of the calendar year, and a return made on the basis of a fiscal year shall be filed on or before the fifteenth day of the ninth month following the close of the fiscal year.

(d) In case of sickness, absence, or other disability or whenever in his judgment good cause exists, the Commissioner may allow further time for filing returns.

(e) Any corporation which ceases its operations in this State before the end of its income year because of its intention to dissolve or to withdraw from this State, or because of a merger or consolidation or for any other reason whatsoever shall file its return for the then current income year within 75 days after the date it terminates its business in this State.

(f) There shall be annexed to the return the affirmation of an officer of the corporation making the return in the following form: " 'Under penalties prescribed by law, I hereby affirm that to the best of my knowledge and belief this return, including any accompanying schedules and statements, is true and complete.' If prepared by a person other than taxpayer, his affirmation is based on all information of which he has any knowledge." (1939, c. 158, s. 329; 1943, c. 400, s. 4; 1951, c. 643, s. 4; 1953, c. 1302, s. 4; 1955, c. 17, s. 1; 1957, c. 1340, s. 4; 1963, c. 1169, s. 2; 1967, c. 1110, s. 3.)

§ **105-130.18. Failure to file returns; supplementary returns.**—If the Commissioner of Revenue shall be of the opinion that any corporation has failed to file a return or to include in a return filed, either intentionally or through error, items of taxable income he may require of such corporation a return or supplementary return, under affirmation, in such form as he shall prescribe, of all the items of income which the corporation received during the year for which the return is made, whether or not taxable under this Division. If from a supplementary return or otherwise the Commissioner finds any items of income, taxable under this Division, have been omitted from the original return, or any items returned as taxable that are not taxable, or any item of taxable income overstated or understated, he may require any such item to be disclosed to him under affirmation of the corporation, and to be added to or deducted from the original return. Such supplementary return and the correction of the original return shall not relieve the corporation from any

of the penalties to which it may be liable under the provisions of G.S. 105-236. The Commissioner may proceed under the provisions of G.S. 105-241.1, whether or not he requires a return or a supplementary return under this section. (1939, c. 158, s. 331; 1959, c. 1259, s. 8; 1967, c. 1110, s. 3.)

§ **105-130.19. Time and place of payment of tax.**—(a) Except as otherwise provided in this section and in Article 4B of this Chapter, the full amount of the tax payable as shown on the face of the return shall be paid to the Commissioner of Revenue at the office where the return is filed and within the time fixed by law for filing the return.

(b) If the amount of the tax exceeds fifty dollars ($50.00), payment may be made in two equal installments: One half on the date the return is filed, and one half on or before the fifteenth day of the sixth month following the month in which the return was originally due to be filed, with interest on the deferred payment at the rate of six percent (6%) per annum from the date the return was originally due to be filed. If the amount of the tax exceeds four hundred dollars ($400.00), payment may be made in four equal installments: One fourth at the time of filing the return, one fourth on or before the fifteenth day of the third month following the month in which the return was originally due to be filed, one fourth on or before the fifteenth day of the sixth month following the month in which the return was originally due to be filed, and one fourth on or before the fifteenth day of the ninth month following the month in which the return was originally due to be filed with interest on deferred payments at the rate of six percent (6%) per annum from the date the return was originally due to be filed.

(c) In the event any deferred payment is not made when due, then the entire balance of the tax will immediately become due and collectible, and interest upon such outstanding balance shall be added at the rate of six percent (6%) per annum from the date the return was originally due to be filed until paid.

(d) The tax may be paid with uncertified check during such time and under such regulations as the Commissioner of Revenue shall prescribe; but if a check so received is not paid by the bank on which it is drawn, the taxpayer by whom such check is tendered shall remain liable for the payment of the tax and for all legal penalties the same as if such check had not been tendered. (1939, c. 158, s. 332; 1943, c. 400, s. 4; 1947, c. 501, s. 4; 1951, c. 643, s. 4; 1955, c. 17, s. 2; 1959, c. 1259, s. 2; 1963, c. 1169, s. 2; 1967, c. 1110, s. 3.)

§ **105-130.20. Corrections and changes.**—(a) If the amount of the taxable income for any year of any corporation subject to taxation under this Division, as reported or as reportable to the United States Treasury Department, is changed, corrected, or otherwise determined by the Commissioner of Internal Revenue or other officer of the United States of competent authority, such taxpayer, within two years after receipt of a final determination reflecting the changed, corrected or determined taxable income shall make return under oath or affirmation to the Commissioner of Revenue of such taxable income. The Commissioner of Revenue shall thereupon proceed to determine, from such facts or evidence as he may have brought to his attention or shall otherwise acquire, whether or not the same were considered or taken into account in the federal determination, the correct tax liability of such corporation for the year. If there shall be any additional tax due from such corporation, the same shall be assessed and collected; and if there shall have been an overpayment of the tax, the Commissioner shall, within 30 days after the final determination of the tax liability, refund the amount of such overpayment.

(b) Any corporation which fails to comply with this section as to making return of federally determined taxable income within the time specified shall be subject to all penalties provided in G.S. 105-236, in the case of additional tax due, and shall forfeit its rights to any refund due by reason of federal changes.

(c) When the corporation makes the return of federally determined taxable

income the Commissioner of Revenue shall make assessments or refunds based thereon within three years from the date the return required by this section is filed and not thereafter. If the corporation fails to make such return, no statute of limitations shall apply: Provided, that if the Department of Revenue receives from the United States government or any of its agents a report reflecting such federally determined taxable income, the Commissioner of Revenue shall make assessment for taxes due based on such taxable income within five years from the date the report from the United States government or its agent is actually received and not thereafter. The assessment of tax or additional tax under this section shall not be subject to any statute of limitations except as provided in this section.

(d) Nothing in this section shall be construed as preventing the Commissioner of Revenue from making an assessment immediately following the receipt from any source of information concerning the correction, change in, or determination of net income of a taxpayer by the United States government. (1939, c. 158, s. 334; 1947, c. 501, s. 4; 1949, c. 392, s. 3; 1957, c. 1340, s. 14; 1963, c. 1169, s. 2; 1967, c. 1110, s. 3.)

§ **105-130.21. Information at the source.** — (a) Every corporation having a place of business or having one or more employees, agents or other representatives in this State, in whatever capacity acting, including lessors or mortgagors of real or personal property, or having the control, receipt, custody, disposal, or payment of interest (other than interest coupons payable to the bearer), rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments or other fixed or determinable annual or periodical gains or profits paid or payable during any year to any taxpayer, shall make complete return thereof to the Commissioner of Revenue under such regulations and in such form and manner and to such extent as may be prescribed by him. The filing of any report in compliance with the provisions of this section by a foreign corporation shall not constitute an act in evidence of and shall not be deemed to be evidence that such corporation is doing business in this State.

(b) Every corporation doing business or having a place of business in this State shall file with the Commissioner of Revenue, on such form and in such manner as he may prescribe, the names and addresses of all taxpayers, residents of North Carolina, to whom dividends have been paid and the amount of such dividends during the income year. (1939, c. 158, s. 328; 1945, c. 708, s. 4; 1957, c. 1340, s. 4; 1967, c. 1110, s. 3.)

§ **105-131:** Repealed by Session Laws 1967, c. 1110, s. 3.

Cross Reference. — For present provisions similar to the repealed section, see §§ 105-130.1, 105-134.

§ **105-132:** Transferred to § 105-135 by Session Laws 1967, c. 1110, s. 3.

Division II. Individual Income Tax.

§ **105-133. Short title.**—This Division of the income tax Article shall be known and may be cited as the Individual Income Tax Act. (1967, c. 1110, s. 3.)

Editor's Note. — Session Laws 1967, c. 1110, s. 3, applicable to all taxable years beginning on or after Jan. 1, 1967, extensively amended and revised this Article, dividing it into three divisions: I. Corporation Income Tax, containing §§ 105-130 to 105-130.21; II. Individual Income Tax, containing §§ 105-133 to 105-159; and III. Income Tax—Estates, Trusts, and Beneficiaries, containing §§ 105-160 to 105-163. Section 105-133 is new with the 1967 act. Former § 105-133 is now § 105-136.

Section 16, c. 1110, Session Laws 1967, provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

§ **105-134. Purpose.**—The general purpose of this Division is to impose a tax

for the use of the State government upon the net income in excess of the exemptions herein allowed collectible annually:

(1) Of every resident of this State.

(2) Of every nonresident individual deriving income from North Carolina sources attributable to the ownership of any interest in real or tangible personal property in this State or deriving income from a business, trade, profession, or occupation carried on in this State. (1939, c. 158, s. 301; 1967, c. 1110, s. 3.)

Editor's Note.—Prior to the enactment of Session Laws 1967, c. 1110, s. 3, applicable to all taxable years beginning on or after Jan. 1, 1967, § 105-134 related to corporations, and provisions similar to those in the above section, but applicable to corporations and fiduciaries as well as individuals, appeared in § 105-131. See Editor's note to § 105-133. As to the corporation income tax, see now §§ 105-130 to 105-130.21.

§ 105-135. Definitions.—For the purpose of this Division, and unless otherwise required by the context:

(1) The word "corporation" includes joint-stock companies or associations and insurance companies.

(2) The words "domestic corporation" mean any corporation organized under the laws of this State.

(3) The words "educational institution" mean only an educational institution which normally maintains a regular faculty and curriculum and normally has a regularly organized body of students in attendance at the place where its educational activities are carried on.

(4) The word "fiduciary" means a guardian, trustee, executor, administrator, receiver, conservator, or any person, whether individual or corporation, acting in any fiduciary capacity for any person, estate or trust.

(5) The words "fiscal year" mean an income year, ending on the last day of any month other than December. A taxpayer who pursuant to the provisions of § 441 (f) of the Federal Internal Revenue Code of 1954 has elected to compute his income tax liability to the United States on the basis of an annual period varying from 52 to 53 weeks, for any income year ending after August 16, 1954, shall compute his taxable income for the purposes of this Division on the basis of the same period used by such taxpayer in accordance with the Federal Internal Revenue Code of 1954 in computing his tax liability to the United States for such income year.

(6) The words "foreign corporation" mean any corporation other than a domestic corporation.

(7) The words "foreign country" mean any jurisdiction other than the one embraced within the United States. The words "United States," when used in a geographical sense, include the states, the District of Columbia, and the possessions of the United States.

(8) A "head of household" is a single individual, a widow, a widower, or a divorced individual who maintains a household, as hereinafter defined, which constitutes the principal place of abode during the major portion (183 days or more) of the taxable year of himself, herself, or his or her closely related dependent. An individual shall be considered as maintaining a household for the purposes of this subdivision only if over half the cost of maintaining the household during the taxable year is furnished by such individual. A "closely related dependent" for purposes of this subdivision shall be an individual for whom a six hundred dollar ($600.00) exemption is allowable under G.S. 105-149 (a)(5)a. A "household" for purposes of this subdivision shall be a place of abode which shall

include those accommodations normally required for both eating and sleeping.

(9) The words "income year" or "taxable year" mean the calendar year or the fiscal year upon the basis of which the net income is computed under this Division; provided, that if no fiscal year has been established, they mean the calendar year, except that in the case of a return made for a fractional part of a year under the provisions of this Division or under rules or regulations prescribed by the Commissioner of Revenue, the words "income year" or "taxable year" mean the period for which such return is made.

(10) The word "individual" means a natural person.

(11) The word "paid," for the purposes of the deductions under this Division, means "paid or accrued" and the words "paid or accrued" shall be construed according to the method of accounting upon the basis of which the net income is computed under this Division. The word "received," for the purpose of the computation of the net income under this division, means "received or accrued," and the words "received or accrued" shall be construed according to the method of accounting upon the basis of which the net income is computed under this Division.

(12) The word "person" includes individuals, fiduciaries, partnerships.

(13) The word "resident" applies only to individuals and includes, for the purpose of determining liability for the tax imposed with reference to the income of any income year, all individuals who, at any time during such income year, are domiciled in this State, or who, whether regarding their domicile as in this State or not, reside within this State for other than a temporary or transitory purpose. In the absence of convincing proof to the contrary, any individual who is present within the State for more than six months during such income year shall be deemed to be a resident of the State; but absence from the State for more than six months shall raise no presumption that the individual is not a resident of the State.

If an individual was a resident of this State for only part of the income year, having moved into or removed from the State during such year, such individual shall, as to income received by him during the period of his residence, report for taxation all income required to be so reported by residents and shall, as to income received by him during the remainder of such year, report for taxation all income required to be so reported by nonresidents: Provided, that in the case of an individual removing from the State during such year, he shall not be regarded as having become a nonresident until he shall have both established a definite domicile elsewhere and abandoned any domicile he may have acquired in this State.

The fact that an individual is a nonresident of the State at the time the tax becomes due and payable shall not affect his liability for the tax.

(14) The word "taxpayer" includes any individual, subject to the tax imposed by this Division. (1939, c. 158, s. 302; 1941, c. 50, s. 5; 1955, c. 1331, s. 2; 1957, c. 1340, s. 4; 1963, c. 1169, s. 2; 1967, c. 1110, s. 3; 1969, c. 1075, s. 4.)

Editor's Note. — This section was formerly § 105-132. It was transferred to its present location by Session Laws 1967, c. 1110, s. 3, applicable to all taxable years beginning on or after Jan. 1, 1967, which repealed former § 105-135, relating to income from stock in foreign corporations. See Editor's note to § 105-133.

The 1969 amendment, applicable for taxable years beginning on or after Jan. 1, 1969, rewrote subdivision (8). Session Laws 1969, c. 1075, s. 8, provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

§ 105-136. Individuals.—A tax is hereby imposed upon every resident of this State which shall be levied, collected, and paid annually, with respect to the net income of the taxpayer as herein defined, and upon the net income derived from North Carolina sources of every nonresident individual which is attributable to the ownership of any interest in real or tangible personal property in this State or which is from a business, trade, profession, or occupation carried on in this State, computed at the following rates, after deducting the exemptions provided in this Division.

On the excess over the amount legally exempted, up to two thousand dollars ($2,000), three percent (3%).

On the excess above two thousand dollars ($2,000), and up to four thousand dollars ($4,000), four percent (4%).

On the excess above four thousand dollars ($4,000), and up to six thousand dollars ($6,000), five percent (5%).

On the excess over six thousand dollars ($6,000), and up to ten thousand dollars ($10,000), six percent (6%).

On the excess over ten thousand dollars ($10,000), seven percent (7%). (1939, c. 158, s. 310; 1957, c. 1340, s. 4; 1967, c. 1110, s. 3.)

Editor's Note. — This section was formerly § 105-133. It was moved to its present location by Session Laws 1967, c. 1110, s. 3, applicable to all taxable years beginning on or after Jan. 1, 1967. Former § 105-136 was repealed by Session Laws 1957, c. 1340, s. 4. See Editor's note to § 105-133.

Religious Order Member Not Exempt from Tax.—See opinion of Attorney General to Mr. J.A. Porter, Jr., Director, Division of Auditing and Accounting, State Board of Education, 40 N.C.A.G. 841 (1970).

§ 105-137. Year of assessment.—The tax imposed by this Division shall be assessed, collected, and paid in the year following the year for which the assessment is made, except as provided to the contrary in Article 4A of this Chapter. (1939, c. 158, s. 313; 1959, c. 1259, s. 2; 1967, c. 1110, s. 3.)

§ 105-138: Repealed by Session Laws 1967, c. 1110, s. 3.

Editor's Note.—The repeal is effective for all taxable years beginning on or after Jan. 1, 1967. See Editor's note to § 105-133. For present provisions similar to those of the repealed section, see § 105-130.11.

§ 105-138.1: Repealed by Session Laws 1967, c. 1110, s. 3.

Editor's Note.—The repeal is effective for all taxable years beginning on or after Jan. 1, 1967. See Editor's note to § 105-133. For present provisions similar to those of the repealed section, see § 105-130.12.

§ 105-139: Repealed by Session Laws 1967, c. 1110, s. 3.

Editor's Note.—The repeal is effective for all taxable years beginning on or after Jan. 1, 1967. See Editor's note to § 105-133. For present provisions relating to fiduciaries, see §§ 105-160 through 105-163.

§ 105-140. Net income defined. — The words "net income" mean the gross income of a taxpayer, less the deductions allowed by this Division. (1939, c. 158, s. 316; 1967, c. 1110, s. 3.)

Stated in Good Will Distributors (Northern), Inc. v. Shaw, 247 N.C. 157, 100 S.E.2d 334 (1957).
Cited in Stiles v. Currie, 254 N.C. 197, 118 S.E.2d 428 (1961); Ward v. Clayton, 276 N.C. 411, 172 S.E.2d 531 (1970).

§ 105-141. Gross income defined.—(a) Except as otherwise provided in subsection (b) of this section, "gross income" for purposes of this Division shall mean all income in whatever form and from whatever source derived, including (but not limited to) the following items:

(1) Compensation for services, including fees, commissions and similar items;

(2) Gross income derived from business;
(3) Gains derived from dealings in property;
(4) Interest;
(5) Rents;
(6) Royalty;
(7) Dividends;
(8) Alimony and separate maintenance payments, subject to the provisions of G.S. 105-141.2;
(9) Annuities, subject to the provisions of G.S. 105-141.1;
(10) Income from life insurance and endowment contracts;
(11) Pensions;
(12) Income from discharge of indebtedness;
(13) Distributive share of partnership income subject to the provisions of G.S. 105-142(c);
(14) Income in respect of a decedent, subject to the provisions of G.S. 105-142.1;
(15) Income from an interest in an estate or trust;
(16) Payments made by or on behalf of an employer by reason of death of an employee to the widow or heirs of the employee, subject to certain exclusions as provided in subsection (b) of this section;
(17) Recovery of bad debts and similar items previously charged off;
(18) Amounts received as reimbursement for losses of such nature as those allowable under subdivision (9)a and (9)b of G.S. 105-147 in excess of the adjusted basis of property, subject to the limitations in G.S. 105-144.1; and
(19) Prizes and awards, subject to the exceptions provided in subsection (b) of this section relating to scholarship and fellowship grants.

(b) The words "gross income" do not include the following items, which shall be exempt from taxation under this Division, but shall be reported in such form and manner as may be prescribed by the Commissioner of Revenue:

(1) The proceeds of life insurance policies and contracts paid upon the death of the insured to beneficiaries or to the estate of the insured.
(2) The amount received by the insured as a return of premium or premiums paid by him under life insurance endowment contracts, either during the term or at the maturity of the term mentioned in the contracts or upon surrender of the contract.
(3) The value of property acquired by gift, bequest, devise or descent (but the income from such property shall be included in gross income).
(4) Interest upon the obligations of the United States or its possessions, or of the State of North Carolina, or of a political subdivision thereof, or of nonprofit educational institutions organized or chartered under the laws of the State of North Carolina: Provided, interest upon the obligations of the United States shall not be excluded from gross income unless interest upon obligations of the State of North Carolina or any of its political subdivisions is excluded from income taxes imposed by the United States.
(5) Any amounts received (i) through accident or health insurance, (ii) through health or accident plans financed by profit-sharing trusts or pension trusts, or through self-funded reimbursement plans adopted by an employer for the benefit of his employees, reimbursing such employees for expenses incurred for their medical care or for the medical care of their spouses or their dependents, (iii) under workmen's compensation acts or similar acts (which have been judicially declared to provide benefits in the nature

of workmen's compensation benefits, by whatever name called) as compensation for personal injuries or sickness, and (iv) for damages, whether by suit or agreement on account of injuries or sickness; provided, that any amounts received from the sources mentioned in this subsection as reimbursement for medical expenses incurred and claimed in a prior year or in prior years shall be excluded only to the extent that such amounts exceed the deduction claimed under subdivision (11) of G.S. 105-147 (relating to medical, etc., expenses), except that nothing in this subsection shall be construed as preventing a taxpayer from filing an amended return for a taxable year in which a medical deduction was claimed and allowed for the purpose of reducing the amount of the medical-expense deduction claimed in such year by any reimbursement for such medical expenses received in a later year when a change in the prior year is not barred by the provisions of this Division.

(6) The rental value of a home and the appurtenances thereof furnished to a minister of the gospel as a part of his compensation, or the rental allowance paid to him as a part of his compensation to the extent used by him to rent or provide a home including the appurtenances thereof; also the rental value of any homes and quarters and the appurtenances thereof furnished the officers and employees of orphanages, whose duties require them to live on the premises and in buildings owned by such institutions, as a part of their compensation.

(7) The amounts received in lump sum or monthly payments of benefits under the Social Security Act.

(8) The amounts received in lump sum or monthly payment benefits from retirement or pension systems of other states by former teachers or State employees of such states: Provided, this exclusion shall apply only to individuals receiving benefits from states which grant similar exclusions or exemptions for individual income tax purposes to retired members of the North Carolina Retirement System for Teachers and State Employees or which levy no income tax on individuals.

(9) The gross income of an employee shall not include:

a. The value of any meals or lodging furnished by his employer for the convenience of the employer provided, in the case of meals, the meals are furnished on the business premises of the employer, and, in the case of lodging, the employee is required to accept such lodging on the business premises of his employer as a condition of his employment; and

b. Amounts expended by his employer for premiums on group life, accident, health, or hospitalization insurance plans for the benefit of the employee.

(10) The amounts received as a scholarship at an educational institution (as defined in G.S. 105-135) or as a fellowship grant, including the value of contributed services and accommodations; and the amounts received to cover expenses for travel, research, clerical help, or equipment, which are incident to such scholarship or fellowship grant to the extent that such amounts are exempt for federal income tax purposes under the provisions of § 117 of the Internal Revenue Code of 1954 as amended.

(11) Amounts received by the estate, widow or heirs of an employee paid by or on behalf of one or more employers and paid by reason of death of any one employee to the extent of five thousand dollars ($5,000) with respect to the death of any one employee regardless of the number of employers making such payments,

except that such exclusion shall not apply to amounts with respect to which the employee possessed, immediately before his death, a nonforfeitable right to receive the amounts while living, except that even though an employee possessed a nonforfeitable right immediately before his death to receive the amounts while living, the exclusion provided in this subdivision will still apply in those cases in which the total distributions are payable within one taxable year of the distributee to such a distributee by a pension, profit-sharing, stock bonus or annuity trust qualifying under the provisions of subsection (f)(1)a of G.S. 105-161.

(12) Compensation received for active service as a member of the armed forces of the United States below the grade of commissioned officer; and so much of the compensation of a commissioned officer in such armed forces as does not exceed five hundred dollars ($500.00), for any month during any part of which such member served in a combat zone during any induction period, or was hospitalized as a result of wounds, disease, or injury incurred while serving in a combat zone during an induction period, except that this subdivision shall not apply for any month during any part of which there are no combatant activities in the combat zone. For the purposes of this subdivision the term "commissioned officer" does not include a warrant officer; the term "combat zone" means an area which the President of the United States by executive order designates as an area in which armed forces of the United States are or have been engaged in combat; service is performed in a combat zone only if performed on or after the date designated by the President by executive order as the date of the commencing of combatant activities in such zone; the term "compensation" does not include pension and retirement pay; and the term "induction period" means any period during which individuals are liable for induction for training and service in the armed forces of the United States.

(13) The amounts received in lump sum or monthly payments of benefits from retirement and pension funds established for firemen or law-enforcement officers by or under the control of cities or counties located in North Carolina; provided, that such amounts shall be exempt from income tax only if they would have been exempt under the provisions of either G.S. 143-166 (relating to the Law-Enforcement Officers' Benefit and Retirement Fund) or G.S. 128-31 (relating to North Carolina Local Governmental Employee's Retirement Fund) if such cities or counties had elected to provide such benefits for firemen or law-enforcement officers under the provisions of such laws.

(14) Any amount, not to exceed three thousand dollars ($3,000) received during any year under a federal employee retirement program to which the employee made contributions during his working years.

(15) Amounts received by members of the armed forces as hostile-fire duty pay which is authorized by Public Law 88-132 enacted by the Congress of the United States on October 2, 1963.

(16) All disability pay received from the United States government by reason of service in either the army, navy, marine corps, nurses' corps, air corps, air force, or any of the armed services of the United States.

(17) a. A portion of amounts contributed for the purchase of an annuity contract for an employee by an employer described in section 501(c)(3) of the Federal Internal Revenue Code which is exempt from federal income tax under section 501(a) of such Code, or for an employee who performs services for an educational institution (as defined in G.S. 105-135(3)) by an

employer which is a state, a political subdivision of a state, or an agency or instrumentality of any one or more of the foregoing, if such annuity contract is not purchased under a plan which meets the requirement of G.S. 105-161(f)(1)a, and if the employee's rights under the annuity contract are nonforfeitable except for failure to pay future premiums. However, such portion of amounts contributed by such employer for such annuity contract on or after such rights become nonforfeitable shall be excluded from the gross income of the employee for the taxable year only to the extent that the aggregate of such amounts does not exceed the exclusion allowance (as herein defined) for such taxable year. In addition, the employee shall include in his gross income the amounts received under such annuity contract for the year received as provided in G.S. 105-141.1 (relating to annuities).

b. For purposes of this subdivision, the "exclusion allowance" for an employee for the taxable year is an amount equal to the excess, if any, of (i) the amount determined by multiplying twenty percent (20%) of his includible compensation (as herein defined) by the number of years of service, over (ii) the aggregate of the amounts contributed by the employer for annuity contracts and excludible from gross income of the employee for any prior taxable year.

For purposes of this subdivision, the term "includible compensation" means, in the case of any employee, the amount of compensation which is received from the employer described in the first paragraph of this subdivision, and which is includible in gross income for the most recent period (ending not later than the close of the taxable year) which under the following paragraph may be counted as one year of service. Such term does not include any amount contributed by the employer for any annuity contract to which this subdivision applies.

In determining the number of years of service for purposes of this subdivision there shall be included (i) one year for each full year during which the individual was a full-time employee of the organization purchasing the annuity for him, and (ii) a fraction of a year (determined as the Commissioner of Revenue may prescribe) for each full year during which such individual was a part-time employee of such organization and for each part of a year during which such individual was a full-time or part-time employee of such organization. In no case shall the number of years of service be less than one.

If for any taxable year of the employee this subdivision applies to two or more annuity contracts purchased by the employer, such contracts shall be treated as one contract.

For purposes of this subdivision and G.S. 105-141.1(e) (relating to specific rules for computing employees' contributions to annuity contract), if rights of the employee under an annuity contract described in the first paragraph of this subdivision change from forfeitable to nonforfeitable rights, then the amount (determined without regard to this subsection) includible in gross income by reason of such change shall be treated as an amount contributed by the employer for such annuity contract as of the time such rights become nonforfeitable.

The provisions of this subdivision shall not apply to any amounts contributed by an employer pursuant to an agreement to take a reduction in salary or to forego an increase in salary.

(18) Any amount, not to exceed twelve hundred fifty dollars ($1,250)

received by a taxpayer during any year as retired or retainer pay as a result of service in any of the armed forces of the United States. (1939, c. 158, s. 317; 1941, c. 50, s. 5; c. 283; 1943, c. 400, s. 4; 1945, c. 708, s. 4; c. 752, s. 3; 1951, c. 643, s. 4; 1957, c. 1224; c. 1340, s. 4; 1961, c. 893; 1963, c. 1169, s. 2; 1965, c. 833; c. 1003, s. 1; 1967, c. 716, s. 1; cc. 871, 1025; c. 1110, s. 3; cc. 1151, 1221; 1969, cc. 178, 1272; 1971, cc. 792, 996.)

Local Modification. — Forsyth County Employees' Retirement Plan, and Winston-Salem Employees' Retirement Fund, as to subsection (b)(13): 1969, c. 1076.

Editor's Note.—The first 1969 amendment, effective and applicable to all taxable years beginning on or after Jan. 1, 1969, inserted "or law-enforcement officers" near the beginning and near the end of subdivision (13) of subsection (b).

The second 1969 amendment, effective with respect to income years beginning on or after Jan. 1, 1969, substituted "three thousand dollars ($3,000)" for "one thousand two hundred dollars ($1,200)" in subdivision (14) of subsection (b).

The first 1971 amendment, applicable to taxable years beginning on and after Jan. 1, 1971, added subdivision (17) of subsection (b).

The second 1971 amendment, effective with respect to income years beginning on and after Jan. 1, 1972, added subdivision (18) of subsection (b).

For comment on definition of rents from foreign real estate, see 17 N.C.L. Rev. 382.

The cases in the following note were decided prior to the 1967 amendments which substantially rewrote this section. See Editor's note to § 105-133.

This division taxes income derived from any source whatever and in whatever form paid. Foreman Mfg. Co. v. Johnson, 261 N.C. 504, 135 S.E.2d 205 (1964).

Section Does Not Include Loans. — Neither this section, which defines income, nor § 105-147, which specifies deductions, includes loans. In re Fleishman, 264 N.C. 204, 141 S.E.2d 256 (1965).

Loans to a taxpayer do not constitute taxable income and should not, therefore, be included as gross income on his income tax return. In re Fleishman, 264 N.C. 204, 141 S.E.2d 256 (1965).

Nor Value of Property Acquired by Gift.—The value of property acquired by gift is excluded from both State and federal income tax. Foreman Mfg. Co. v. Johnson, 261 N.C. 504, 135 S.E.2d 205 (1964).

A gain resulting from the involuntary conversion of a capital asset by fire was taxable under the State law as income, notwithstanding that the proceeds of the fire insurance plus additional cash were necessary for and used in the restoration of the building, under this section and § 105-142, prior to the passage of § 105-144.1. State v. Speizman, 230 N.C. 459, 53 S.E.2d 533 (1949).

Former Exemption of Compensation from Federal Government.—The provision of a former statute exempting from income tax that part of gross income received from salaries, wages, or other compensation from the federal government was held to apply to individuals only and not to corporations, foreign or domestic. Atlantic Coast Line R.R. v. Maxwell, 207 N.C. 746, 178 S.E. 592 (1935).

Salaries of State and Federal Officers.—It was formerly held that the State could not tax the salary of a federal officer, nor of a State officer whose office was created by the Constitution. Purnell v. Page, 133 N.C. 125, 45 S.E. 534 (1903).

Cited in Good Will Distributors (Northern), Inc. v. Shaw, 247 N.C. 157, 100 S.E.2d 334 (1957).

§ 105-141.1. Gross income—annuities.—(a) With respect to amounts received as annuities, "gross income as used in this division shall include any amount received as an annuity (whether for a period certain or during one or more lives) under an annuity, endowment or life insurance contract, exclusive of that part of any amount received as an annuity under an annuity, endowment or life insurance contract which bears the same ratio to such amount as the investment in the contract (as of the annuity starting date) bears to the expected return under the contract (as of such date).

(b) Definitions:

(1) Investment in the Contract.—For the purposes of subsection (a), the investment in the contract as of the annuity starting date is

a. The aggregate amount of premiums or other consideration paid for the contract, minus

b. The aggregate amount received under the contract before such date, to the extent that such amount was excludable from gross income under this section or prior income tax laws.

(2) Adjustment in Investment Where There Is Refund Feature.—If,

a. The expected return under the contract depends in whole or part on the life expectancy of one or more individuals;

b. The contract provides for payments to be made to a beneficiary (or to the estate of an annuitant) on or after the death of the annuitant or annuitants; and

c. Such payments are in the nature of a refund of the consideration paid,

then the value (computed without discount for interest) of such payments on the annuity starting date shall be subtracted from the amount determined under subdivision (1). Such value shall be computed in accordance with actuarial tables prescribed by the Commissioner. For the purposes of this paragraph and subsection (d)(2)a, the term "refund of the consideration paid" includes amounts payable after the death of an annuitant by reasons of a provision in the contract for a life annuity with a minimum period of payment certain, but (if part of the consideration was contributed by an employer) does not include that part of any payment to a beneficiary (or to the estate of the annuitant) which is not attributable to the consideration paid by the employee for the contract as determined under subdivision (1)a.

(3) Expected Return.—For the purposes of subsection (a), the expected return under the contract shall be determined as follows:

a. Life Expectancy.—If the expected return under the contract, for the period on and after the annuity starting date, depends in whole or in part on the life expectancy of one or more individuals, the expected return shall be computed in accordance with annuity tables in force and used by the Federal Internal Revenue Service in computing annuities at the time as of which such computation is made.

b. Installment Payments.—If subparagraph a does not apply, the expected return is the aggregate of the amounts receivable under the contract as an annuity.

(4) Annuity Starting Date.—For purposes of this section, the annuity starting date in the case of any contract is the first day of the first period for which an amount is received as an annuity under the contract; except that if such date was before January 1, 1957, then the annuity starting date is January 1, 1957.

(c) Employees Annuities:

(1) Employees Contributions Recoverable in Three Years.—Where,

a. Part of the consideration for annuities, endowment or life insurance contract is contributed by the employer, and

b. During the three-year period beginning on the date (whether on or before January 1, 1957) on which an amount is first received under the contract as an annuity, the aggregate amount receivable by the employee under the terms of the contract is equal to or greater than the consideration for the contract contributed by the employee,

then all amounts received as an annuity under the contract shall be excluded from gross income until there has been so excluded (under this paragraph and prior income tax laws) an amount equal to the consideration for the contract contributed by the employee. Thereafter all amounts so received under the contract shall be included in gross income.

(2) Special Rules for Application of Subdivision (1).—For the purpose of subdivision (1), if the employee died before any amount was re-

ceived as an annuity under the contract, the words "receivable by the employee" shall be read as "receivable by a beneficiary of the employee."

(d) Amounts Not Received as Annuities:

(1) General Rule.—If any amount is received under an annuity, endowment or life insurance contract, if such amount is not received as an annuity, and if no other provision of the section applies, then such amount:

a. If received on or after the annuity starting date, shall be included in gross income; or

b. If subparagraph a does not apply, shall be included in gross income, but only to the extent that it (when added to amounts previously received under the contract which were excludable from gross income under this division or prior income tax laws) exceeds the aggregate premiums or other consideration paid.

For purposes of this section any amount received that is in the nature of a dividend or similar distribution shall be treated as an amount not received as an annuity.

(2) Special Rules for Application of Subdivision (1).—For purposes of subdivision (1), the following shall be treated as amounts not received as annuities:

a. Any amount received, whether in a single sum or otherwise, under a contract in full discharge of the obligation under the contract which is in the nature of a refund of the consideration paid for the contract; and

b. Any amount received under a contract on its surrender, redemption or maturity.

In the case of any amount to which the preceding sentence applies, the rule of subdivision (1)b shall apply (and the rule of subdivision (1) a shall not apply).

(3) Limit on Tax Attributable to Receipt of Lump Sum.—If a lump sum is received under an annuity, endowment or life insurance contract, and the part which is includable in gross income is determined under subdivision (1), then the tax attributable to the inclusion of such part in gross income for the taxable year shall not be greater than the aggregate of the tax attributable to such part had it been included in the gross income of the taxpayer ratably over the tax year in which received and the preceding two taxable years.

(e) Special Rules for Computing Employees Contributions.—In computing for purposes of subsection (b)(1)a, the aggregate amount of premiums or other consideration paid for the contract, for the purposes of subsection (c)(1), the consideration for the contract contributed by the employee, and for the purposes of subsection (d)(1)b, the aggregate premiums or other consideration paid, amounts contributed by the employer shall be included, but only to the extent that:

(1) Such amounts were includable in the gross income of the employee under this division or prior income tax laws; or

(2) If such amounts had been paid directly to the employee at the time they were contributed, they would not have been includable in the gross income of the employee under the law applicable at the time of such contribution.

(f) Rules for Transfer Where a Transfer Was for Value.—Where any contract (or any interest therein) is transferred (by assignment or otherwise) for a valuable consideration, to the extent that the contract (or interest therein) does not, in the hands of the transferee, have a basis which is determined by reference to the basis in the hand of the transferor, then:

(1) For purposes of this section, only the actual value of such

consideration, plus the amount of the premiums and other consideration paid by the transferee after the transfer, shall be taken into account in computing the aggregate amount of the premiums or other consideration paid for the contract;

(2) For purposes of subsection (b)(1)b there shall be taken into account only the aggregate amount received under the contract by the transferee before the annuity starting date, to the extent that such amount was excludable from gross income under this division or prior income tax laws; and

(3) The annuity starting date is January 1, 1957, or the first day of the first period for which the transferee received an amount under the contract as an annuity, whichever is the later.

For purposes of this subsection, the term "transferee" includes a beneficiary of, or the estate of, the transferee.

(g) Option to Receive Annuity in Lieu of Lump Sum.—If,

(1) A contract provides for payment of a lump sum in full discharge of an obligation under the contract, subject to an option to receive an annuity in lieu of such lump sum;

(2) The option is exercised within 60 days after the date on which such lump sum first became payable; and

(3) Part or all of such lump sum shall (but for this subsection) be includable in gross income by reason of subsection (d)(1),

then, for purposes of this section, no part of such lump sum shall be considered as includable in gross income at the time such lump sum first became payable.

(h) Interest. — Notwithstanding any other provisions of this section, if any amount is held under an agreement to pay interest thereon, the interest payments shall be included in gross income. (1957, c. 1340, s. 4; 1967, c. 1110, s. 3.)

§ **105-141.2. Gross income—alimony payments.**—Gross income includes amounts received by a wife from her husband or by a husband from his wife as periodic payments under a decree of divorce or separate maintenance, under a written separation agreement, or under a decree requiring support and maintenance to the extent includable in gross income for federal income tax purposes under the provisions of § 71 of the Internal Revenue Code of 1954 as amended. (1957, c. 1340, s. 4; 1967, c. 1110, s. 3.)

§ **105-141.3. Adjusted gross income defined.** — The words "adjusted gross income" for the purposes of this division shall mean gross income taxable under this division less all expenses allowed as deductions by this division which were incurred in deriving such income. (1963, c. 1169, s. 2; 1967, c. 1110, s. 3.)

§ **105-142. Basis of return of net income.** — (a) The net income of a taxpayer shall be computed in accordance with the method of accounting regularly employed in keeping the books of such taxpayer, but such method of accounting must be consistent with respect to both income and deductions, but if in any case such method does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income, but shall follow as nearly as practicable the federal practice, unless contrary to the context and intent of this division.

(b) Change of Income Year.

(1) A taxpayer may change the income year upon which he reports for income tax purposes without prior approval by the Commissioner of Revenue if such change in income year has been approved by or is acceptable to the Federal Commissioner of Internal Revenue and is used for filing income tax returns under the provisions of the Internal Revenue Code of 1954.

If a taxpayer desires to make a change in his income year other than as provided above he may make such change in his income year with the approval of the Commissioner of Revenue, provided such approval is requested at least 30 days prior to the end of his new income year.

A taxpayer who has changed his income year without requesting the approval of the Commissioner of Revenue as provided in the first paragraph of this subdivision shall submit to the Commissioner of Revenue notification of any change in the income year after the change has been approved by the Federal Commissioner of Internal Revenue or his agent where application for permission to change is required by the Federal Commissioner of Internal Revenue with such notification stating that such approval has been received. Where application for change of the income year is not required by the Federal Commissioner of Internal Revenue, notification of the intention to change the income year shall be submitted to the Commissioner of Revenue prior to the time for filing the short period return.

(2) A return for a period of less than 12 months (referred to in this subsection as "short period") shall be made when the taxpayer changes his income year. In such a case, the return shall be made for the short period beginning on the day after the close of the former taxable year and ending at the close of the day before the day designated as the first day of the new taxable year, except that taxpayers changing to, or from, a taxable year varying from 52 to 53 weeks as provided in subdivision (5) of G.S. 105-135 shall not be required to file a short period return if such change results in a short period of 359 days or more or of less than seven days. Short period income tax returns shall be filed within the same period following the end of such short period as is required for full year returns under the provisions of G.S. 105-155.

(3) In the case of a taxpayer who is an individual, if a return is made for a short period under the provisions of subdivision (2) of this subsection the exemptions allowed as a deduction under G.S. 105-149 shall be reduced to amounts which bear the same ratio to the full exemptions as the number of months in the short period bears to 12 and the net taxable income for the short period shall be placed on an annual basis by multiplying such income by 12 and by dividing the result by the number of months in the short period. The tax shall be the same part of the tax computed on the annual basis as the number of months in the short period is of 12 months.

(c) An individual carrying on the business in partnership shall be liable for income tax only in his individual capacity, and shall include in his gross income, whether distributed or not, his distributive share of the net income of the partnership and dividends from foreign corporations for each income year. If an established business in this State is owned by a nonresident individual or by a partnership having one or more nonresident members, the manager of the business in this State shall report the earnings of such business in this State, and the distributive share of the income of each nonresident owner or partner and pay the tax as levied on individuals in this division for each such nonresident owner or partner. The individual or partnership business carried on in this State may deduct the payment required to be made for such nonresident individual or partner or partners from their distributive share of the profits of such business in this State: Provided, that if an established unincorporated business owned by a nonresident individual or a partnership having one or more nonresident members is operating in one or more other states the net income of the business attributable to North Carolina shall be

determined by multiplying the total net income of the business by the ratio ascertained under the provisions of G.S. 105-130.4, and shall be entitled to the rights and privileges accorded corporations therein. Total net income shall be the entire gross income of the business less all expenses, taxes, interest and other deductions allowable under this division which were incurred in the operation of the business.

(d) The amount actually distributed or made available to any employee or the beneficiary of an employee by an employees' trust, which qualifies under subsection (f)(1)a of G.S. 105-161 as an exempt organization, shall be taxable to the employee or his beneficiary in the year in which distributed or made available; provided, that if such employee has made contributions to such trust, and the benefits are received as periodic payments, the amounts annually received shall be taxed as an annuity as provided in G.S. 105-141.1. The amount actually received or made available to the employee or his beneficiary which consists of corporate shares or other securities shall be taken into account in determining the amount distributed or made available at their fair market value, except that the net unrealized appreciation in the corporate shares or other securities of the employer corporation shall not be included in determining such amount distributed or made available for purposes of this subsection.

(e) An individual, who patronizes or owns stock or has membership in a farmers' marketing or purchasing cooperative or mutual, organized under Subchapter 4 or Subchapter 5 of Chapter 54 of the General Statutes of North Carolina, shall include in his gross income for the year in which the allocation is made his distributive share of any savings, whether distributed in cash or credit, allocated by the cooperative or mutual association for each income year.

(f) (1) A taxpayer who regularly sells or otherwise disposes of personal property on the installment plan may return as income therefrom in any taxable year that proportion of the installment payments actually received in that year which the gross profit, realized or to be realized when payment is completed, bears to the total contract price.

(2) Income from a sale or other disposition of real property, or a casual sale or other casual disposition of personal property (other than property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year) for a price exceeding one thousand dollars ($1,000), may be returned on the basis and in the manner prescribed in subdivision (1), provided, however, that such income may be so returned only if in the taxable year of the sale or other disposition there are no payments or the payments (exclusive of evidence of indebtedness of the purchaser) do not exceed thirty percent (30%) of the selling price; and, provided further, that if a timely election is made to report a gain from an installment sale on the basis prescribed in this subsection such election shall be binding on the taxpayer and he may not after the date prescribed by law for filing his return change to another method of reporting such gains, and in like manner if a timely election is made to report a gain on other than the installment basis such election shall likewise be binding on the taxpayer.

(3) Sale or Other Disposition.

a. If an installment obligation is satisfied at other than its face value or is distributed, transmitted, sold or otherwise disposed of, gain or loss shall result to the extent of the difference between the basis of the obligation and

1. The amount realized, in the case of satisfaction at other than face value or a sale or exchange, or
2. The fair market value of the obligation at the time of the distribution, transmission or disposition in the case of

the distribution, transmission, or disposition otherwise than by sale or exchange.

Any gain or loss so resulting shall be considered as resulting from the sale or exchange of the property in respect of which the installment obligation was received.

b. The basis of an installment obligation shall be the excess of the face value of the obligation over an amount equal to the income which would be returnable were the obligation satisfied in full.

c. Except as provided elsewhere in this division this subdivision (3) shall not apply to the transmission of installment obligations at death. (1939, c. 158, s. 313; 1943, c. 400, s. 4; 1945, c. 708, s. 4; 1949, c. 392, s. 3; 1955, c. 1313, s. 1; 1957, c. 1340, s. 4; 1963, c. 1169, s. 2; 1967, c. 1110, s. 3.)

Subsection (a) authorizes no deductions not included in § 105-147. In re Fleishman, 264 N.C. 204, 141 S.E.2d 256 (1965).

Loan Not Income and Repayment Not Deductible.—The classification of a loan as income for the year in which the money was borrowed and as a deduction for the year in which the money was repaid, not only is not an approved and generally accepted method of accounting but also is a procedure directly contrary to "the context and intent" of this Article. In re Fleishman, 264 N.C. 204, 141 S.E.2d 256 (1965).

A gain resulting from the involuntary conversion of a capital asset by fire was taxable under the State law as income, notwithstanding that the proceeds of the fire insurance plus additional cash were necessary for and used in the restoration of the building, under this section and § 105-141, prior to the passage of § 105-144.1. State v. Speizman, 230 N.C. 459, 53 S.E.2d 533 (1949).

Requirement That Commissioner of Revenue Follow Federal Practice. — Subsection (a) of this section, stipulating that the Commissioner of Revenue shall follow the federal practice as nearly as practicable in instances where the method of accounting of the taxpayer does not clearly reflect the income of the taxpayer, does not require the Commissioner to apply the provisions of sec. 112(f), 26 U.S.C.A. 95, in computing the income of a taxpayer from involuntary conversion of a capital asset. State v. Speizman, 230 N.C. 459, 53 S.E.2d 533 (1949). See § 105-144.1 and note.

Necessity for Reliance on Federal Tax Returns. — Recognizing the practical necessity for the North Carolina Department of Revenue to rely upon tax returns accepted by the Federal Internal Revenue Service for a proper reflection of taxable income upon foreign corporations, the General Assembly enacted this section. In re Virginia-Carolina Chemical Corp., 248 N.C. 531, 103 S.E.2d 823 (1958).

Cited in Watson v. Watson Seed Farms, Inc., 253 N.C. 238, 116 S.E.2d 716 (1960).

§ 105-142.1. Income in respect of decedents. — (a) The amount of all items of gross income in respect of a decedent which are not properly includable in the gross income of the decedent for the taxable period in which falls the date of his death or for a prior taxable period (including all items of gross income in respect of a prior decedent if the right to receive such items was acquired by reason of the death of the prior decedent or by bequest, devise or inheritance from the prior decedent) shall be included in the gross income, for the taxable year when received, of:

(1) The estate of the decedent, if the right to receive the amount is acquired by the decedent's estate from the decedent;

(2) The person who, by reason of the death of the decedent, acquires the right to receive the amount if the right to receive the amount is not acquired by the decedent's estate from the decedent; or

(3) The person who acquires from the decedent the right to receive the amount by bequest, devise or inheritance if the amount is received after a distribution by the decedent's estate of such right or is received without an administration of the decedent's estate.

(b) If a right to receive an amount of income in respect of a decedent is transferred by the estate of the decedent or by a person who received such right by reason of the death of the decedent or by bequest, devise or inheritance from the decedent, there shall be included in the gross income of the estate of such person, as the case may be, for the taxable period in which the transfer

occurs, the fair market value of such right at the time of transfer plus the amount by which any consideration for the transfer exceeds such fair market value. For purposes of this paragraph, the term "transfer" includes a sale, exchange, or other disposition or the satisfaction of an installment obligation at other than face value, but does not include transmission at death to the estate of the decedent or a transfer to a person pursuant to the right of such person to receive such amount by reason of the death of the decedent or by bequest, devise or inheritance from the decedent.

(c) The right, described in subsection (a) of this section, to receive an amount shall be treated in the hands of the estate of the decedent or any individual who acquires such right by reason of the death of the decedent, or by bequest, devise, or inheritance from the decedent, as if it had been acquired by the estate or such individual in the transaction in which the right to receive the income was originally derived and the amount includible in gross income under subsections (a) and (b) shall be considered in the hands of the estate or such individual to have the character which it would have had in the hands of the decedent if the decedent had lived and received such amount.

(d) For the purposes of this section an amount equal to the excess of the face amount of an installment obligation (the income from which was properly reportable by the decedent on the installment basis under G.S. 105-142) over the basis of such obligation in the hands of the decedent shall be considered as an item of gross income in respect of a decedent, and such obligation shall be considered a right to receive an item of gross income in respect of a decedent.

(e) The amount of any deduction allowable under this division in respect of a decedent which is not properly allowable to the decedent for the taxable period in which falls the date of his death or for a prior taxable period shall be allowed to the estate of the decedent except that, if the estate of the decedent is not liable to discharge the obligation to which the deduction relates, such deduction shall be allowed to the person, who by reason of the death of the decedent or by bequest, devise or inheritance acquires, subject to the obligation, from the decedent an interest in property of the decedent. (1957, c. 1340, s. 4; 1967, c. 1110, s. 3.)

§ **105-143:** Repealed by Session Laws 1967, c. 1110, s. 3.

Editor's Note.—The repeal is effective for all taxable years beginning on or after Jan. 1, 1967. See Editor's note to § 105-133. For present statute similar to the repealed section, see § 105-130.6.

§ **105-144. Determination of gain or loss.**—(a) Except as provided in subsection (c) of this section, in ascertaining the gain or loss from the sale or other disposition of property:

(1) For property acquired after January 1, 1921 and before July 1, 1963, the basis shall be the cost thereof; provided, however, that in the case of property which was included in the last preceding annual inventory used in determining net income in a return under this Division, such inventory value shall be the basis in lieu of cost.

(2) For property acquired before January 1, 1921, the basis for the purpose of ascertaining gain, shall be the fair market value of the property at January 1, 1921, or the cost of the property, whichever is greater; and the basis for determining loss, shall be the cost of the property in all cases, if such cost is known or determinable.

(3) For property acquired on or after July 1, 1963, the basis shall be as follows:

a. For property acquired by purchase, the cost thereof, provided that in the case of property which was included in the last preceding annual inventory used in determining net income in a return under this Division, such inventory value shall be used in lieu of cost.

b. For property acquired by gift, the same basis as it would be in the hands of the donor or the last preceding owner by whom it was not acquired by gift, except that if the basis (as adjusted) is greater than the fair market value of the property at the time of the gift, then for the purpose of determining loss the basis shall be such fair market value; provided that if a gift tax is paid to this State with respect to such property the basis shall be increased by the amount of the gift tax paid with respect to such gift, but such increase shall not exceed an amount equal to the amount by which the fair market value at the time of the gift exceeded the basis of the property in the hands of the donor at the time of the gift.

c. For property acquired by bequest, devise, or descent, either the fair market value at the date of death of the former owner, or in the case of an election under G.S. 105-9.1 the fair market value at the alternate valuation date at which time a value is established for inheritance tax purposes.

The basis of property so determined under this subsection (a) shall be adjusted for capital additions or losses applicable to the property and for depreciation, amortization, and depletion, allowed or allowable.

(b) Except as hereinafter provided in subsection (c) of this section, the final distribution to the taxpayer of the assets of a corporation shall be treated as a sale of the stock or securities of the corporation owned by him, and the gain or loss shall be computed accordingly. Cash dividends paid by a corporation prior to January 1, 1969, from earnings derived from the sale of substantially all its assets under the provisions of § 337 of the Internal Revenue Code of 1954 shall be subject to the provision of G.S. 105-147(7) to the extent the gain on such sale shall be taxable by the State of North Carolina. Provided, however, that the preceding sentence shall not apply to pending litigation in a court of competent jurisdiction.

(c) An election as to recognition of gain in certain liquidations of corporations shall be allowed subject to the following:

(1) General Rule.—In the case of property distributed in complete liquidation of a corporation, if

a. The liquidation is made in pursuance of a plan of liquidation adopted on or after June 21, 1961; and

b. The distribution is in complete cancellation or redemption of all the stock, and the transfer of all the property under the liquidation occurs within some one calendar month,

then in the case of each qualified electing shareholder (as defined in subdivision (2)) gain on the shares owned by him at the time of the adoption of the plan of liquidation shall be recognized only to the extent provided in subdivision (4).

(2) Qualified Electing Shareholders.—For purposes of this section, the term "qualified electing shareholder" means an individual who is a shareholder of any class of stock (whether or not entitled to vote on the adoption of such plan of liquidation) who is a shareholder at the time of the adoption of such plan, and whose written election to have the benefits of subdivision (1) has been made and filed in accordance with subdivision (3), but only if written elections have been so filed by shareholders (other than corporations) who at the time of the adoption of the plan of liquidation are owners of stock possessing at least eighty percent (80%) of the total combined voting power (exclusive of voting power possesed by stock owned by corporations) of all classes of stock entitled to vote on the adoption of such plan of liquidation.

(3) Making and Filing of Elections.—The written elections referred to in subdivision (2) shall be deemed to have been made and filed if,

and only if, such written elections were duly made and filed for federal income tax purposes in conformity with the provisions of § 333 of the 1954 Internal Revenue Code and the regulations thereunder.

(4) Noncorporate Shareholders.—In the case of a qualified electing shareholder other than a corporation.

a. There shall be recognized, and treated as ordinary income, so much of the gain as is not in excess of his ratable share of the earnings and profits of the corporation accumulated after January 1, 1921, such earnings and profits to be determined as of the close of the month in which the transfer in liquidation occurred under subdivision (1), paragraph b, but without diminution by reason of distributions made during such month; but by including in the computation thereof all amounts accrued up to the date on which the transfer of all the property under the liquidation is completed; and

b. There shall be recognized and treated as gain so much of the remainder of the gain as is not in excess of the amount by which the value of that portion of the assets received by him which consists of money, or of stock or securities acquired by the corporation after December 31, 1962, exceeds his ratable share of such earnings and profits.

(5) Basis of Property Received in Liquidation.—If property was acquired by an individual shareholder in the liquidation of a corporation in cancellation or redemption of stock, and with respect to such acquisition gain was realized, but as the result of an election made by a shareholder under this section the extent to which gain was recognized was determined under this section, then the basis shall be the same as the basis of the stock cancelled or redeemed in the liquidation, decreased in the amount of any money received by the shareholder, and increased in the amount of gain recognized to him. (1939, c. 158, s. 319; 1941, c. 50, s. 5; 1957, c. 1340, s. 4; 1961, c. 1093; 1963, c. 1169, s. 2; 1965, c. 580; 1967, c. 1110, s. 3; 1969, c. 1120.)

Editor's Note.—The 1969 amendment added the second and third sentences of subsection (b).

This section has to do only with fixing for tax purposes the mode of ascertaining realized gains or losses sustained in respect to the disposal of property. Hence the statute is not applicable to a gift of property to a charitable institution. Wiscassett Mills Co. v. Shaw, 235 N.C. 14, 68 S.E.2d 816 (1952).

This section prescribes the method for ascertaining the amount of a loss resulting "from the sale or other disposition of property." Ward v. Clayton, 276 N.C. 411, 172 S.E.2d 531 (1970).

When Method for Ascertaining Loss Is Applicable.—The method for ascertaining the amount of a loss prescribed in this section is applicable whenever property is disposed of by sale, casualty or otherwise, in such manner as to result in a taxable gain or a deductible loss. Ward v. Clayton, 276 N.C. 411, 172 S.E.2d 531 (1970).

Income tax law is concerned only with realized losses, as with realized gains. Ward v. Clayton, 5 N.C. App. 53, 167 S.E.2d 808 (1969).

Basis Where Loss Is from Sale or Other Disposition of Property. — This section clearly provides that in ascertaining a loss from the sale or other disposition of property, the basis shall be the adjusted cost of the property. Ward v. Clayton, 5 N.C. App. 53, 167 S.E.2d 808 (1969).

A casualty loss is an "other disposition of property." Ward v. Clayton, 5 N.C. App. 53, 167 S.E.2d 808 (1969).

A taxpayer's loss of timber by fire is an "other disposition of property" within the meaning of this section, and therefore the income tax deduction allowable under § 105-147 for such casualty loss may not exceed the taxpayer's cost basis of the property so destroyed. Ward v. Clayton, 276 N.C. 411, 172 S.E.2d 531 (1970).

And Is Not Treated Differently Than a Loss from a Sale.—Nothing indicates the General Assembly intended a taxpayer's deductible loss by fire or other casualty to be treated differently from a loss resulting from a sale. Ward v. Clayton, 276 N.C. 411, 172 S.E.2d 531 (1970).

Taxpayer showed no cost basis whereby a realized loss could be measured. Ward v. Clayton, 5 N.C. App. 53, 167 S.E.2d 808 (1969).

§ 105-144.1. Involuntary conversions; recognition of gain.—(a) General Rule.—If property (as a result of its destruction in whole or in part, theft, seizure, or requisition or condemnation or threat or imminence thereof) is compulsory or involuntarily converted—

(1) Into property similar or related in service or use to the property so converted, no gain shall be recognized.

(2) Into money or into property not similar or related in service or use to the converted property, and the disposition of the converted property occurred after December 31, 1958, the gain (if any) shall be recognized except to the extent hereinafter provided in this paragraph:

a. If the taxpayer during the period specified in subparagraph b for the purpose of replacing the property so converted, purchases other property similar or related in service or use to the property so converted, or purchases stock in the acquisition of control of a corporation owning such other property, at the election of the taxpayer the gain shall be recognized only to the extent that the amount realized upon such conversion (regardless of whether such amount is received in one or more taxable years) exceeds the cost of such other property or such stock. For purposes of this paragraph—

1. No property or stock acquired before the disposition of the converted property shall be considered to have been acquired for the purpose of replacing such converted property unless held by the taxpayer on the date of such disposition; and

2. The taxpayer shall be considered to have purchased property or stock only if, but for the provisions of subsection (b) of this section, the unadjusted basis of such property or stock would be its cost within the meaning of this Division.

b. The period referred to in subparagraph a shall be the period beginning with the date of the disposition of the converted property, or the earliest date of the threat or imminence or requisition or condemnation of the converted property, whichever is the earlier, and end—

1. One year after the close of the first taxable year in which any part of the gain upon the conversion is realized, or

2. Subject to such terms and conditions as may be specified by the Commissioner of Revenue, at the close of such later date as the Commissioner of Revenue may designate on application by the taxpayer. Such application shall be made at such time and in such manner as the Commissioner of Revenue may prescribe.

c. If a taxpayer has made the election provided in subparagraph a then—

1. The statutory period for the assessment of any deficiency, for any taxable year in which any part of the gain on such conversion is realized, attributable to such gain shall not expire prior to the expiration of three years from the date the Commissioner of Revenue is notified by the taxpayer of the replacement of the converted property or of an intention not to replace, and

2. Such deficiency may be assessed before the expiration of such three-year period notwithstanding the provisions of law which would otherwise prevent such assessment.

d. If the election provided in subparagraph a is made by the

taxpayer and such other property or such stock was purchased before the beginning of the last taxable year in which any part of the gain upon such conversion is realized, any deficiency, to the extent resulting from such election, for any taxable year ending before such last taxable year may be assessed (notwithstanding the provisions of law which would otherwise prevent such assessment) at any time before the expiration of the period within which a deficiency for such last taxable year may be assessed.

(b) If the property was acquired, after January 1, 1921, as the result of a compulsory or involuntary conversion described in subsection (a)(1), the basis shall be the same as in the case of the property so converted, decreased in the amount of any money received by the taxpayer which was not expended in accordance with the provisions of law (applicable to the year in which such conversion was made) determining the taxable status of the gain or loss upon such conversion, and increased in the amount of gain or decreased in the amount of loss to the taxpayer recognized upon such conversion under the law applicable to the year in which such conversion was made. In the case of property purchased by the taxpayer in a transaction described in subsection (a)(2) which resulted in the nonrecognition of any part of the gain realized as the result of a compulsory or involuntary conversion, the basis shall be the cost of such property decreased in the amount of the gain not so recognized; and if the property purchased consists of more than one piece of property, the basis determined under this sentence shall be allocated to the purchased properties in proportion to their respective costs.

(c) For purposes of this section, if livestock are destroyed by or on account of disease, or are sold or exchanged because of disease, such destruction or such sale or exchange shall be treated as an involuntary conversion to which this section applies.

(d) For purposes of this section, the sale or exchange of livestock (other than poultry) held by a taxpayer for draft, breeding, or dairy purposes in excess of the number the taxpayer would sell if he followed his usual business practices shall be treated as an involuntary conversion to which this section applies if such livestock are sold or exchanged by the taxpayer solely on account of drought.

(e) As used in this section, the term "control" means the ownership of stock possessing at least eighty per centum (80%) of the total combined voting power of all classes of stock entitled to vote, and at least eighty per centum (80%) of the total number of shares of all other classes of stock of the corporation.

(f) (1) For purposes of subsection (a), if real property (not including stock in trade or other property held primarily for sale) held for productive use in trade or business or for investment is (as the result of its seizure, requisition, or condemnation, or threat or imminence thereof) compulsory or involuntarily converted, property of a like kind to be held either for productive use in trade or business or for investment shall be treated as property similar or related in service or use to the property so converted.

(2) Paragraph (1) shall not apply to the purchase of stock in the acquisition of control of a corporation described in subsection (a)(2)a.

(g) In the administration of this section, the Commissioner may, in his discretion, apply the federal rules and regulations, rulings, and federal court decisions pertinent to the administration and construction of § 1033 of the Federal Internal Revenue Code of 1954, but the Commissioner shall not be bound by such rules and regulations, rulings and decisions. (1949, c. 1171; 1959, c. 1259, s. 4; 1967, c. 1110, s. 3.)

Federal Regulations and Rulings Adopted by Commissioner. — On May 5, 1949, the Commissioner of Revenue of North Carolina promulgated a regulation for the purpose of administering this section, in which he adopted the federal rules and regulations, rulings and

federal court decisions pertinent to the administration and construction of section 112(f) of the Internal Revenue Code. State v. Speizman, 230 N.C. 459, 53 S.E.2d 533 (1949).

Pending Litigation. — The mere statement in the act from which this section was codified that it is to affect pending litigation, will not be construed as sufficient authority to authorize the Commissioner of Revenue to refund to a taxpayer a tax legally assessed and collected prior to the enactment of the act. State v. Speizman, 230 N.C. 459, 53 S.E.2d 533 (1949).

Section Does Not Authorize Refund of Tax Previously Collected. — This section adopting the federal rule for determining income tax upon the involuntary conversion of a capital asset, does not authorize the Commissioner of Revenue to refund income tax legally assessed and collected upon such capital gain prior to the enactment of this section, even though the tax was paid under protest. State v. Speizman, 230 N.C. 459, 53 S.E.2d 533 (1949).

§ 105-144.2. Sale of principal residence of taxpayer — nonrecognition of gain.—(a) If property (in this section called "old residence") used by the taxpayer as his principal residence is sold by him after December 31, 1956, and, within a period beginning one year before the date of such sale and ending one year after such date, property (in this section called "new residence") is purchased and used by the taxpayer as his principal residence, gain (if any) from such sale shall be recognized only to the extent that the taxpayer's adjusted sales price (as defined in subsection (b)) of the old residence exceeds the taxpayer's cost of purchasing the new residence.

(b) Adjusted Sales Price Defined.

(1) In General.—For purposes of this section, the term "adjusted sales price" means the amount realized, reduced by the aggregate of the expenses for work performed on the old residence in order to assist in its sale.

(2) Limitations.—The reduction provided in paragraph (1) applies only to expenses—

a. For work performed during the 90-day period ending on the day on which the contract to sell the old residence is entered into;

b. Which are paid on or before the thirtieth day after the date of the sale of the old residence; and

c. Which are

1. Not otherwise allowable as deductions in computing taxable income under this Chapter, and

2. Not taken into account in computing the amount realized from the sale of the old residence.

(3) Effective Date.—The reduction provided in paragraph (1) applies to expenses for work performed in any taxable year (whether beginning before, on or after January 1, 1957), but only in the case of a sale or exchange of an old residence which occurs after December 31, 1956.

(c) Rules for Application of Section.—For the purposes of this section:

(1) An exchange by the taxpayer of his residence for other property shall be treated as a sale of such residence, and the acquisition of a residence on the exchange of property shall be treated as a purchase of such residence.

(2) A residence any part of which was constructed or reconstructed by the taxpayer shall be treated as purchased by the taxpayer. In determining the taxpayer's cost of purchasing a residence, there shall be included only so much of his cost as is attributable to the acquisition, construction, reconstruction, and improvements made which are properly chargeable to capital account, during the period specified in subsection (a).

(3) If a residence is purchased by the taxpayer before the date of his sale of the old residence, the purchased residence shall not

be treated as his new residence if sold or otherwise disposed of by him before the date of the sale of the old residence.

(4) If the taxpayer, during the period described in subsection (a), purchases more than one residence which is used by him as his principal residence at some time within one year after the date of the sale of the old residence, only the last of such residences so used by him after the date of such sale shall constitute the new residence.

(5) In the case of a new residence the construction of which was commenced by the taxpayer before the expiration of one year after the date of the sale of the old residence, the period specified in subsection (a), and the one year referred to in paragraph (4) of this subsection, shall be treated as including a period of 18 months beginning with the date of the sale of the old residence.

(d) Limitation.—Subsection (a) shall not apply with respect to the sale of the taxpayer's residence if within one year before the date of such sale the taxpayer sold at a gain other property used by him as his principal residence, and any part of such gain was not recognized by reason of subsection (a).

(e) Basis of New Residence.—Where the purchase of a new residence results, under subsection (a) in the nonrecognition of gain on the sale of an old residence, in determining the adjusted basis of the new residence as of any time following the sale of the old residence, the adjustments to basis shall include a reduction by an amount equal to the amount of the gain not so recognized on the sale of the old residence. For this purpose, the amount of the gain not so recognized on the sale of the old residence includes only so much of such gain as is not recognized by reason of the cost, up to such time, of purchasing the new residence.

(f) Tenant-Stockholder in a Cooperative Housing Corporation.—For purposes of this section references to property used by the taxpayer as his principal residence, and references to the residence of a taxpayer, shall include stock held by a tenant-stockholder in a cooperative housing corporation if -

(1) In the case of stock sold, the house or apartment which the taxpayer was entitled to occupy as such stockholder was used by him as his principal residence, and

(2) In the case of stock purchased, the taxpayer used as his principal residence the house or apartment which he was entitled to occupy as such stockholder.

(g) Husband and Wife.

(1) If the taxpayer and his (or her) spouse own the old residence by the entirety and purchase the new residence by the entirety, then any gain shall be recognized only to the extent provided in subsection (a) of this section and shall be divided equally between the spouses, and the basis of the new residence shall be divided equally between said spouses.

(2) If the taxpayer and his (or her) spouse own (or owned) either the old or the new residence by the entirety and the other residence is (or was) owned solely by one of the spouses then the nonrecognition of gain as provided in subsection (a) of this section shall not apply unless both such spouses consent to compute any gain or loss upon the sale of the old residence as if the new residence were purchased under the same ownership as the old residence and to determine the basis of the new residence as if the old residence were owned under the same ownership as that under which the new residence is purchased. (1957, c. 1340, s. 4.)

§ 105-144.3. Bond premium amortization by bondholder. — (a) Amortization of bond premiums on tax-exempt bonds shall be mandatory

for all taxpayers. Amortization for the taxable year shall be accomplished by lowering the basis or adjusted basis of the bond, with no deduction against gross income for the year.

(b) Amortization of bond premiums on taxable bonds shall be elective for all taxpayers. The amortizable premium for the taxable year may be deducted only if an adjustment is made to the basis of the bond.

(c) For purposes of this section, the term "bond" means any bond, debenture, note, or certificate or other evidence of indebtedness issued by any corporation and bearing interest and includes any like obligation issued by any government or political subdivision thereof. (1957, c. 1340, s. 4; 1963, c. 1169, s. 2.)

§ 105-144.4. Stock distribution pursuant to antitrust laws.—(a) Effect on Distributees.

(1) General Rule.—If a corporation (referred to in this section as the "distributing corporation") distributes to a shareholder, with respect to its stock held by such shareholder, stock which, when distributed to the distributee, is divested stock (as defined in subsection (d)) then no gain or loss shall be recognized to (and no amount shall be includible in the income of) such shareholder on the receipt of such divested stock.

(2) Non-Prorata Distribution, etc.—Paragraph (1) shall be applied without regard to the following:

a. Whether or not the distribution is pro rata with respect to all of the shareholders of the distributing corporation, and

b. Whether or not the shareholder surrenders stock in the distributing corporation.

(3) Distributions to Avoid Federal Income Tax.—Paragraph (1) shall not apply to any transaction one of the principal purposes of which is the distribution of the earnings and profits of the distributing corporation or of the corporation whose stock is distributed, or both (but the mere fact that either corporation has accumulated earnings and profits shall not be construed to mean that one of the principal purposes of the transaction is the distribution of the earnings and profits of either corporation, or both).

(4) Distribution Involving Gift or Compensation.—In the case of a distribution to which paragraph (1) applies, but which

a. Results in a gift, see G.S. 105-188 et seq. of the General Statutes, or

b. Has the effect of the payment of compensation, see G.S. 105-141 of the General Statutes.

(b) Basis of Property Acquired in Distributions.—If, by reason of subsection (a), gain or loss is not recognized with respect to the receipt of divested stock, then, under regulations prescribed pursuant to G.S. 105-262:

(1) If the divested stock is received by a shareholder without the surrender by such shareholder of stock in the distributing corporation, the basis of such divested stock and of the stock with respect to which it is distributed shall, in the distributee's hands, be determined by allocating the adjusted basis of the stock with respect to which the distribution was received between such stock and the divested stock received; or

(2) If the divested stock is received by a shareholder in exchange for stock in the distributing corporation, the basis of the divested stock shall, in the distributee's hands, be the same as the adjusted basis of the stock exchanged therefor.

(c) Allocation of Earnings and Profits.

(1) Allocation in Certain Corporate Separations.—In the case of a distri-

bution or exchange under subsection (a) of stock in a controlled corporation, proper allocation with respect to the earnings and profits of the distributing corporation and the controlled corporation shall be made under regulations prescribed pursuant to G.S. 105-262.

(2) Definition of Controlled Corporation.—For the purposes of paragraph (1), the term "controlled corporation" means a corporation with respect to which at least eighty percent (80%) of the total combined voting power of all classes of stock entitled to vote and at least eighty percent (80%) of the total number of shares of all other classes of stock is owned by the distributing corporation.

(d) Definition of Divested Stock.—For the purposes of this section, the term "divested stock" means stock which is

(1) The subject of a judgment, decree, or other order of a court or of a commission or board authorized to enforce compliance in a suit or other proceeding brought by the United States or such a commission or board under the Sherman Act (26 Stat. 209, 15 U.S.C. sec. 1-7, as amended) and the Clayton Act (38 Stat. 730, 15 U.S.C. sec. 12-27, as amended), and

(2) Distributed by the distributing corporation pursuant to a judgment, decree, or order entered after June 1, 1958, in such suit or proceeding, if such judgment, decree, or order

a. Directs the distributing corporation to divest itself of such stock,

b. Specifies and itemizes the stock to be divested, and

c. Recites that such divestment is necessary or appropriate to effectuate the policies of the Sherman Act or the Clayton Act, or both. (1959, c. 1131; 1967, c. 1110, s. 3.)

§ 105-145. Exchanges of property.—(a) When property is exchanged for other property of like kind, the property received in exchange shall be considered as a conversion of assets from one form to another, from which no gain or loss shall be deemed to arise.

(b) (1) In the case of the organization of a corporation, the stock or securities received shall be considered to take the place of property transferred therefor, and no gain or loss shall be deemed to arise therefrom.

(2) No gain or loss shall be recognized when property is transferred to a corporation, the organization of which has been completed before such transfer, solely in exchange for stock or securities in such corporation if, immediately after such exchange, the person or persons making such transfer are in control of the corporation.

(c) (1) No gain or loss to a stockholder shall be recognized when a corporation, which is a party to a reorganization, in pursuance of the plan of reorganization, and in exchange solely for its own stock or securities, or without the transfer to it by or on account of its stockholders of any property, distributes to its stockholders stock or securities in one or more other corporations, each of which is also a party to the reorganization. No gain or loss to the holder of any security issued by a corporation shall be recognized when such corporation is a party to a reorganization and, in pursuance of the plan of reorganization and in exchange solely for securities issued by it, distributes to the holders of such securities stock or securities in one or more other corporations each of which is also a party to the reorganization.

(2) As used in this section, the term "reorganization" shall mean:

a. A statutory merger or consolidation.

b. The acquisition by one corporation, in exchange solely for all or

a part of its voting stock, of stock of another corporation which the acquiring corporation controls immediately after such acquisition (whether or not it had control immediately before the acquisition).

c. The acquisition by one corporation, in exchange solely for all or a part of its voting stock (or in exchange solely for all or a part of the voting stock of a corporation which controls the acquiring corporation), of substantially all the properties of another corporation, but in determining whether the exchange is solely for voting stock the assumption by the acquiring corporation of a liability of the other, or the fact that property acquired is subject to a liability, is disregarded.

d. A transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or one or more of its shareholders (including those who were shareholders immediately before the acquisition) or any combination thereof is in control of the corporation to which the assets are transferred; but only if, in pursuance of the plan, stock or securities of the corporation to which the assets are transferred are distributed to the shareholders tax-free or partially tax-free.

e. A recapitalization.

f. A mere change in identity, form, or place of organization, however effected.

(3) As used in this section, the term "a party to a reorganization" includes the corporation resulting from a reorganization and includes both corporations in the case of a reorganization resulting from the acquisition by one corporation of stock or properties of another, and the term "control" means the ownership of stock possessing at least eighty percent (80%) of the total combined voting power of all classes of stock entitled to vote and at least eighty percent (80%) of the total number of shares of all other classes of stock of the corporation.

(d) If a corporation distributes to a shareholder, with respect to its stock, or distributes to a security holder, in exchange for its securities, solely stock or securities of a corporation which it controls immediately before the distribution and if the distribution was not used principally as a device for the distribution of the earnings and profits of the distributing corporation or the controlled corporation or both, and as part of the distribution the distributing corporation distributes all of the stock and securities in the controlled corporation held by it immediately before the distribution or an amount of stock in the controlled corporation constituting control and if the distribution of the stock in the controlled corporation was not in pursuance of a plan having as one of its principal purposes the avoidance of income tax, then no gain or loss shall be recognized to, and no amount shall be includable in the income of, such shareholder or security holder on the receipt of such stock or securities.

(e) In administering this section and in interpreting the clause "property of like kind," the Commissioner shall whenever applicable use as a guide the federal rules and regulations in the administration of § 1031 of the Federal Internal Revenue Code of 1954 to the extent that same are not in conflict with the provisions of this section. (1939, c. 158, s. 320; 1943, c. 400, s. 4; 1955, c. 1239, ss. 1-3; 1957, c. 1340, s. 4; 1959, c. 1259, s. 4; 1963, c. 1169, s. 2; 1967, c. 1110, s. 3.)

§ 105-146. Inventory. — Whenever, in the opinion of the Commissioner of Revenue, it is necessary, in order clearly to determine the income of any taxpayer, inventories shall be taken by such taxpayer upon such basis as the Commissioner of Revenue may prescribe, conforming

as nearly as may be to the best accounting practice in the trade or business and most clearly reflecting the income. (1939, c. 158, s. 321.)

§ 105-147. Deductions.—In computing net income there shall be allowed as deductions the following items:

(1) All the ordinary and necessary expenses paid during the income year in carrying on any trade or business, including:
   a. As to individuals, reasonable wages of employees for services rendered in producing such income.
   b. As to partnership, reasonable wages of employees and a reasonable allowance for copartners or members of a firm, for services actually rendered in producing such income, the amount of such salary allowance to be included in the personal return of the copartner receiving same.
   c. As to taxpayers engaged in the business of farming, reasonable expenses paid during the income year for the purpose of soil and water conservation to the extent allowable for federal income tax purposes under the provisions of § 175 of the Internal Revenue Code of 1954 as amended.
   d. Repealed by Session Laws 1967, c. 1110, s. 3.
   e. As to taxpayers engaged in the business of farming, reasonable expenses paid during the income year for the purpose of clearing land to make such land suitable for the purpose of farming to the extent allowable under § 182 of the Internal Revenue Code of 1954 as amended.

(2) In the case of an individual, all the ordinary and necessary expenses paid or incurred during the income year for the production or collection of income; for the management, conservation, or maintenance of property held for the production of income; or in connection with the determination, collection or refund of any tax.

(3) All the ordinary and necessary expenses paid during the income year by any teacher, substitute teacher, principal or superintendent of the public schools of the State for the purpose of attending summer school in any accredited college or university. Ordinary and necessary expenses shall be construed to include but shall not be limited to tuition, matriculation fees, registration fees, amounts paid for books and necessary classroom supplies, subsistence and individual athletic supplies. The deduction authorized under this subdivision shall not exceed the sum of two hundred and fifty dollars ($250.00) for any one year.

(4) Rentals or other payments required to be made as a condition of the continued use or possession for the purpose of the trade of property to which the taxpayer has not taken or is not taking title, or in which he has no equity.

(5) All interest paid during the income year on the indebtedness of the taxpayer except interest paid or accrued in connection with the ownership of real or personal property from which income is derived but is not taxable under this division.

(6) a. Taxes owed by the taxpayer and paid or accrued during income year except those taxes with respect to which a deduction is denied under paragraph b of this subdivision.
   b. No deduction shall be allowed for the following taxes:
      1. Taxes on net income by whatever name called and excess profits taxes.
      2. Gift, inheritance, and estate taxes.
      3. Federal tax on undistributed earnings.
      4. Sales taxes, gasoline taxes, automobile license, and registration fees, unless incurred in the operation of a trade or business.

5. Social security and unemployment taxes paid by an employee or self-employed person.
6. That part of social security and unemployment taxes required to be deducted by the employer from the earnings of an employee.
7. Taxes or assessments assessed for local benefit of a kind tending to increase the value of property assessed.
8. Taxes paid or accrued in connection with the ownership of real or tangible personal property from which income is derived but is not taxable under this division.

(7) Dividends from stock issued by any corporation to the extent herein provided. As soon as may be practicable after the close of each calendar year, the Commissioner of Revenue shall determine from each corporate income tax return filed with him during such year, and due from the filing corporation during such year, the proportion of the entire net income or loss of the corporation allocable to this State under the provisions of G.S. 105-130.4, except as provided herein; if a corporation has a net taxable income in North Carolina and a net loss from all sources wherever located, or, if a corporation has a net loss in North Carolina and a net income from all sources wherever located, the Commissioner shall require the use of the allocation fraction determined under the provisions of G.S. 105-130.4. A taxpayer who is a stockholder in any such corporation shall be allowed to deduct from his gross income the same proportion of the dividends received by him from such corporation during his income year ending at or after the end of such calendar year. Provided that notwithstanding any other provision of this subdivision, a taxpayer who is a stockholder in a holding company as defined in G.S. 105-130.7(6) shall determine the deductible portion of dividend received from such holding company as provided therein. No deduction shall be allowed for any part of any dividend received by such taxpayer from any corporation which filed no income tax return with the Commissioner of Revenue during such calendar year. Dividends received by a taxpayer from stock in any insurance company of this State taxed under the provisions of G.S. 105-228.5 shall be deductible from the gross income of such taxpayer, and a proportionate part of any dividends received from stock in any foreign insurance corporation shall be deductible, such part to be determined on the basis of the ratio of premiums reported for taxation in this State to total premiums collected both in and out of the State. Dividends received by a taxpayer from stock in any bank or trust company in this State taxed under the provisions of Article 8C of Subchapter I of this Chapter shall be deductible. A taxpayer shall be allowed to deduct such proportionate part of dividends received by him from a North Carolina regulated investment company, as defined in G.S. 105-130.12 as represents and corresponds to income received by such regulated investment company which would not be taxed by this State if received directly by the North Carolina resident.

(8) In the case of an individual, moving expenses paid or incurred during any taxable year beginning on or after January 1, 1967, in connection with the commencement of work by such individual as an employee at a new principal place of work to the extent allowed or allowable for federal income tax purposes under the provisions of § 217 of the Internal Revenue Code of 1954 as amended.

(9) Losses of such nature as designated below:

a. Losses of capital or property used in trade or business actually sustained during the income year except that: No deduction shall

be allowed for losses arising from personal loans, endorsements or other transactions of a personal nature not entered into for profit; and losses of such character as specified in paragraph c below shall be deductible only to the extent therein provided.

b. Losses of property not connected with a trade or business sustained in the income year if arising from fire, storm, shipwreck or other casualties or theft to the extent such losses are not compensated for by insurance or otherwise; provided, that for the purpose of this subdivision, any loss arising from theft shall be treated as sustained during the taxable year in which the taxpayer discovers such loss.

c. Losses incurred in the income year from the sale of corporate shares or bonds of corporations or governments, or from transactions in commodity futures contracts. Provided, that in the case of any loss claimed to have been sustained from any sale or other disposition of shares of stock or securities, other than transactions in commodity futures contracts, where it appears that, within a period beginning 30 days before the date of such sale or disposition and ending 30 days after such date, the taxpayer has acquired (by purchase or by an exchange on which the entire amount of gain or loss was recognized by law) or has entered into a contract or option so to acquire substantially identical stock or securities then no deduction for the loss shall be allowed unless the taxpayer is a dealer in stocks or securities and the loss is sustained in a transaction made in the ordinary course of its business; if the property consists of stock or securities the acquisition of which (on the contract or option to acquire which) resulted in the nondeductibility under this section of the loss from the sale or other disposition of substantially identical stock or securities, then the basis shall be the basis of the stock or securities sold or disposed of, increased or decreased, as the case may be, by the difference, if any, between the price at which the stock was acquired and the price at which such substantially identical stock or securities were sold or otherwise disposed of; if the amount of stock or securities acquired (or covered by the contract or option to acquire) is greater than the amount of stock or securities sold or otherwise disposed of, then the provisions herein with respect to the adjustment of the basis of the stock or securities acquired (or covered by the contract or option to acquire) shall not apply to that portion of the amount of stock or securities acquired (or covered by the contract or option to acquire) which shall be in excess of the amount of the stock or securities sold; if the amount of the stock or securities acquired (or covered by the contract or option to acquire) is less than the amount of stock or securities sold or otherwise disposed of, then the provisions hereof with respect to disallowance of loss claimed to have been sustained from the sale or other disposition of stock or securities shall not apply to the portion of the amount thereof in excess of the amount of the stock or securities acquired (or covered by the contract or option to acquire).

d. Losses in the nature of net economic losses sustained in any or all of the five preceding income years arising from business transactions or to capital or property as specified in a and c above subject to the following limitations:

1. The purpose in allowing the deduction of net economic loss of a prior year or years is that of granting some measure of relief

to taxpayers who have incurred economic misfortune or who are otherwise materially affected by strict adherence to the annual accounting rule in the determination of taxable income, and the deduction herein specified does not authorize the carrying forward of any particular items or category of loss except to the extent that such loss or losses shall result in the impairment of the net economic situation of the taxpayer such as to result in a net economic loss as hereinafter defined.

2. The net economic loss for any year shall mean the amount by which allowable deductions for the year other than personal exemptions, nonbusiness deductions and prior year losses shall exceed income from all sources in the year including any income not taxable under this division.
3. Any net economic loss of a prior year or years brought forward and claimed as a deduction in any income year may be deducted from taxable income of the year only to the extent that such carry-over loss from the prior year or years shall exceed any income not taxable under this division received in the same year in which the deduction is claimed, except that in the case of taxpayers required to apportion to North Carolina their net apportionable income, as defined in this division, only such proportionate part of the net economic loss of a prior year shall be deductible from the income taxable in this State as would be determined by the use of the apportionment ratio computed under the provisions of G.S. 105-130.4 or of subsection (c) of G.S. 105-142, as the case may be, for the year of such loss.
4. A net economic loss carried forward from any year shall first be applied to, or offset by, any income taxable or nontaxable of the next succeeding year before any portion of such loss may be carried forward to a succeeding year.
5. No loss shall either directly or indirectly be carried forward more than five years.

(10) Debts ascertained to be worthless and actually charged off within the income year, if connected with business and, if the amount has previously been included in gross income in a return under this division; or, in the discretion of the Commissioner, a reasonable addition to a reserve for bad debts.

(11) a. Amounts expended by an individual during the year for medical care for himself, herself, his or her qualifying spouse and his or her dependents, to the extent that the total of such expenses actually paid in the income year and not compensated for by insurance or otherwise shall exceed five percent (5%) of his or her adjusted gross income; provided, that the total allowable deduction in any taxable year shall not exceed five thousand dollars ($5,000).

b. For the purpose of this subdivision:

1. The term "medical care" means amounts paid for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body; for transportation primarily for and essential to medical care; and for insurance against illness or accident other than insurance against loss of earnings.
2. The term "qualifying spouse" means a spouse who has not claimed a two thousand dollar ($2,000) personal exemption.

3. The term "dependents" means those individuals qualifying as dependents under the provisions of subdivision (5) of subsection (a) of G.S. 105-149, or those individuals for whom a dependency exemption is allowed under that subdivision.

(12) An allowance for depreciation and obsolescence of property and an allowance for depletion in the case of mines, oil and gas wells, other natural deposits and timber to the extent allowed or allowable for federal income tax purposes under the provisions of the Internal Revenue Code of 1954 as amended; provided, that where joint returns are filed by husband and wife for federal income tax purposes the deduction allowed for additional first year depreciation shall be such amount as would have been allowable if separate federal returns had been filed; and provided further, that where there is a difference in the basis of property for State and federal purposes, such difference shall be taken into account in determining the depreciation, obsolescence or depletion allowable under this subdivision.

(13) In lieu of any depreciation allowance pursuant to this section, at the option of the taxpayer, an allowance with respect to the amortization of the cost of any air cleaning device, sewage or waste treatment plant, including waste lagoons and pollution abatement equipment purchased or constructed and installed which reduces the amount of air or water pollution resulting from the discharge of sewage and industrial wastes or other polluting materials or substances into streams, lakes, or rivers, or the emission of air contaminants into the outdoor atmosphere, based on a period of 60 months. The deduction provided herein shall apply to the facilities or equipment of private or public utilities built and installed primarily for the purpose of providing sewer service to residential and outlying areas. The deduction provided for in this subdivision shall be allowed by the Commissioner only upon condition that the person or firm claiming such allowance shall furnish to the Commissioner a certificate from the Board of Water and Air Resources certifying that said Board has found as a fact that the waste treatment plant, air cleaning device, or air or water pollution abatement equipment purchased or constructed and installed as above described has actually been constructed and installed and that such plant or equipment complies with the requirements of said Board with respect to such plants or equipment, that such plant, device, or equipment is being effectively operated in accordance with the terms and conditions set forth in the permit, certificate of approval, or other document of approval issued by the Board of Water and Air Resources, and that the primary purpose thereof is to reduce air or water pollution resulting from the emission of air contaminants or the discharge of sewage and waste and not merely incidental to other purposes and functions. The deduction herein provided for shall also be allowed as to plants or equipment constructed or installed before January 1, 1955, but only with respect to the undepreciated value of such plants or equipment.

(14) An allowance with respect to the amortization of the cost of any emergency facility, as such facility is defined in § 168 of the Internal Revenue Code of 1954, and an allowance with respect to amortization of the cost of a grain storage facility, as such facility is defined in § 169 of the Internal Revenue Code of 1954, to the extent allowed or allowable under such provisions for federal income tax purposes.

(15) Contributions or gifts made by individuals, firms and partnerships

within the income year to corporations, trusts, community chests, funds, foundations or associations organized, and operated exclusively for religious, charitable, literary, scientific, or educational purposes or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or contributions or gifts made by individuals, firms and partnerships within the income tax year to posts or organizations of war veterans, or auxiliary units or societies of any such posts or organizations, if such posts, organizations, units, or societies are organized in the United States or any of its possessions, and if no part of their net earnings inures to the benefit of any private shareholder or individual, or the organization known as Alcoholics Anonymous or any local chapter thereof, or to a cemetery company owned and operated exclusively for the benefit of its members, or any corporation chartered solely for burial purposes as a cemetery corporation and not permitted by its charter to engage in any business not necessarily incident to that purpose, if such company or corporation is not operated for profit and no part of the net earnings of such company or corporation inures to the benefit of any private shareholder or individual; or rescue squads, volunteer fire departments and the Civil Air Patrol, if such organization is not operated for profit and no part of the net earnings of such organization inures to the benefit of any private shareholder, member or individual: Provided, that in the case of such contributions or gifts by a partnership, such amounts shall not be deductible in determining the net income of the partnership but shall be allocated to each partner on the basis of the ratio used for determining each partner's share of the distributive gain or loss of the partnership, and shall be claimed to the extent allowable on each partner's individual return; and, provided further, that in the case of such contributions or gifts by individuals, the amount allowed as a deduction shall be limited to an amount not in excess of fifteen per centum (15%) of the individual's adjusted gross income.

(16) Contributions or gifts made by individuals, firms, and partnerships within the income year to the State of North Carolina, any of its institutions, instrumentalities, or agencies, any county or municipality of this State, their institutions, instrumentalities, or agencies, and contributions or gifts made by individuals, firms, and partnerships within the income year to educational institutions or nonprofit hospitals located within North Carolina, no part of the net earnings of which inures to the benefit of any private stockholder or individual; provided, that in the case of contributions or gifts by a partnership such amounts shall not be deductible in determining the net income of the partnership but shall be allocated to each partner on the basis of the ratio used for determining each partner's share of the distributive gain or loss of the partnership, and shall be claimed to the extent allowable on each partner's individual return. For the purpose of this subdivision, the words "educational institution" shall mean only an educational institution which normally maintains a regular faculty and curriculum and normally has a regularly organized body of students in attendance at the place where the educational activities are carried on.

The words "educational institution" shall be deemed to include all of such institution's departments, schools and colleges, a group of "educational institutions" and an organization (corporation, trust, foundation, association or other entity) organized and operated

exclusively to receive, hold, invest and administer property and to make expenditures to or for the sole benefit of an "educational institution" or group of "educational institutions."

(17) Amounts actually expended by an individual, taxable under this division, in maintaining one or more relatives of the taxpayer, dependent upon the taxpayer for their chief support, in an institution for the care of mental or physical defectives irrespective of whether such dependent relatives be above or below the age of 18: Provided, that the deduction authorized in this subdivision shall apply only to actual expenditures in excess of the amounts allowed as personal exemption for such dependents under the provisions of subdivision (5) of subsection (a) of § 105-149, and the maximum amount that may be deducted by an individual under the authorization herein stated shall not exceed eight hundred dollars ($800.00). Provided further, that any excess of such actual expenditures over the personal exemption for such dependents plus eight hundred dollars ($800.00) may be construed as medical expenses and may be deducted subject to the provisions of subdivision (11) of this section.

(18) a. In the case of a nonresident individual, firm or partnership, the deductions allowed in this section (with the exception of deductions allowed by subdivisions (15) and (16) of this section) shall be allowed only if and to the extent that they are connected with income arising from sources within the State; and the proper apportionment and allocation of the deductions with respect to sources of income within and without the State shall be determined under rules and regulations prescribed by the Commissioner of Revenue.

b. In the case of a nonresident individual, firm or partnership, deductions as provided for and as limited by subdivisions (15) and (16) of this section shall be allowed only if the donees shall have an office in this State and be actively engaged in this State in performing the functions for which the said donees were organized.

(19) In computing net income no deduction shall be allowed under this section for "ordinary and necessary expenses"; rental expense, interest expenses, taxes or contributions being otherwise deductible under this section, if (i) the same are not actually paid within the taxable year or within the time fixed by statute for filing the taxpayer's return; and (ii) if, by reason of the method of accounting of the person to whom the payment is to be made, the amount thereof is not, unless actually paid, includable in the gross income of such person for the taxable year in which or with which the taxable year of the taxpayer ends. In the case of taxpayers who keep their accounts and report for income tax purposes on a cash basis, items of expenditure of such nature as specified above in this subdivision shall not be allowed as a deduction unless such were actually paid within the income year for which a report is made.

(20) Reasonable amounts paid by employers within the income year to trusts which qualify for exemption under subdivision (10) of G.S. 105-138 [subsection (f)(1)a of G.S. 105-161], and reasonable amounts paid by a self-employed individual or owner-employee to a retirement program pursuant to a plan adopted by such individual and approved by the Internal Revenue Service; provided, that amounts which are deductible for federal income tax purposes shall be prima facie allowable as deductions hereunder; provided further, that, in the case of taxpayers on the accrual basis, they shall be deemed to have made payments on the last day of the year of accrual

actual payments are made within the time fixed by statute for filing the taxpayer's return.

(21) Payments made by a divorced or estranged spouse to his or her spouse who is living separate and apart from the spouse making such payment for the separate support and maintenance of such spouse, except that only such amounts may be deducted under this subdivision as are includable in the gross income of the spouse receiving such payments under the provisions of G.S. 105-141.2. Provided, that any individual who reports his income to the State of North Carolina on the accrual basis may claim the deduction authorized by this subdivision if the payments claimed as a deduction are actually made within the time fixed by statute for filing the taxpayer's return.

(22) Individual income taxpayers whose income is reportable to the State for income tax purposes, may, at their option, under such rules and regulations as the Commissioner of Revenue may prescribe, elect to claim a standard deduction equal to ten percent (10%) of their adjusted gross income or five hundred dollars ($500.00), whichever is the lesser, in lieu of all deductions other than those incurred in the deriving of the income and other than personal exemptions and dependency deductions provided that where both spouses have income taxable in this State and one spouse elects to take credit for the standard deduction provided herein, the other spouse must also take such standard deduction. For the purpose of this subdivision, the phrase "adjusted gross income" shall mean adjusted gross income as defined in G.S. 105-141.3 of this Division.

Provided, further, that the provisions of this subdivision shall not apply to taxpayers who are not residents of this State.

(23) As to employers, the amount of the salary or other compensation of an employee which is paid for a period of not more than 24 months after the employee's death to his estate, widow, or heirs provided such payment is made in recognition of services rendered by the employee prior to his death and is reasonable in amount.

(24) Deduction for Removal of Architectural Barriers to the Handicapped.—Any taxpayer who shall renovate an existing building or facility owned by such taxpayer in order to permit physically handicapped persons to enter and leave such building or facility, or to have effective use of the accommodations and facilities therein shall be allowed a deduction for the entire amount of the cost of such renovation. The deduction shall be allowable in the year the renovation is completed and shall be in lieu of any depreciation or amortization of the cost of such renovation. "Building or facility" shall mean only a building or facility, or such part thereof as is intended to be used, and is actually used, by the general public. If such building or facility is owned by more than one owner, the cost of renovation shall be apportioned among or between the owners as their interests may appear. The minimum renovation required in order to entitle a taxpayer to claim the deduction herein provided shall include one or more of the following: the provision of ground level or ramped entrances, free movement between public use areas, and washroom and toilet facilities accessible to and usable by physically handicapped persons. (1939, c. 158, s. 322; 1941, c. 50, s. 5; 1943, c. 400, s. 4; c. 668; 1945, c. 708, s. 4; c. 752, s. 3; 1947, c. 501, s. 4; c. 894; 1949, c. 392, s. 3; 1951, c. 643, s. 4; c. 937, s. 4; 1953, c. 1031, s. 1; c. 1302, s. 4; 1955, c. 1100, s. 1; c. 1331, s. 1; cc. 1332, 1342; c. 1343, s. 1; 1957, c. 1340, ss. 4, 8; 1959, c. 1259, s. 4; 1961, c. 201, s. 1; c. 1148; 1963, c. 1169, s. 2; 1965, c. 1048; 1967, cc. 259, 550; c. 892, s. 6; c. 1110, s. 3; c. 1252, s. 2; 1969, cc. 725, 1082, 1123; c. 1175, s. 2; 1971, c. 1087, s. 2; c. 1206, s. 2.)

Editor's Note.—The first 1969 amendment, effective for taxable years beginning on and after Jan. 1, 1969, inserted the provisions as to rescue squads, volunteer fire departments and the Civil Air Patrol in subdivision (15).

The second 1969 amendment, applicable with respect to income tax years commencing on or after July 1, 1969, inserted "or nonprofit hospitals" near the middle of the first sentence of the first paragraph of subdivision (16).

The third 1969 amendment, effective for taxable years beginning on and after Jan. 1, 1969, inserted the fourth sentence of subdivision (7).

The fourth 1969 amendment, effective July 1, 1969, added the second sentence of the first paragraph and the second paragraph of subdivision (16).

The first 1971 amendment, effective for income years beginning on or after Jan. 1, 1972, added "or those individuals for whom a dependency exemption is allowed under that subdivision" at the end of subdivision (11)b3.

The second 1971 amendment, effective Jan. 1, 1972, added subdivision (24).

For comment on subdivision (19), see 17 N.C.L. Rev. 383. For discussion of the provisions of this and other sections of the North Carolina income tax law designed to guard against excessive duplicate taxation, see 27 N.C.L. Rev. 582.

For brief comment on the second 1951 amendment which made an insertion, since deleted, in subdivision (7), see 29 N.C.L. Rev. 415.

For comment on the 1953 amendments which amended subdivisions (12) and (15) and added subdivision (22), see 31 N.C.L. Rev. 436, 439 (1953).

For note on income tax consequences of alimony payments, see 29 N.C.L. Rev. 319.

For notes as to employees' death benefits and the relation between trust income and beneficiary income under the 1957 amendments, see 36 N.C.L. Rev. 163, 166 (1958).

Constitutionality of subdivision (18).—Subdivision (18) of this section limiting the right of a nonresident taxpayer, in computing his net income taxable by this State, to claim only those deductions which are related to his business in this State, is valid and does not constitute an unlawful discrimination in that residents of this State are permitted personal deductions not allowed to the nonresident, since only the income of the nonresident earned within this State is subject to income taxes here. Stiles v. Currie, 254 N.C. 197, 118 S.E.2d 428 (1961).

Deduction Defined.—A deduction is defined as "something that is or may be subtracted." Ward v. Clayton, 5 N.C. App. 53, 167 S.E.2d 808 (1969).

Nature of Deductions. — Deductions are in the nature of exemptions; they are privileges, not matters of right, and are allowed as a matter of legislative grace. Ward v. Clayton, 5 N.C. App. 53, 167 S.E.2d 808 (1969).

Taxpayer claiming deduction must bring himself within the statutory provisions authorizing the deduction. Ward v. Clayton, 5 N.C. App. 53, 167 S.E.2d 808 (1969).

The allowance of a deduction in the computation of taxable income is a privilege granted as a matter of legislative grace. One claiming the deduction must bring himself within the statutory provisions authorizing it, and in general the deduction may be taken only by the taxpayer to whom it accrues. Holly Farms Poultry Indus., Inc. v. Clayton, 9 N.C. App. 345, 176 S.E.2d 367 (1970).

Business expenses are proper deductions from one's taxable income. Ward v. Clayton, 5 N.C. App. 53, 167 S.E.2d 808 (1969).

This section authorizes a deduction for certain casualty losses, including fire, to property not connected with a trade or business. Ward v. Clayton, 5 N.C. App. 53, 167 S.E.2d 808 (1969).

Section Prescribes No Method for Ascertaining Amount of Casualty Loss. — This section enumerates the items, including casualty losses, which are deductible, but prescribes no method for ascertaining the amount of such casualty loss. Ward v. Clayton, 276 N.C. 411, 172 S.E.2d 531 (1970).

Determining Deduction for Loss of Timber by Fire.—A taxpayer's loss of timber by fire is an "other disposition of property" within the meaning of § 105-144, and therefore the income tax deduction allowable under this section for such casualty loss may not exceed the taxpayer's cost basis of the property so destroyed. Ward v. Clayton, 276 N.C. 411, 172 S.E.2d 531 (1970).

Deduction of Particular Charges, Expenses, or Disbursements.—The states may allow deductions in the computation of income for income tax purposes as they choose, and statutes imposing a tax on incomes ordinarily authorized the deduction from gross income of particular charges, expenses, or disbursements, in arriving at the income on which the tax is to be imposed. Ward v. Clayton, 5 N.C. App. 53, 167 S.E.2d 808 (1969).

Strict Accounting on Annual Basis Formerly Required.—The North Carolina income tax statutes formerly required all taxpayers to account strictly on an annual basis, reporting for each taxable year all items of gross income and claiming as deductions for that year only items properly pertaining to that accounting period. Holly Farms Poultry Indus., Inc. v. Clayton, 9 N.C. App. 345, 176 S.E.2d 367 (1970).

But Loss Carry-Over Provision Was Added for Purpose of Tax Relief.—For the purpose of granting some measure of relief to taxpayers

who have incurred economic misfortune or who are otherwise materially affected by strict adherence to the annual accounting rule in the determination of taxable income, the legislature added a loss carry-over provision to the State income tax statute which is now subdivision (9)d of this section. Holly Farms Poultry Indus., Inc. v. Clayton, 9 N.C. App. 345, 176 S.E.2d 367 (1970).

Deduction of Prior Year's Net Economic Loss from Current Gross Income. — Subdivision (9)d of this section permits, under certain conditions, a deduction of a prior year's net economic loss from current gross income in order to determine taxable income. The legislature was under no constitutional or other legal compulsion to allow any carry-over to be deducted from taxable income in a future year. It enacted the carry-over provisions purely as a matter of grace, gratuitously conferring a benefit but limiting such benefit to the net economic loss of the taxpayer after deducting therefrom the allocable portion of such taxpayer's nontaxable income. Holly Farms Poultry Indus., Inc. v. Clayton, 9 N.C. App. 345, 176 S.E.2d 367 (1970).

Deduction of Loss Carry-Over from Post-Merger Income Depends on Continuity of Business.—A corporation resulting from a merger may not deduct from its post-merger income the loss carry-over of one or more of its constituent corporations unless there is a continuity of business enterprise—that is, unless the income-producing business has not been altered, enlarged, or materially affected by the merger. Holly Farms Poultry Indus., Inc. v. Clayton, 9 N.C. App. 345, 176 S.E.2d 367 (1970).

Type of Merger Makes No Difference. — In determining whether there is a "continuity of business enterprise" after a merger, for purposes of determining the loss carry-over of the surviving corporation it makes no difference that there was a "vertical type" merger in which the several merged corporations were doing jobs in one continuous chain of processing, rather than a "horizontal type" in which each of the corporations was doing basically the same job. Holly Farms Poultry Indus., Inc. v. Clayton, 9 N.C. App. 345, 176 S.E.2d 367 (1970).

Nor Does Purpose of Merger.—The fact that mergers were made in pursuance of an overall plan to bring into being an "integrated" operation and were not for tax avoidance purposes is not determinative of the question of whether the surviving corporation can carry forward and deduct from its own gross income pre-merger losses under subsection (9)d of this section incurred by corporations with which it merged. Holly Farms Poultry Indus., Inc. v. Clayton, 9 N.C. App. 345, 176 S.E.2d 367 (1970).

No Continuity of Business in Surviving Corporation after Merger.—There was no "continuity of business enterprise" where the net worth of the surviving corporation into which two other corporations were merged was increased substantially by each merger, and the surviving corporation was transformed from a manufacturer of poultry feeds into a combined manufacturing and feeding operation; consequently, the surviving corporation was not entitled under subsection (9)d of this section to carry over and deduct for North Carolina income tax purposes the pre-merger net economic losses of the two submerged corporations from the post-merger income earned by the combined corporate businesses. Holly Farms Poultry Indus., Inc. v. Clayton, 9 N.C. App. 345, 176 S.E.2d 367 (1970).

A corporation resulting from the merger of several separate incorporated businesses was not entitled to carry over and deduct the pre-merger net operating losses of some of its constituent corporations from the post-merger income attributable to the other businesses, since the income against which the offset was claimed was not produced by substantially the same businesses which incurred the losses. Holly Farms Poultry Indus., Inc. v. Clayton, 9 N.C. App. 345, 176 S.E.2d 367 (1970).

The burden of proof to establish a deductible loss and the amount of it is on the plaintiff. Ward v. Clayton, 5 N.C. App. 53, 167 S.E.2d 808 (1969).

Section Does Not Include Loans. — Neither § 105-141, which defines income, nor this section, which specifies deductions, includes loans. In re Fleishman, 264 N.C. 204, 141 S.E.2d 256 (1965).

Amounts expended to repay the principal of a loan are not allowed as deductions from taxable income. In re Fleishman, 264 N.C. 204, 141 S.E.2d 256 (1965).

Income from Business Situated in Another State.—In order for a resident taxpayer to be entitled to deduct income derived from a business situated in another state from his income taxable by this State, the taxpayer must show that he has a business or investment in such other state, that the income therefrom is taxable in that state, and that the questioned income is derived from such business or investment. Sabine v. Gill, 229 N.C. 599, 51 S.E.2d 1 (1948).

What are "ordinary and necessary" expenses necessarily vary in individual cases, and depend upon the nature of a particular business, its size, its location, its mode of operations, and to some extent the business customs and practices prevailing at the time and in the locality or area where the taxpayer operates. Therefore, in order to take care of the varying situations as they arise, this section should be left flexible in form for application in individual cases according to the practical meaning of the statutory language.

Wiscassett Mills Co. v. Shaw, 235 N.C. 14, 68 S.E.2d 816 (1952).

In order for an item of expense to be deductible it must be both an "ordinary" expense and a "necessary" expense, since these words are used conjunctively. Also of controlling significance is this phrase appearing in the section: "in carrying on any trade or business." Here, the connotation is that the expense in order to be deductible must relate to the cost of "carrying on" the business, and carrying on a business in plain language means operating the business. Therefore, it would seem that an expense in order to be deductible within the purview of this section not only must be an "ordinary and necessary" business expense, but as a general rule it must relate in a substantial way to the costs of current operations,—to the cost of producing the gross income from which the deduction is sought. Wiscassett Mills Co. v. Shaw, 235 N.C. 14, 68 S.E.2d 816 (1952).

Capital Expenditures Not Deductible.—This section does not sanction the deduction of an expenditure the underlying purpose and predominant effect of which are to provide permanent improvements or betterments reasonably calculated to enhance the value of the taxpayer's business or property for a period substantially beyond the year in which the outlay is made. Such an outlay is a capital expenditure, as distinguished from an item of normal operating business expense, and it is not deductible for income tax purposes. Wiscassett Mills Co. v. Shaw, 235 N.C. 14, 68 S.E.2d 861 (1952).

Ordinarily, the expense of installing sewers is treated as a capital expenditure and is not deductible under this section. And the fact that the taxpayer does not own the property on which the mains were laid and did not by contractual arrangement with the city acquire some vested property rights therein in return for the sums paid to the city does not have the effect of transforming these capital expenditures into ordinary and necessary business expenses to be written off entirely within the year. Wiscassett Mills Co. v. Shaw, 235 N.C. 14, 68 S.E.2d 816 (1952).

Subdivision (4) was intended to provide for the deduction only of "rentals or other payments" as and when the items accrue from year to year, and in no event may it be interpreted as authorizing the deduction in one year of a prepayment of rentals or other like charges for a period of years in advance. Wiscassett Mills Co. v. Shaw, 235 N.C. 14, 68 S.E.2d 816 (1952).

Advance Rentals, Bonuses, etc., to Be Spread Over Life of Lease.—Rentals required to be paid for the use or possession of business property, not owned by the taxpayer and in which he has no equity, may usually be deducted in computing income tax. However, where an expenditure made by a lessee is in the nature of an investment in property used in his trade or business, or is the cost, or part of the cost, of the lease itself, it cannot be deducted in toto from the lessee's taxable income as an expense for the year in which it occurred, but must be recovered in annual allowances. Thus, advances, rentals and bonuses, the price paid for an assignment of a lease, and other similar expenditures by a lessee are not deductible as ordinary and necessary business expenses in the year of payment but are required to be spread over the entire life of the lease. Wiscassett Mills Co. v. Shaw, 235 N.C. 14, 68 S.E.2d 816 (1952).

"Amount" of Gift. — Subdivision (15) contains no technical language. Thus, it must be interpreted in accordance with the ordinary use and common understanding of the words used. According to ordinary use, the "amount" of a gift and the value of a gift have the same meaning and effect. It follows, then, that when a contribution is made in property rather than in cash, the amount of the gift, and the amount of the deduction, is the fair market value of the property at the time of the gift. Wiscassett Mills Co. v. Shaw, 235 N.C. 14, 68 S.E.2d 816 (1952).

Determination of Deduction of Loss for Prior Years.—Subdivision (9)d requires the inclusion of nontaxable income in arriving at an allowable deduction for carry-over purposes to be deducted from taxable income in a succeeding year. Dayton Rubber Co. v. Shaw, 244 N.C. 170, 92 S.E.2d 799 (1956), decided prior to the 1963 amendment.

The 1957 amendment to subdivision (9)d enlarges the time for a loss carry-over and permits a taxpayer, in computing its income tax for the year 1957, to bring forward losses for the prior five years as a credit against income. Royle & Pilkington Co. v. Currie, 250 N.C. 726, 110 S.E.2d 339 (1959), decided prior to the 1963 amendment.

Deduction by Successor Corporation of Loss Sustained by Submerged Corporation. —See Good Will Distributors (Northern), Inc. v. Shaw, 247 N.C. 157, 100 S.E.2d 334 (1957); Good Will Distributors, Inc. v. Currie, 251 N.C. 120, 110 S.E.2d 880 (1959).

Deduction for Depletion Not Required to Be on Basis of Cost.—Deduction on basis of percentage of cost is applicable to depreciation and not to depletion. A reasonable allowance is provided for depletion. There is no requirement it should be on the basis of cost. In re Virginia-Carolina Chemical Corp., 248 N.C. 531, 103 S.E.2d 823 (1958).

Prior to the 1953 amendment to this section, the section permitted a reasonable allowance for depletion without requiring that it should be calculated on percentage of cost; the 1953 amendment made mandatory that which was permissible before. In re Virginia-Carolina

Chemical Corp., 248 N.C. 531, 103 S.E.2d 823 (1958).

Regulation in Respect to Carry-Over Losses Held to Comply with Subdivision (9)d. — The Supreme Court found no conflict between the Income Tax Regulation No. 2, promulgated on 10 February, 1944, by the Commissioner of Revenue and followed by the Department of Revenue in its administrative practice with respect to carry-over losses, and the statutory provisions with respect thereto. Dayton Rubber Co. v. Shaw, 244 N.C. 170, 92 S.E.2d 799 (1956).

Taxes Accruing Prior to Effective Date of Section Not Deductible.—See Wiscassett Mills Co. v. Shaw, 235 N.C. 14, 68 S.E.2d 816 (1952).

Payments Made to Deceased Employee's Estate, Widow or Heirs.—Prior to the 1957 amendment of subsection (23) of this section, payments by an employer in discharge of its legal obligations to compensate its employee were deductible. Boylan-Pearce, Inc. v. Johnson, 257 N.C. 582, 126 S.E.2d 492 (1962).

There appears to be a statutory correlation between § 105-147(23) and the last paragraph of § 105-141(a). Boylan-Pearce, Inc. v. Johnson, 257 N.C. 582, 126 S.E.2d 492 (1962).

The contention that payments by an employer to the widow of an employee are allowable as deductions only when a legal obligation to make such payments exists would seem to render meaningless the 1957 amendment of subsection (23) of this section. Boylan-Pearce, Inc. v. Johnson, 257 N.C. 582, 126 S.E.2d 492 (1962).

The 1957 amendment of subsection (23) of this section makes no reference to a previous or preexisting "contract, resolution of the board of directors, or custom," of the corporation with respect to payments by an employer to a deceased employee's estate, widow or heirs. Boylan-Pearce, Inc. v. Johnson, 257 N.C. 582, 126 S.E.2d 492 (1962).

Payments by an employer to the widow of a deceased executive were authorized and allowable as deductions under subdivision (23) of this section in computing employer's net income, and were not taxable as gifts under § 105-188, and no legal significance was attached to the fact that there was no preexisting plan or policy, or to the fact that the resolution authorizing the payments was not adopted until some 13 months after the death of the executive, or to the fact that the employer was a so-called family corporation. Boylan-Pearce, Inc. v. Johnson, 257 N.C. 582, 126 S.E.2d 492 (1962).

Cited in American Equitable Assurance Co. v. Gold, 249 N.C. 461, 106 S.E.2d 875 (1959); In re Vanderbilt University, 252 N.C. 743, 114 S.E.2d 655 (1960).

§ 105-148. Items not deductible.—In computing net income no deduction shall in any case be allowed in respect of:

(1) Personal, living, or family expenses.

(2) Any amount paid out for new buildings or for permanent improvements or betterments, made to increase the value of any property or estate.

(3) Premiums paid on any life insurance policy except to the extent that such payments made by the employer are on group life insurance plans for the benefit of the employees, which plans have been approved by the Commissioner of Insurance and which premiums constitute ordinary and necessary business expense.

(4) Sick pay.

(5) Child care payments.

(6) Contributions to individuals.

(7) Commuting expenses.

(8) Contributions to any governmental unit, instrumentality, agency or institution other than those contributions allowable as deductions in subdivisions (15) and (16) of G.S. 105-147. (1939, c. 158, s. 323; 1941, c. 50, s. 5; 1943, c. 400, s. 4; 1959, c. 1259, s. 4; 1963, c. 1169, s. 2.)

§ 105-149. Exemptions.—(a) There shall be deducted from the net income the following exemptions:

(1) In the case of a single individual, a personal exemption of one thousand dollars ($1,000).

(2) In the case of a married man with a wife living with him, two thousand dollars ($2,000). Provided, that a husband living with his wife may by agreement with his wife allow her to claim the two thousand dollars ($2,000) exemption provided in this subsection and

the husband in such case shall be entitled to claim an exemption of only one thousand dollars ($1,000), in which case the husband must file a return for the same year, regardless of whether he shall have reportable income for such year, and shall claim thereon only a one thousand dollar ($1,000) exemption exclusive of any other exemptions to which he may be entitled under this subsection.

(2a) In the case of an individual who qualifies as "head of household" as defined in subdivision (8) of G.S. 105-135, two thousand dollars ($2,000), but the "head of household" exemption shall not be allowable to a married woman living with her husband except as provided in subsection (c)(2) of this section. The "head of household" exemption shall be in lieu of and not in addition to the exemptions established in subdivisions (1), (2), (4), (6) and (7) of subsection (a). Only one "head of household" exemption shall be allowable with respect to any one household, as the term "household" is defined in subdivision (8) of G.S. 105-135, and no individual shall be entitled to more than one "head of household" exemption.

(3) A married woman having a separate and independent income, one thousand dollars ($1,000).

(4) In the case of a widow or widower having minor child or children, natural or adopted, two thousand dollars ($2,000).

(5) Six hundred dollars ($600.00) for each dependent (as defined below) whose gross income for the calendar year in which the taxable year of the taxpayer begins is less than one thousand dollars ($1,000), or who is a child of the taxpayer either under 19 years of age or a student regularly enrolled for full-time study in a school, college, or other institution of learning. For the purpose of the preceding sentence, the term "child" means an individual who is a son or daughter (natural or adopted), or a stepson or stepdaughter of the taxpayer.

An additional exemption of six hundred dollars ($600.00) for a dependent (as defined in this subdivision) who is a full-time student at an accredited college or university or other institution of higher learning under such rules or regulations as may be prescribed by the Commissioner of Revenue. For the purposes of this paragraph, the words "full-time student" shall mean a dependent enrolled in full-time study on the last day of the income year or enrolled for full-time study for a period of at least five months (whether or not consecutive) during the income year.

For the purposes of this subsection, the term "dependent" means any of the following individuals over half of whose support, for the calendar year in which the taxable year of the taxpayer begins, was received from the taxpayer:

a. A son or daughter (or a descendent of either), a stepson, or stepdaughter, a brother or sister (including a brother or sister of the half blood), a stepbrother, stepsister, father or mother (or an ancestor of either), a stepfather, a stepmother, a son or daughter of a brother or sister, a brother or sister of the father or mother, a son-in-law, a daughter-in-law, a father-in-law, a mother-in-law, a brother-in-law, or a sister-in-law of the taxpayer;

b. An individual who was a member of the same household as the taxpayer;

c. A former member of the same household as the taxpayer or an individual who otherwise qualifies as a dependent of the taxpayer, who for the taxable year of such taxpayer receives institutional care required by reason of a physical or mental disability.

The exemption provided in this subdivision for children of taxpayers shall be allowed only to the person claiming the two thousand dollar ($2,000) exemption provided in subdivision (2) of this subsection except, however, that where husband and wife are divorced and have children of their marriage for which they would otherwise be entitled to an exemption hereunder, the parent furnishing the chief support of his (or her) child during the income year shall be entitled to said exemption, irrespective of whether said parent has custody of said child or children or is head of the household during said year.

For the purpose of determining the chief support of an individual other than a son or daughter (natural or adopted) or a stepson or stepdaughter of the taxpayer, over one half of the support of the individual for the calendar year shall be treated as received from the taxpayer if:

a. No one individual contributed over half of such support;
b. Over half of such support was received from individuals each of whom, but for the fact that he did not contribute over half of such support, would have been entitled to claim such individual as a dependent for a taxable year beginning in such calendar year;
c. The taxpayer contributed over ten percent (10%) of such support; and
d. Each individual described in paragraph b (other than the taxpayer) who contributed over ten percent (10%) of such support files a written declaration (in such manner and form as the Commissioner of Revenue may prescribe) that he will not claim such individual as a dependent for any taxable year beginning in such calendar year.

Nothing in this subdivision shall be construed to allow one spouse to claim a six-hundred-dollar ($600.00) exemption for the other spouse.

(6) In the case of a fiduciary filing a return for the net income received during the income year of a deceased resident or nonresident individual who has died during the tax year or income year without having made a return, two thousand dollars ($2,000) if the individual was a married man, and one thousand dollars ($1,000) if the individual was single or a married woman not qualifying as "head of a household."

In the case of a fiduciary filing a return for an insolvent or incompetent individual resident or nonresident where the fiduciary has complete charge of such net income the same exemption to which the beneficiary would be entitled.

(7) In the case of a divorced person having the sole custody of a minor child or children and receiving no alimony for the support of himself, herself, child, or children two thousand dollars ($2,000).

(8) In the case of any person who is totally blind, such person shall be entitled to an additional exemption of one thousand dollars ($1,000) in addition to all other exemptions allowed by law. Provided, such person shall submit to the Department of Revenue a certificate from a physician, an optometrist or from the State Commission for the Blind certifying that such condition exists.

(9) In the case of an individual who has reached the age of 65 years on or before the last day of the taxable year, an exemption of one thousand dollars ($1,000) in addition to all other exemptions allowed by this section.

(b) The exemptions allowable under this section shall be denied to an

individual having income both within and without this State unless the entire income of such individual is shown in his or her return to this State; and if the entire income of such individual is shown in his or her return, the exemptions allowable under this section shall be denied in the proportion that the income earned outside of this State bears to the total income both within and without this State.

(c) The status on the last day of the income year shall determine the right to the exemptions provided in this section, except that:

(1) A taxpayer shall be entitled to the exemptions for a husband, wife or dependents who have died during the year,

(2) A taxpayer who shall have been divorced or separated or shall cease to be "head of a household" during such year shall be entitled to the exemptions as though such event had not occurred if the taxpayer's status was unchanged for the major part of such income year,

(3) A taxpayer shall be entitled to an exemption for a dependent if such taxpayer furnished the major part of the support of such dependent during the income year. (1939, c. 158, s. 324; 1941, c. 50, s. 5; 1943, c. 400, s. 4; 1945, c. 708, s. 4; 1947, c. 501, s. 4; 1949, c. 392, s. 3; c. 1173; 1951, c. 643, s. 4; 1957, c. 1340, s. 4; 1959, c. 1259, s. 4; 1963, c. 1169, s. 2; 1967, c. 716, s. 2; c. 1110, s. 3; 1969, c. 1075, s. 4; 1971, c. 1087, s. 1.)

Editor's Note. — The 1969 amendment, applicable to all taxable years beginning on or after Jan. 1, 1969, deleted the former second sentence of subdivision (2) of subsection (a), relating to the exemption for a "head of household," and added subdivision (2a) of subsection (a). Session Laws 1969, c. 1075, s. 8, provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

The 1971 amendment, in the second sentence of subsection (a)(2), deleted "when" preceding "a husband," deleted the language formerly appearing between "living with his wife" and "may by agreement," substituted "in which case" for "Provided, further, that if the two thousand dollars ($2,000) exemption is taken by the wife," substituted "reportable" for "taxable," and added the language following "income for such year." The amendment also substituted "claiming" for "entitled to" in the fourth paragraph of subsection (a)(5).

Session Laws 1971, c. 1087, s. 3, provides: "This act shall become effective for income years beginning on or after January 1, 1972."

§ 105-150. Exemption as to insurance or other compensation received by veterans.—Any American residing in the State of North Carolina who joined any of the allied armies during the World War and who, on account of injuries received while in service, receives insurance or compensation from any of the allied countries is hereby exempt from liability for income tax on such insurance or compensation in the State of North Carolina. The benefits of this section are hereby extended to and include those coming within the provisions of said section serving at any time between December 7, 1941 and the termination of World War II. (1929, c. 184; 1945, c. 968, s. 1.)

§ 105-151. Tax credits for income taxes paid to other states by individuals.—(a) Individuals who are residents of this State shall be allowed a credit against the taxes imposed by this division for income taxes imposed by and paid to another state or country on income taxed under this division, subject to the following conditions:

(1) The credit shall be allowed only for taxes paid to such other state or country on income derived from sources within such state or country which is taxed under the laws thereof irrespective of the residence or domicile of the recipient; provided, that whenever a taxpayer who is deemed to be a resident of this State under the provisions of this division and who is deemed also to be a resident of another state or country under the laws of such other state or country the Commissioner of Revenue may, in his discretion, allow a credit against the taxes imposed by this division for such taxes imposed by and paid to such other state or country on income taxed under this division.

(2) The fraction of the gross income for North Carolina income tax purposes which is subject to income tax in another state or country shall be ascertained and the North Carolina net income tax before credit under this section shall be multiplied by such fraction. The credit allowed shall be either the product thus calculated or the income tax actually paid the other state or country whichever is smaller.

(3) Receipts showing the payment of income taxes to another state or country and a true copy of a return or returns upon the basis of which such taxes are assessed must be filed with the Commissioner of Revenue at, or prior to, the time credit is claimed. If credit is claimed on account of a deficiency assessment, a true copy of the notice assessing or proposing to assess the deficiency, as well as a receipt showing the payment of the deficiency, must be filed.

(b) If any taxes paid to another state or country for which a taxpayer has been allowed a credit under this section are at any time credited or refunded to the taxpayer, a tax equal to that portion of the credit allowed for such taxes so credited or refunded shall be due and payable from the taxpayer within 30 days from the date of the receipt of the refund or the notice of the credit. If the amount of such tax is not paid within 30 days of receipt or notice the taxpayer shall be subject to the penalties and interest on delinquent payments provided for in Subchapter I of this Chapter. (1939, c. 158, s. 325; 1941, c. 50, s. 5; c. 204, s. 1; 1943, c. 400, s. 4; 1957, c. 1340, s. 4; 1963, c. 1169, s. 2; 1967, c. 1110, s. 3.)

Editor's Note. — For discussion of the provisions of this and other sections of the North Carolina income tax law designed to guard against excessive duplicate taxation, see 27 N.C. L. Rev. 582.

§ 105-152. Returns.—(a) The following persons shall file with the Commissioner of Revenue an income tax return under affirmation, showing therein specifically the items of gross income and the deductions allowed by this division, and such other facts as the Commissioner may require for the purpose of making any computation required by this division:

(1) Every resident or nonresident who has a gross income during the income year which is in excess of the personal exemption to which he or she is entitled under the provisions of G.S. 105-149(a), without the inclusion of the exemptions for dependents provided under subdivision (5) of said subsection, any part of which is subject to taxation in this State.

(2) Every resident or nonresident required under the provisions of G.S. 105-149(b) to prorate his exemption and who has a gross income during the income year from sources both within and without this State in excess of the prorated exemption, any part of which is subject to taxation in this State.

(3) Every partnership having a place of business in the State as provided in G.S. 105-154.

(4) Any person whom the Commissioner believes to be liable for a tax under this division, when so notified by the Commissioner of Revenue and requested to file a return.

(b) If the taxpayer is unable to make his own return, the return shall be made by a duly authorized agent or by a guardian or other person charged with the care of the person or property of such taxpayer.

(c) The return of an individual, who, while living, received income in excess of the exemption during the income year, and who has died before making the return, shall be made in his name and behalf by the administrator, or executor of the estate, and the tax shall be levied upon and collected from his estate.

(d) When the Commissioner of Revenue has reason to believe that any taxpayer so conducts the trade or business as either directly or indirectly to distort his true net income and the net income properly attributable to the

State, whether by the arbitrary shifting of income, through price fixing, charges for service, or otherwise, whereby the net income is arbitrarily assigned to one or another unit in a group of taxpayers carrying on business under a substantially common control, he may require such facts as he deems necessary for the proper computation of the entire net income and the net income properly attributable to the State, and in determining same the Commissioner of Revenue shall have regard to the fair profit which would normally arise from the conduct of the trade or business. (1939, c. 158, s. 326; 1941, c. 50, s. 5; 1943, c. 400, s. 4; 1945, c. 708, s. 4; 1951, c. 643, s. 4; 1957, c. 1340, s. 4; 1967, c. 1110, s. 3.)

Cited in Garrou Knitting Mills v. Gill, 228 N.C. 764, 47 S.E.2d 240 (1948).

§ 105-153: Repealed by Session Laws 1967, c. 1110, s. 3.

Editor's Note. — The repeal is effective for all taxable years beginning on or after Jan. 1, 1967. See Editor's note to § 105-133. For present statute covering the subject matter of the repealed section, see § 105-161.

§ 105-154. Information at the source.—(a) Every individual, partnership, corporation, joint-stock company or association, or insurance company, being a resident or having a place of business or having one or more employees, agents or other representatives in this State, in whatever capacity acting, including lessors or mortgagors of real or personal property, fiduciaries, employers, and all officers and employees of the State or of any political subdivision of the State and all officers and employees of the United States of America or of any political subdivision or agency thereof having the control, receipt, custody, disposal, or payment of interest (other than interest coupons payable to bearer), rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments or other fixed or determinable annual or periodical gains, profits, and incomes paid or payable during any year to any taxpayer, shall make complete return thereof to the Commissioner of Revenue under such regulations and in such form and manner and to such extent as may be prescribed by him. The filing of any report in compliance with the provisions of this section by a foreign corporation shall not constitute an act in evidence of and shall not be deemed to be evidence that such corporation is doing business in this State.

(b) Every partnership having a place of business in the State shall make a return, stating specifically the items of its gross income and the deductions allowed by this division, and shall include in the return the names and addresses of the individuals who would be entitled to share in the net income if distributable, and the amount of the distributive share of each individual, together with the distributive shares of corporation dividends. The return shall be signed by one of the partners under affirmation in the form prescribed in G.S. 105-155 of this division, and the same penalties prescribed in G.S. 105-236 shall apply in the event of a willful misstatement. (1939, c. 158, s. 328; 1945, c. 708, s. 4; 1957, c. 1340, s. 4; 1967, c. 1110, s. 3.)

§ 105-155. Time and place of filing returns.—Returns shall be in such form as the Commissioner of Revenue may from time to time prescribe, and shall be filed with the Commissioner at his main office, or at any branch office which he may establish. The return of every person reporting on a calendar year basis shall be filed on or before the fifteenth day of April in each year, and the return of every person reporting on a fiscal year basis shall be filed on or before the fifteenth day of the fourth month following the close of the fiscal year. In case of sickness, absence, or other disability or whenever in his judgment good cause exists, the Commissioner may allow further time for filing returns.

There shall be annexed to the return the affirmation of the taxpayer making the return in the following form: "Under penalties prescribed by law, I hereby

affirm that to the best of my knowledge and belief this return, including any accompanying schedules and statements, is true and complete. (If prepared by a person other than taxpayer, his affirmation is based on all information of which he has any knowledge.)" The Commissioner shall cause to be prepared blank forms for the said returns, and shall cause them to be distributed throughout the State, and to be furnished upon application; but failure to receive or secure the form shall not relieve any taxpayer from the obligation of making any return herein required. (1939, c. 158, s. 329; 1943, c. 400, s. 4; 1951, c. 643, s. 4; 1953, c. 1302, s. 4; 1955, c. 17, s. 1; 1957, c. 1340, s. 4; 1963, c. 1169, s. 2; 1967, c. 1110, s. 3.)

Editor's Note. — For brief comment on the 1953 amendment which rewrote the second paragraph, see 31 N.C.L. Rev. 441 (1953).

Applied in City of Winston-Salem v. Powell Paving Co., 7 F. Supp. 424 (M.D.N.C. 1934).

§ 105-156. Failure to file returns; supplementary returns.—If the Commissioner of Revenue shall be of the opinion that any taxpayer has failed to file a return or to include in a return filed, either intentionally or through error, items of taxable income, he may require from such taxpayer a return or supplementary return, under oath, in such form as he shall prescribe, of all the items of income which the taxpayer received during the year for which the return is made, whether or not taxable under the provisions of this division. If from a supplementary return or otherwise the Commissioner finds any items of income, taxable under this division, have been omitted from the original return, or any items returned as taxable that are not taxable, or any item of taxable income overstated, he may require the items so omitted to be disclosed to him under oath of the taxpayer, and to be added to or deducted from the original return. Such supplementary return and the correction of the original return shall not relieve the taxpayer from any of the penalties to which he may be liable under any provision of G.S. 105-236. The Commissioner may proceed under the provisions of G.S. 105-241.1, whether or not he requires a return or a supplementary return under this section. (1939, c. 158, s. 331; 1959, c. 1259, s. 8; 1967, c. 1110, s. 3.)

§ 105-156.1. Effective dates of 1957 amendments to Article 4.— Except as otherwise expressly provided herein, the amendments to this Article by Session Laws 1957, c. 1340, s. 4, shall take effect for income years beginning on or after January 1, 1957. (1957, c. 1340, s. 4; 1967, c. 1110, s. 3.)

§ 105-157. Time and place of payment of tax.—(a) Except as otherwise provided in this section and in Article 4A of this Chapter, the full amount of the tax payable as shown on the face of the return shall be paid to the Commissioner of Revenue at the office where the return is filed at the time fixed by law for filing the return.

(b) The tax may be paid with uncertified check during such time and under such regulations as the Commissioner of Revenue shall prescribe; but if a check so received is not paid by the bank on which it is drawn, the taxpayer by whom such check is tendered shall remain liable for the payment of the tax and for all legal penalties the same as if such check had not been tendered. (1939, c. 158, s. 332; 1943, c. 400, s. 4; 1947, c. 501, s. 4; 1951, c. 643, s. 4; 1955, c. 17, s. 2; 1959, c. 1259, s. 2; 1963, c. 1169, s. 2; 1967, c. 702, s. 1; c. 1110, s. 3.)

Applied in City of Winston-Salem v. Powell Paving Co., 7 F. Supp. 424 (M.D.N.C. 1934).

§ 105-158. Abatement of income taxes of certain members of the armed forces upon death.—In the case of any individual

(1) Who dies

a. On or after January 1, 1964;

b. During an induction period [as defined in G.S. 105-141(b)(12)];

c. While in active service as a member of the armed forces of the United States; and

d. While serving in a combat zone [as determined under G.S. 105-141(b)(12)]; or

(2) Who dies

a. On or after January 1, 1964; and

b. As a result of wounds, disease or injury incurred during an induction period, while in active service as a member of the armed forces of the United States, and while serving in a combat zone on or after January 1, 1964,

no individual income tax imposed by the State of North Carolina shall apply with respect to the taxable year in which falls the date of his death, or with respect to any prior taxable year ending on or after the first day he so served in a combat zone; and any tax under this division and under the corresponding provisions of prior revenue laws for taxable years preceding those above specified which is unpaid at the date of his death (including interest, additions to the tax, and additional amounts) shall not be assessed and if assessed the assessment shall be abated, and if collected shall be credited or refunded as an overpayment. (1969, c. 1116.)

Editor's Note. — Former § 105-158 was repealed by Session Laws 1959, c. 1259, s. 9.

§ 105-159. Corrections and changes.—If the amount of the net income for any year of any taxpayer under this division, as reported or as reportable to the United States Treasury Department, is changed, corrected, or otherwise determined by the Commissioner of Internal Revenue or other officer of the United States of competent authority, such taxpayer, within two years after receipt of internal revenue agent's report or supplemental report reflecting the corrected or determined net income shall make return under oath or affirmation to the Commissioner of Revenue of such corrected, changed or determined net income. In making any assessment or refund under this section, the Commissioner shall consider all facts or evidence brought to his attention, whether or not the same were considered or taken into account in the federal assessment or correction. If the taxpayer fails to notify the Commissioner of Revenue of assessment of additional tax by the Commissioner of Internal Revenue, the statute of limitations shall not apply. The Commissioner of Revenue shall thereupon proceed to determine, from such evidence as he may have brought to his attention or shall otherwise acquire, the correct net income of such taxpayer for the fiscal or calendar year, and if there shall be any additional tax due from such taxpayer the same shall be assessed and collected; and if there shall have been an overpayment of the tax the said Commissioner shall, within 30 days after the final determination of the net income of such taxpayer, refund the amount of such excess: Provided, that any taxpayer who fails to comply with this section as to making report of such change as made by the federal government within the time specified shall be subject to all penalties as provided in G.S. 105-236, in case of additional tax due, and shall forfeit his rights to any refund due by reason of such change.

When the taxpayer makes the return reflecting the corrected net income as required by this section, the Commissioner of Revenue shall make assessments or refunds based thereon within three years from the date the return required by this section is filed and not thereafter. When the taxpayer does not make the return reflecting the corrected net income as required by this section but the Department of Revenue receives from the United States government or one of its agents a report reflecting such corrected net income, the Commissioner of Revenue shall make assessments for taxes due based on such corrected net income within five years from the date the report from the United States government or its agent is actually received and not thereafter.

Nothing in this section shall be construed as preventing the Commissioner of Revenue from making an assessment immediately following the receipt from any source of information concerning the correction, change in, or determination of net income of a taxpayer by the United States government The assessment of tax or additional tax under this section shall not be subject to any statute of limitations except as provided in this section. (1939, c. 158, s. 334; 1947, c. 501, s. 4; 1949, c. 392, s. 3; 1957, c. 1340, s. 14; 1963, c. 1169, s. 2; 1967, c. 1110, s. 3.)

This section imposes on the taxpayer a positive duty with respect to his income tax liability beyond that required by § 105-152, respecting his original return; it is his duty not only to report the change made by the federal department but to file another return under oath reflecting it. And the fact that three years had already elapsed after the filing of the original return before the taxpayer received notice of the change made by the federal department did not bring into operation the statute of limitations in § 105-160 so as to relieve the taxpayer of this duty. Garrou Knitting Mills v. Gill, 228 N.C. 764, 47 S.E.2d 240 (1948).

Procedure under Former Statute Exclusive. — The procedure prescribed by the former statute requiring that a new return be made within 30 days of the receipt of the redetermination of the taxpayer's income tax by the federal government was held exclusive and had to be followed to entitle the taxpayer to the relief therein provided. State ex rel. Maxwell v. Hinsdale, 207 N.C. 37, 175 S.E. 847 (1934).

Cited in American Bakeries Co. v. Johnson, 259 N.C. 419, 131 S.E.2d 1 (1963); Ward v. Clayton, 5 N.C. App. 53, 167 S.E.2d 808 (1969).

Division III. Income Tax—Estates, Trusts, and Beneficiaries.

§ **105-160. Short title.**—This division shall be known and may be cited as the Income Tax Act for Estates, Trusts, and Beneficiaries. (1967, c. 1110, s. 3.)

Editor's Note. — Session Laws 1967, c. 1110, s. 3, applicable to all taxable years beginning on or after Jan. 1, 1967, extensively revised and amended this Article, dividing it into three divisions: I. Corporation Income Tax, containing §§ 105-130 to 105-130.21; II. Individual Income Tax, containing §§ 105-133 to 105-159; and III. Income Tax — Estates, Trusts, and Beneficiaries, containing §§ 105-160 to 105-163. Division III, §§ 105-160 through 105-163, is new with the 1967 act, former §§ 105-160 and 105-162 having been repealed by Session Laws 1957, c. 1340, s. 10, former § 105-161 having been repealed by Session Laws 1959, c. 1259, s. 9, and former § 105-163 having been repealed by Session Laws 1955, c. 1350, s. 14. Present §§ 105-161 and 105-162 contain certain provisions similar to those appearing in §§ 105-130 through 105-159 prior to the 1967 act, and the historical citations to the old sections containing similar provisions have been added to the new.

Section 16, c. 1110, Session Laws 1967, provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

§ **105-161. Estates and trusts.**—(a) Imposition of the Tax.—The tax imposed by this division shall apply to the taxable income of estates and trusts including:

(1) Income accumulated in trust for the benefit of unborn or unascertained individuals or individuals with contingent interest, and income accumulated or held for future distribution under the terms of the will or trust;

(2) Income which is to be distributed currently by the fiduciary to the beneficiaries;

(3) Income received by estates of deceased individuals during the period of administration or settlement of the estate; and

(4) Income which, in the discretion of the fiduciary, may be either distributed to the beneficiaries or accumulated.

(b) Computation and Payment.—The net taxable income of an estate or a trust shall be determined in the same manner as provided in Division II of this Article for an individual except as otherwise provided in this section. The tax shall be at the same rates as provided in G.S. 105-136 for individuals and shall

be computed on that portion of undistributed net income of an estate or trust which is for the benefit of a resident of this State, or for the benefit of a nonresident to the extent that such income is derived from an established business or from an investment in tangible property located in this State. The tax so computed shall be paid by the fiduciary responsible for administering the estate or trust.

(c) Definitions.—For the purpose of this section the words and phrases defined in Division II of Article 4 shall have the same meanings prescribed to them in that division. In addition, the following words and phrases when used in this section, shall, for the purpose of this section, have the meanings respectively prescribed to them in this subsection, except in those instances where the context clearly indicates a different meaning:

(1) Distributable Net Income: The taxable income of the estate or trust computed with the following modifications:

a. No deduction shall be taken under subsection (d)(5) and (d)(6) of this section (relating to additional deductions).

b. No deduction shall be taken under subsection (d)(7) of this section (relating to personal exemption).

c. Gains from the sale or exchange of property shall be excluded to the extent that such gains are allocated to corpus and are not (i) paid, credited, or required to be distributed to any beneficiary during the taxable year, or (ii) paid, permanently set aside, or to be used for the purposes specified in subsection (d)(4) of this section.

Losses from the sale or exchange of property shall be excluded except to the extent such losses are taken into account in determining the amount of gains from the sale or exchange of property which are paid, credited or required to be distributed to any beneficiary during the taxable year.

d. For purposes only of trusts described in subsection (d)(5) of this section which are required to distribute current income only, there shall be excluded those items of gross income constituting extraordinary dividends or taxable stock dividends which the fiduciary, acting in good faith, does not pay or credit to any beneficiary by reason of his determination that such dividends are allocable to corpus under the terms of the governing instrument and applicable State law.

e. There shall be included any tax-exempt interest to which G.S. 105-141(b)(4) applies, reduced by any amounts which would be deductible in respect of disbursement allocated to such interest but for the provisions of G.S. 105-147(5).

If the estate or trust is allowed a deduction under subsection (d)(4) of this section, the amount of the modifications specified in subsection (c)(1)e above shall be reduced to the extent that the amount of income which is paid, permanently set aside, or to be used for the purposes specified in subsection (d)(4) of this section is deemed to consist of items specified in subsection (c)(1)e. For this purpose, such amount shall (in the absence of specific provisions in the governing instrument) be deemed to consist of the same proportion of each class of items of income of the estate or trust as the total of each class bears to the total of all classes.

(2) Income: The term "income," when not preceded by the words "taxable," "distributable net," "undistributed net," or "gross," means the amount of income of the estate or trust for the taxable year determined under the terms of the governing instrument and applicable State law. Items of gross income constituting extraordinary dividends or taxable stock dividends which the

fiduciary, acting in good faith, determines to be allocable to corpus under the terms of the governing instrument and applicable State law shall not be considered income.

(3) Taxable Income: The term "taxable income" means the gross income as defined in G.S. 105-141 less the deductions and exemptions allowed by this section.

(4) Beneficiary: Any heir, legatee, devisee, and any other person, firm or corporation who acquires under any governing instrument the right to receive income from any estate or trust.

(d) Deductions.—(1) Allowable Deductions: Except as otherwise provided in this section, the same deductions allowed individuals under G.S. 105-147 shall be allowed in computing the net income of an estate or trust.

(2) Deductions for Depreciation and Depletion: In case of property held in trust, the deduction for depreciation and depletion shall be apportioned between the income beneficiaries and the trustee in accordance with the instrument creating the trust, or in the absence of such provisions, on the basis of the trust income allocable to each. In the case of an estate, the allowable depreciation deduction shall be apportioned between the estate and the heirs, legatees, and devisees on the basis of the portion of the income of the estate allocable to each.

(3) Double Deduction Not Allowed: Amounts allowable under G.S. 105-9 as a deduction in computing the taxable estate of a decedent for inheritance tax purposes shall not be allowed as a deduction in computing the taxable income of the estate, unless there is filed, within the time and in the manner and form prescribed by the Commissioner of Revenue, a statement that the amounts have not been allowed as deductions under G.S. 105-9 and a waiver of the right to have such amounts allowed as deductions under G.S. 105-9. This subdivision shall not apply with respect to deductions allowed under G.S. 105-142.1(e) (relating to income in respect of decedents).

(4) Amounts Paid or Permanently Set Aside for Charity:

a. Deduction: In determining the net income of an estate or trust for purposes of this section (other than a trust described in subsection (d)(5) of this section), there shall be allowed as a deduction in computing the taxable income of the estate or trust (in lieu of the deductions allowed by G.S. 105-147(15) and (16)) any amount of the gross income, without limitation, which pursuant to the terms of the governing instrument is, during the taxable year, paid or permanently set aside for a religious, charitable, scientific, literary, or educational purpose or for the prevention of cruelty to children or animals, or for a distributee specified in G.S. 105-147(15) or G.S. 105-147(16).

b. Limitation on Deduction:

1. Trade or Business Income: In computing the deduction allowable under paragraph a of this subdivision to a trust, no amount otherwise allowable under paragraph a shall be allowable as a deduction with respect to income of the taxable year which is allocable to its unrelated business income for such year. For purposes of the preceding sentence, the term "unrelated business income" means an amount equal to the amount which, if such trust were exempt from tax under subsection (f)(1) of this section, would be computed as its unrelated business taxable income under subsection (f)(2) of this section, (relating to income derived from certain business activities).

2. Prohibited Transactions: The amount otherwise allowable

under paragraph a of this subdivision as a deduction shall not be allowable if the trust has engaged in a prohibited transaction. For purposes of this subdivision, the term "prohibited transaction" means any transaction after January 1, 1967, in which any trust while holding income or corpus which has been permanently set aside or is to be used exclusively for charitable or other purposes described in paragraph a of this subdivision:

I. Lends any part of such income or corpus, without receipt of adequate security and a reasonable rate of interest, to;

II. Pays any compensation from such income or corpus, in excess of a reasonable allowance for salaries or other compensation for personal services actually rendered, to;

III. Makes any part of its services available on a preferential basis to;

IV. Uses such income or corpus to make any substantial purchase of securities or any other property, for more than an adequate consideration in money or money's worth from;

V. Sells any substantial part of the securities or other property comprising such income or corpus, for less than an adequate consideration in money or money's worth, to; or

VI. Engages in any other transaction which results in a substantial diversion of such income or corpus to;

the creator of such trust; any person who has made a substantial contribution to such trust; a member of a family (including for these purposes brothers and sisters, whether by whole or half blood, spouse, ancestors, and lineal descendants) of an individual who is the creator of the trust or who has made a substantial contribution to the trust; or a corporation controlled by any such creator or person through the ownership, directly or indirectly, of fifty percent (50%) or more of the total combined voting power of all classes of stock of the corporation.

The amount otherwise allowable under paragraph a of this subdivision as a deduction shall be denied by reason of having engaged in a prohibited transaction only for taxable years after the taxable year during which the trust is notified by the Commissioner of Revenue that it has engaged in such transaction, unless such trust entered into such prohibited transaction with the purpose of diverting such corpus or income from the purposes described in paragraph a of this subdivision, and such transaction involved a substantial part of such corpus or income. Provided, that if the deduction of any trust under paragraph a has been denied as herein provided, such trust, with respect to any taxable year following the taxable year in which notice is received of denial of the deduction under paragraph a, may, in such manner as prescribed by the Commissioner of Revenue, file claim for the allowance of the unlimited deduction under paragraph a, and if the Commissioner of Revenue is satisfied that such trust will not knowingly again engage in a prohibited transaction the denial of the deduction provided herein shall not apply with respect to the taxable years after the year in which such claim is filed.

3. Accumulated Income: If the amounts permanently set aside, or

to be used exclusively for the charitable and other purposes described in paragraph a of this subdivision during the taxable year or any prior taxable year and not actually paid out by the end of the taxable year:

I. Are unreasonable in amount or duration in order to carry out such purposes of the trust;

II. Are used to a substantial degree for purposes other than those prescribed in paragraph a of this subdivision; or

III. Are invested in such manner as to jeopardize the interests of the religious, charitable, scientific, etc., beneficiaries, the amount otherwise allowable under paragraph a of this subdivision shall be limited to the amount actually paid out during the taxable year.

(5) Deduction for Trusts Distributing Current Income Only:

a. Deduction: In the case of any trust the terms of which provide that all of its income is required to be distributed currently, and do not provide that any amounts are to be paid, permanently set aside, or used for the purposes specified in subsection (d)(4) of this section (relating to deduction for charitable, etc., purposes), there shall be allowed as a deduction in computing the taxable income of the trust the amount of the income for the taxable year which is required to be distributed currently. This subdivision shall not apply in any taxable year in which the trust makes distributions other than amounts of income required to be distributed currently.

b. Limitation of the Deduction: If the amount of income required to be distributed currently exceeds the distributable net income of the trust for the taxable year, the deduction shall be limited to the amount of the distributable net income. For this purpose, the computation of distributable net income shall not include items of income which are not included in the gross income of the trust and the deductions allocable thereto.

(6) Deductions for Estates and Trusts Accumulating Income or Distributing Corpus:

a. Deduction: In any taxable year there shall be allowed as a deduction in computing the taxable income of an estate or trust (other than a trust to which subsection (d)(5) applies), the sum of:

1. Any amount of income for such taxable year required to be distributed currently (including any amount required to be distributed which may be paid out of income or corpus to the extent such amount is paid out of income for such taxable year); and

2. Any other amounts properly paid, credited, or required to be distributed for such taxable year. In no case shall this deduction exceed the distributable net income of the estate or trust.

b. Character of Amounts Distributed: The amount determined under paragraph a shall be treated as consisting of the same proportion of each class of items entering into the computation of distributable net income of the estate or trust as the total of each class bears to the total distributable net income of the estate or trust in the absence of the allocation of different classes of income under the specific terms of the governing instrument. In the application of the preceding sentence, the items of deduction entering into the computation of distributable net income (including the deduction allowed under subsection (d)(4)) shall be

allocated among the items of distributable net income in such manner as may be prescribed by the Commissioner of Revenue.

c. Limitation on the Deduction: No deduction shall be allowed under paragraph a in respect of any portion of the amount allowed as a deduction under that paragraph (without regard to this paragraph) which is treated under paragraph b as consisting of any items of distributable net income which are not included in the gross income for the estate or trust.

d. Exclusion: There shall not be included as amounts falling within subsection (d)(6) of this section:

1. Any amount which, under the terms of the governing instrument, is properly paid or credited as a gift or bequest of a specific sum of money or of specific property and which is paid or credited all at once or in not more than three installments. For this purpose, an amount which can be paid or credited only from the income of the estate or trust shall not be considered as a gift or bequest of a specific sum of money.
2. Any amount paid or permanently set aside or otherwise qualifying for the deduction provided in subsection (d)(4) of this section.
3. Any amount paid, credited, or distributed in the taxable year, if subsection (d)(5) or (d)(6) applied to such for a preceding taxable year of an estate or trust because credited or required to be distributed in such preceding taxable year.

e. Separate Shares Treated as Separate Trusts: For the sole purpose of determining the amount of distributable net income in the application of subsection (d)(6) of this section and subsection (b) of G.S. 105-162, in the case a single trust having more than one beneficiary substantially separate and independent shares of different beneficiaries in the trust shall be treated as separate trusts. The existence of such substantially separate and independent shares and the manner of treatment as separate trusts shall be determined as prescribed by the Commissioner of Revenue.

(7) Deduction for Personal Exemption: The following personal exemption deductions shall be allowed under this section:

a. An estate shall be allowed a deduction of one thousand dollars ($1,000).

b. A trust which, under its governing instrument, is required to distribute all of its income currently shall be allowed a deduction of five hundred dollars ($500.00).

c. All other trusts shall be allowed a deduction of two hundred dollars ($200.00).

(8) Deductible Dividends: Where dividend income is received by a fiduciary of an estate or trust and is distributed or distributable to a beneficiary during the taxable year so that it is includible in the gross income of the beneficiary for that taxable year, the dividends or the portion of such dividends which would be deductible to an individual under the provisions of subdivision (7) of G.S. 105-147 shall be deductible by such beneficiary during that taxable year. If the portion of the dividend income distributable to the beneficiary cannot be determined under the governing instrument, the amount of the deduction by the beneficiary shall be that amount which bears the same ratio to the total of the deductible portion of all dividends received by the estate or trust as the amount of income received by

the beneficiary bears to the distributable net income of the estate or trust, except that in no case may the deduction claimed by the beneficiary under this subsection exceed the income distributed or required to be distributed to him from the estate or trust during the taxable year.

(9) Apportionment of Deductions: Deductions allowable under this section shall be apportioned between the beneficiaries and the trust or estate in such manner as prescribed by the Commissioner of Revenue unless otherwise provided in this section.

(10) The Standard Deduction: The standard deduction allowed individuals under subdivision (22) of G.S. 105-147 shall not be allowed an estate or trust.

(e) Returns.—(1) Returns with respect to income taxes, showing therein specifically the items of gross income, the deductions allowed by this section, and such other facts as the Commissioner of Revenue may require, shall be made for the following:

a. Every estate subject to the tax imposed by this section the gross income of which for the taxable year is in excess of one thousand dollars ($1,000). The return of an estate shall be made by the fiduciary thereof.

b. Every trust having for the taxable year any taxable income subject to the tax imposed by this section, or having gross income of one thousand dollars ($1,000) or over, regardless of the amount of taxable income. The return for a trust shall be made by the fiduciary thereof.

c. Every estate or trust of which any beneficiary is a nonresident when such estate or trust has income subject to tax under this section.

(2) Every trust claiming a charitable, etc., deduction under subsection (d)(4) of this section for the taxable year shall furnish such information with respect to such taxable year as the Commissioner of Revenue may by forms or some other manner prescribe, setting forth:

a. The amount of the charitable, etc., deductions taken under subsection (d)(4) of this section within such year (showing separately the amount of such deduction which was paid out and the amount which was permanently set aside for charitable, etc., purposes during such year),

b. The amount paid out within such year which represents amounts for which charitable, etc., deductions under subsection (d)(4) of this section have been taken in prior years,

c. The amount for which charitable, etc., deductions have been taken in prior years but which has not been paid out at the beginning of such year,

d. The amount paid out of principal in the current and prior years for charitable, etc., purposes,

e. The total income of the trust within such year and the expenses attributable thereto, and

f. A balance sheet showing the assets, liabilities, and net worth of the trust as of the beginning of such year.

(f) Exempt Trusts.—

(1) The following trusts shall be exempt from taxation under this division:

a. Pension, profit-sharing, stock bonus and annuity trusts, or combinations thereof, established by employers for the purpose of distributing both the principal and income thereof exclusively to eligible employees, or the beneficiaries of such employees, and so constituted that no part of the corpus or income may be used for,

or diverted to, any purpose other than for the exclusive benefit of the employees or their beneficiaries; provided, there is no discrimination, as to eligibility requirements, contributions or benefits, in favor of officers, shareholders, supervisors, or highly paid employees; provided further, that the interest of individual employees participating therein shall be irrevocable and nonforfeitable to the extent of any contributions made thereto by such employees; and provided further, the Commissioner of Revenue shall be empowered to promulgate rules and regulations regarding the qualification of such trusts for exemption under this subdivision. The exemption of any trust under the provisions of the federal income tax law shall be a prima facie basis for exemption of said trust under this paragraph.

b. Any trust created for religious, charitable, scientific or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any individual.

(2) Trusts described in subdivision (1) of this subsection shall be subject to the tax provided for in this section to the following extent: Gross income derived by any of these trusts from any trade or business the conduct of which is not substantially related to the exercise or performance of those functions constituting the basis for its exemption in subdivision (1) of this subsection, less all deductions allowed by this section directly connected with carrying on such trade or business, provided, this paragraph shall not apply to interest, royalties, dividends, or rent; provided further, this paragraph shall not apply to any trade or business:

a. In which substantially all of the work in carrying on such trade or business is performed for the trust without compensation; or

b. Which is the selling of merchandise, substantially all of which is given to it.

(g) Tax Credits for Income Taxes Paid to Other States.—

(1) If a fiduciary is required to pay income tax to this State for an estate or a trust for which he acts, he shall be allowed a credit against the taxes imposed by this section for income taxes imposed by and paid to another state or country on income derived from sources within such other state or country in accordance with the formula contained in subdivision (2) of this subsection and the requirements of subdivision (3) of this subsection.

(2) The fraction of the gross income for North Carolina income tax purposes which is derived from sources within and subject to income tax in another state or country shall be ascertained and the North Carolina net income tax before credit under this subsection shall be multiplied by such fraction. The credit allowed shall be either the product thus calculated or the income tax actually paid the other state or country, whichever is smaller.

(3) Receipts showing the payment of income taxes to another state or country and a true copy of a return or returns upon the basis of which such taxes are assessed must be filed with the Commissioner of Revenue at, or prior to, the time credit is claimed. If credit is claimed on account of a deficiency assessment, a true copy of the notice assessing or proposing to assess the deficiency, as well as a receipt showing the payment of the deficiency, must be filed.

(4) If any taxes paid to another state or country for which a fiduciary has been allowed a credit under this section are at any time credited or refunded to the fiduciary, a tax equal to that portion of the credit allowed for such taxes so credited or refunded shall be due and

payable from the fiduciary within 30 days from the date of the receipt of the refund or the notice of the credit. If the amount of such tax is not paid within 30 days of receipt or notice the fiduciary shall be subject to the penalties and interest on delinquent payments provided in G.S. 105-236 and G.S. 105-241.1.

(h) Time and Place of Filing Returns.—Returns required under the provisions of subsection (e) of this section shall be in such form as the Commissioner of Revenue may prescribe, and shall be filed with the Commissioner at his main office, or at any branch office which he may establish. The return of every fiduciary reporting on a calendar year basis shall be filed on or before the fifteenth day of April in each year, and the return of every fiduciary reporting on a fiscal year basis shall be filed on or before the fifteenth day of the fourth month following the close of the fiscal year. In the case of sickness, absence, or other disability or whenever in his judgment good cause exists, the Commissioner may allow further time for filing these returns.

(i) Time and Place of Payment of Tax.—

(1) The full amount of the tax payable as shown on the face of the return shall be paid to the Commissioner of Revenue at the office where the return is filed at the time fixed by law for filing the return.

(2) The tax may be paid with uncertified check, but if a check so received is not paid by the bank on which it is drawn, the fiduciary by whom such check is tendered shall remain liable for the payment of the tax and for all penalties lawfully imposed.

(j) Corrections and Changes.—For purposes of this section the provisions of G.S. 105-159 requiring an individual to report changes, corrections, or the determination of net income by the Internal Revenue Service shall apply also to fiduciaries required to file returns for estates and trusts. (1939, c. 158, ss. 314, 315, 324, 325, 327, 332; 1941, c. 50, s. 5; c. 204, s. 1; 1943, c. 400, s. 4; 1945, c. 708, s. 4; c. 752, s. 3; 1947, c. 501, s. 4; 1949, c. 392, s. 3; c. 1173; 1951, c. 643, s. 4; c. 937, s. 1; 1955, c. 17, s. 2; 1313, s. 1; 1957, c. 1340, s. 4; 1959, c. 1259, ss. 2, 4; 1963, c. 1169, s. 2; 1967, c. 1110, s. 3.)

Editor's Note. — Section 3, c. 1252, Session Laws 1967, provides: "This act shall be effective on and after the date of enactment and shall apply to all contributions made to a retirement plan by a self-employed individual or an owner-employee after January 1, 1969."

§ 105-162. Beneficiaries of estates and trusts.—(a) Beneficiaries of Trusts Distributing Current Income Only.—

(1) Inclusion of Income: Subject to the provisions of subdivision (2) below the amount of income for the taxable year required to be distributed currently by a trust described in G.S. 105-161(d)(5) shall be included in the gross income of the beneficiaries to whom the income is required to be distributed, whether distributed or not. If such amount exceeds the distributable net income, there shall be included in the gross income of each beneficiary an amount which bears the same ratio to distributable net income as the amount required to be distributed to such beneficiary bears to the amount of income required to be distributed to all beneficiaries.

(2) Character of Amounts: The amounts specified in subdivision (1) above shall have the same character in the hands of the beneficiary as in the hands of the trust. For this purpose, the amounts shall be treated as consisting of the same proportion of each class of items entering into the computation of distributable net income of the trust as the total of each class bears to the total distributable net income of the trust, unless the terms of the trust specifically allocate different classes of income to different beneficiaries. In the application of the preceding sentence, the items of deduction entering into the computation of distributable net income shall be allocated among the items of

distributable net income in the manner prescribed by the Commissioner of Revenue.

(3) Different Taxable Years: If the taxable year of a beneficiary is different from that of the trust, the amount which the beneficiary is required to include in gross income in accordance with the provisions of this subdivision shall be based upon the amount of income of the trust for any taxable year or years of the trust ending with or within his taxable year.

(b) Beneficiaries of Estates and Trusts Accumulating Income or Distributing Corpus.—

(1) Inclusion of Income: Subject to subdivision (2) below, there shall be included in the gross income of a beneficiary to whom an amount specified in G.S. 105-161(d)(6) is paid, credited, or required to be distributed by an estate or trust described in G.S. 105-161(d)(6) the sum of the following amounts:

a. The amount of income for the taxable year required to be distributed currently to such beneficiary, whether distributed or not. If the amount of income required to be distributed currently to all beneficiaries exceeds the distributable net income (computed without the deduction allowed by G.S. 105-161(d)(4) relating to deduction for charitable, etc., purposes) of the estate or trust, then, in lieu of the amount provided in the preceding sentence, there shall be included in the gross income of the beneficiary an amount which bears the same ratio to distributable net income (as so computed) as the amount of income required to be distributed currently to such beneficiary bears to the amount required to be distributed currently to all beneficiaries. For purposes of this subdivision, the phrase "the amount of income for the taxable year required to be distributed currently" includes any amount required to be paid out of income or corpus to the extent such amount is paid out of income for such taxable year.

b. All other amounts properly paid, credited, or required to be distributed to such beneficiary for the taxable year. If the sum of

1. The amount of income for the taxable year required to be distributed currently to all beneficiaries, and

2. All other amounts properly paid, credited, or required to be distributed to all beneficiaries exceeds the distributable net income of the estate or trust, then, in lieu of the amount provided in the preceding sentence, there shall be included in the gross income of the beneficiary an amount which bears the same ratio to the distributable net income (reduced by the amounts specified in 1) as the other amounts properly paid, credited or required to be distributed to the beneficiary bear to the other amounts paid, credited, or required to be distributed to all beneficiaries.

(2) Exclusions: There shall not be included as amounts falling within subdivision (1) above any amounts described in G.S. 105-161(d)(6)d.

(3) Character of Amounts: The amounts determined under subdivision (1) above shall have the same character in the hands of the beneficiary as in the hands of the estate or trust. For this purpose, the amounts shall be treated as consisting of the same proportion of each class of items entering into the computation of distributable net income as the total of each class bears to the total distributable net income of the estate or trust unless the terms of the governing instrument specifically allocate different classes of income to different beneficiaries. In the application of the preceding sentence,

the items of deduction entering into the computation of distributable net income (including the deduction allowed under G.S. 105-161(d)(4) (relating to deduction for charitable, etc., purposes)) shall be allocated among the items of distributable net income in the manner prescribed by the Commissioner of Revenue. In the application of this subdivision to the amount determined under subdivision (1) a above, distributable net income shall be computed without regard to any portion of the deduction under G.S. 105-161(d)(4) which is not attributable to income of the taxable year.

(4) Different Taxable Years: If the taxable year of a beneficiary is different from that of the estate or trust, the amount to be included in the gross income of the beneficiary shall be based on the distributable net income of the estate or trust and the amounts properly paid, credited, or required to be distributed to the beneficiary during any taxable year or years of the estate or trust ending with or within his taxable year.

(c) Deduction on Termination of Estate or Trust.—If on the termination of an estate or trust, the estate or trust has (i) an unused carry-over loss allowable under the provisions of G.S. 105-147(9)d, or (ii) for the last taxable year of the estate or trust, deductions (other than the deductions allowable under G.S. 105-161(d)(4) relating to deductions for charitable, etc., purposes, or personal exemption) in excess of gross income for such year, then such losses shall be allowed as a deduction, in such manner as may be prescribed by the Commissioner of Revenue, to the beneficiaries succeeding to the property of the estate or trust in the proportion of their respective shares in the property distributed.

(d) Definitions.—For purposes of this section the words and phrases defined in G.S. 105-161(c) shall have the same meanings prescribed to them in that subsection.

(e) Tax Credits for Income Taxes Paid to Other States.—A resident beneficiary of an estate or trust who is taxed under the provisions of Division II on income from an estate or trust determined to be includible in his gross income under this section shall be allowed a credit against such tax for income taxes paid by the fiduciary to another state or country on such income in accordance with the formula contained in subsection (g)(2) of G.S. 105-161 and the requirements of subsection (g)(3) of G.S. 105-161; provided, that if any taxes paid to another state or country for which a beneficiary has been allowed credit under this section are at any time credited or refunded to the beneficiary, a tax equal to that portion of the credit allowed for such taxes so credited or refunded shall be due and payable from the beneficiary within 30 days from the date of receipt of the refund or notice of the credit. If the amount of such tax is not paid within 30 days of receipt or notice the beneficiary shall be subject to the penalties and interest on delinquent payments provided in G.S. 105-236 and G.S. 105-241.1. (1939, c. 158, ss. 318, 326; 1941, c. 50, s. 5; 1943, c. 400, s. 4; 1945, c. 708, s. 4; 1949, c. 392, s. 3; 1951, c. 643, s. 4; 1955, c. 1313, s. 1; 1957, c. 1340, s. 4; 1963, c. 1169, s. 2; 1967, c. 1110, s. 3.)

§ 105-163. Grantor trusts.—(a) Trust Income, Deductions, and Credits Attributable to Grantors and Others as Substantial Owners.—Where it is specified in this section that the grantor or another person shall be treated as the owner of any portion of a trust, there shall then be included in computing the taxable income and credits of the grantor or the other person those items of income, deductions, and credits against tax of the trust which are attributable to that portion of the trust to the extent that such items would be taken into account under Division II in computing the taxable income or credits against the tax of an individual. Any remaining portion of the trust shall be taxed in accordance with G.S. 105-161 and G.S. 105-162.

(b) Reversionary Interests.—

(1) The grantor shall be treated as the owner of any portion of a trust in which he has a reversionary interest in either the corpus or the income therefrom if, as of the inception of that portion of the trust, the interest will or may reasonably be expected to take effect in possession or enjoyment within 10 years commencing with the date of the transfer of that portion of the trust.

(2) Subdivision (1) above shall not apply to the extent that the income of a portion of a trust in which the grantor has a reversionary interest is, under the terms of the trust, irrevocably payable for a period of at least two years (commencing with the date of the transfer) to a designated beneficiary, which beneficiary qualifies as the recipient of a gift or contribution under G.S. 105-147(15) or G.S. 105-147(16).

(3) The grantor shall not be treated under subdivision (1) as the owner of any portion of a trust where his reversionary interest in such portion is not to take effect in possession or enjoyment until the death of the individual or individuals to whom the income therefrom is payable.

(4) Any postponement of the date specified for the reacquisition of possession or enjoyment of the reversionary interest shall be treated as a new transfer in trust commencing with the date on which the postponement is effected and terminating with the date prescribed by the postponement. However, income for any period shall not be included in the income of the grantor by reason of the preceding sentence if such income would not be so includible in the absence of such postponement.

(c) Other Powers of the Grantor.—The grantor or other person shall be treated as the owner of any portion of a trust in which he has reserved for himself powers other than those described in subsection (b) above to the extent that he is determined to be the owner of such portion under the provisions of §§ 674 through 678 of the Internal Revenue Code of 1954 as amended unless contrary to the context or intent of this division. (1967, c. 1110, s. 3.)

Article 4A.

Withholding of Income Taxes from Wages and Filing of Declarations of Estimated Income and Payment of Income Tax by Individuals.

§ **105-163.1. Definitions.**—As used in this Article,

(1) "Commissioner" means the Commissioner of Revenue.

(2) "Corporation" includes an association or a joint stock company.

(3) "Dependent" means a dependent with respect to whom a six-hundred-dollar ($600.00) income tax exemption is allowed under the provisions of Article 4 of this Chapter.

(4) The word "employee" means an individual, whether resident or nonresident in this State, who performs or performed any service in this State for wages or an individual domiciled in this State who performs or performed any service outside this State for wages. The word "employee," as used in this subdivision, is intended to include officers of corporations and elected public officials.

(5) The word "employer" means this State, or any political subdivision thereof, the United States, or any agency or instrumentality of any one or more of the foregoing, or a person, for whom an individual performs or performed any service as an employee; except that:

a. If the person, governmental unit, or agency thereof, for whom the individual performs or performed the service does not have

control of the payment of the wages for such services, the term "employer" (except for the purposes of subdivision (6) of this section) means the person having control of the payment of such wages, and

b. In the case of a person paying wages on behalf of a nonresident person not engaged in trade or business within this State or on behalf of any governmental unit or agency thereof not located within this State, the term "employer" (except for purposes of subdivision (6) of this section) means such person.

(6) The term "wages" means all remuneration (other than fees paid to a public official) for service performed by an employee for his employer, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include remuneration paid:

a. For agricultural labor where such remuneration is paid to workers employed on the farm for services rendered on the farm in the production, harvesting, and transportation of agricultural products to market for the farmer-employer; or

b. For domestic service in a private home, local college club, or local chapter of a college fraternity or sorority; or

c. For service not in the course of the employer's trade or business performed in any calendar quarter by an employee, unless the cash remuneration paid for such service is fifty dollars ($50.00) or more and such service is performed by an individual who is regularly employed by such employer to perform such service. For purposes of this paragraph, an individual shall be deemed to be regularly employed by an employer during a calendar quarter only if:

1. On each of some 24 days during such quarter such individual performs for such employer for some portion of the day service not in the course of the employer's trade or business; or

2. Such individual was regularly employed (as determined under subparagraph 1 above) by such employer in the performance of such service during the preceding calendar quarter; or

d. For services not in the course of the employer's trade or business, to the extent paid in any medium other than cash; or

e. To, or on behalf of, an employee or his beneficiary—

1. From or to a trust described in § 401(a) of the Internal Revenue Code which is exempt from tax under § 501(a) of the Internal Revenue Code at the time of such payment unless such payment is made to an employee of the trust as remuneration for services rendered as such employee and not as a beneficiary of the trust; or

2. Under or to an annuity plan which, at the time of such payment, meets the requirements of § 401 (a) (3), (4), (5), and (6) of the Internal Revenue Code.

(7) The term "transient employer" means an "employer" who is not a resident of this State and who temporarily engages in any activity within the State for the production of income. Without intending to exclude others who may come within the foregoing definition, any nonresident "employer" engaging in any such activity within the State which, as of any date, cannot be reasonably expected to continue for a period of 18 consecutive months shall be deemed to be temporarily engaged in such activity.

(8) "Fiduciary" means a guardian, trustee, executor, administrator, receiver, conservator, or any person acting in any fiduciary capacity for any person, estate or trust.

(9) "Fiscal year" means an accounting period of 12 months ending on the last day of any month other than December.
(10) "Individual" means a natural person.
(11) "Internal Revenue Code" means the United States Revenue Code of 1954, as amended.
(12) "Payroll period" means a period for which a payment of wages is ordinarily made to the employee by his employer, and the term "miscellaneous payroll period" means a payroll period other than a daily, weekly, biweekly, semimonthly, monthly, quarterly, semiannual, or annual payroll period.
(13) "Person" means and includes an individual, a fiduciary, a partnership and a corporation.
(14) "Taxable year" means the calendar year or fiscal year ending during such calendar year, upon the basis of which net income is computed, and in the case of a return made for a fractional part of a year under the provisions of this Chapter or under regulations prescribed by the Commissioner, "taxable year" means the period for which such return is made.
(15) The term "net taxable income" means that part of the income of an individual which, during the taxable year of the individual, is subject to payment of an income tax thereon under the provisions of Article 4 of this Chapter. (1959, c. 1259, s. 1; 1967, c. 716, s. 3.)

Cited in Allen v. Currie, 254 N.C. 636, 119 S.E.2d 917 (1961).

§ 105-163.2. Withholding.—(a) Every employer making payment of wages on or after January 1, 1960, shall deduct and withhold with respect to the wages of each employee for each payroll period an amount determined as follows:

Such amount which, if an equal amount was collected for each similar payroll period with respect to a similar amount of wages for each payroll period during an entire calendar year, would aggregate or approximate the income tax liability of such employee under Article 4 of this Chapter after making allowance for the personal exemptions to which such employee would be entitled on the basis of his status during such payroll period and after making allowance for withholding purposes for a deduction from wages of ten percent (10%) thereof, but not exceeding five hundred dollars ($500.00) per calendar year, and without making allowance for any other deductions.

(b) The Commissioner of Revenue shall cause to be prepared and shall promulgate tables for computing amounts to be withheld with respect to different rates of wages for different payroll periods applicable to the various combinations of exemptions to which an employee may be entitled and taking into account the limited ten percent (10%) deduction above referred to. Such tables may provide for the same amount to be withheld within reasonable salary brackets or ranges so designed as to result in the withholding during a year of approximately the amount of an employee's indicated income tax liability with respect to said year. The withholding of wages pursuant to and in accordance with such tables shall be deemed as a matter of law to constitute compliance with the provisions of subsection (a) of this section, notwithstanding any other provisions of this Article.

(c) If wages are paid with respect to a period which is not a payroll period, the amount to be deducted and withheld shall be that applicable in the case of a miscellaneous payroll period containing a number of days, excluding Sundays and holidays, equal to the number of days in the period with respect to which such wages are paid.

(d) In any case in which wages are paid by an employer without regard to any payroll period or other period, the amount to be deducted and withheld

shall be that applicable in the case of a miscellaneous payroll period containing a number of days equal to the number of days, excluding Sundays and holidays, which have elapsed since the date of the last payment of such wages by such employer during the calendar year, or the date of commencement of employment with such employer during such year, or January 1 of such year, whichever is the later.

(e) The Commissioner may, by regulations, authorize employers:

(1) To estimate the wages which will be paid to any employee in any quarter of the calendar year;

(2) To determine the amount to be deducted and withheld upon each payment of wages to such employee during such quarter as if the appropriate average of the wages so estimated constituted the actual wages paid; and

(3) To deduct and withhold upon any payment of wages to such employee during such quarter such amount as may be necessary to adjust the amount actually deducted and withheld upon the wages of such employee during such quarter to the amount that would be required to be deducted and withheld during such quarter if the payroll period of the employee was quarterly.

(f) The Commissioner is authorized in unusual circumstances wherein he finds that the use of the prescribed tables is impracticable or constitutes an unreasonable requirement of the employer to authorize such employer to use some other method of determining the amounts to be withheld under this Article, provided the amounts withheld under such other method will reasonably approximate the indicated income tax liability of his employees. Further, the Commissioner may authorize an employer to use another method for determining the amounts to be withheld under the provisions of this Article from the wages or salaries of groups of employees or individual employees if the circumstances are such that the use of the tables would produce substantially incorrect results. Any authorization of the use of a different method shall be subject to review and cancellation or alteration by the Commissioner every twelfth month, and the Commissioner may cancel such authorization or order an alteration of such method at any time upon a finding by him that such authorization is being abused or that such method is not resulting in the withholding of a sum reasonably approximating the indicated income tax liability of the employees, which finding may be made by the Commissioner with or without notice or a hearing and shall be conclusive except as hereinafter provided. The Commissioner shall notify the employer in writing of his finding and order thereon, and such notice shall be deemed to have been received by the employer on the third day after having been deposited in the mail and the employer shall thereafter abide by such order. Any employer feeling aggrieved by such order may thereafter apply for a hearing thereon before the Commissioner, unless a hearing has been previously held, and upon such hearing the findings of the Commissioner shall be deemed conclusive.

(g) The Commissioner is authorized to provide by regulation, under such conditions and to such extent as he deems proper, for withholding in addition to that otherwise required under this section in cases in which the employer and the employee agree to such additional withholding. Such additional withholding shall for all purposes be treated as other withholding amounts required to be deducted and withheld under this Article.

(h) The act of compliance with any of the provisions of this Article by a nonresident employer shall not constitute an act in evidence of and shall not be deemed to be evidence that such nonresident is doing business in this State. (1959, c. 1259, s. 1.)

§ **105-163.3. Withholding in accordance with regulations.**—The manner of

withholding and the amount to be deducted and withheld under G.S. 105-163.2 shall be determined in accordance with tables, rules and regulations promulgated by the Commissioner. The withholding exemption allowed by such tables, rules and regulations shall, as nearly as possible, approximate the exemptions to which an employee would be entitled under G.S. 105-149. (1959, c. 1259, s. 1.)

§ 105-163.4. Basis of determination of remuneration being wages.—If any of the remuneration paid by an employer to an employee during any payroll period or during any miscellaneous period without reference to a payroll period constitutes actual reimbursement of the employee for ordinary and necessary expenses incurred by the employee on behalf of the employer and in the furtherance of the business of the employer, then such amounts as are paid to reimburse the employee for such expenses are not to be considered as wages and no amounts shall be deducted and withheld therefrom. (1959, c. 1259, s. 1.)

§ 105-163.5. Exemptions allowable; certificates.—(a) An employee receiving wages shall be entitled to the exemptions for which such employee qualifies under the provisions of Article 4 of this Chapter.

(b) Every employee shall, on or before January 1, 1960, or at the time of commencing employment, whichever is later, furnish his employer with a signed withholding exemption certificate informing the employer of the exemptions which the employee claims, which in no event shall exceed the amount of exemptions to which the employee is entitled under G.S. 105-149; but, in the event that the employee fails to file the exemption certificate required herein, the employer, in computing amounts to be withheld from said employee's wages, shall allow the employee the exemption accorded a single person with no dependents.

(c) Withholding exemption certificates shall take effect as of the beginning of the first payroll period which ends on or after the date on which such certificate is furnished, or if payment of wages is made without regard to a payroll period, then such certificate shall take effect as of the beginning of the miscellaneous payroll period for which the first payment of wages is made on or after the date on which such certificate is furnished; provided, that certificates furnished before January 1, 1960, shall be deemed to have been furnished on that date.

(d) If, on any day during the calendar year, the amount of withholding exemptions to which the employee is entitled is less than the amount of withholding exemptions claimed by the employee on the withholding exemption certificate then in effect with respect to him, the employee shall, within 10 days thereafter, furnish the employer with a new withholding exemption certificate relating to the amount of withholding exemptions which the employee then claims, which shall in no event exceed the amount to which he is entitled on such day. If, on any day during the calendar year, the amount of withholding exemptions to which the employee is entitled is greater than the amount of withholding exemptions claimed, the employee may furnish the employer with a new withholding exemption certificate relating to the amount of withholding exemptions which the employee then claims, which shall in no event exceed the amount to which he is entitled on such day.

(e) Withholding exemption certificates shall be in such form and contain such information as the Commissioner may prescribe, but, insofar as practicable, the Commissioner shall cause the form of such certificates to be substantially similar to federal exemption certificates. (1959, c. 1259, s. 1.)

§ 105-163.6. Payment of amounts withheld; personal liability for failure to withhold; limitation of recovery.—(a) Every employer required to deduct and withhold from an employee's wages under G.S. 105-163.2 shall, for the

quarterly period beginning January 1, 1960, and for each quarterly period thereafter, on or before the last day of the month following the close of each quarterly period, make return and pay over to the Commissioner the amounts required to be withheld under G.S. 105-163.2. Such returns shall be in such form and contain such information as the Commissioner may prescribe.

(b) Notwithstanding any of the other provisions of this section, all transient employers shall make return and pay over to the Commissioner on a monthly basis the amounts required to be withheld under G.S. 105-163.2. Such returns and payments to the Commissioner by transient employers shall be made on or before the last day of the month following the month for which such amounts were deducted and withheld from the wages of his employees.

(c) Notwithstanding any of the other provisions of this section, all employers engaged in any business which is seasonal shall make return and pay over to the Commissioner on a monthly basis the amounts required to be withheld under G.S. 105-163.2. Such returns and payments to the Commissioner by employers engaged in such seasonal business shall be made on or before the last day of the month following the month for which such amounts were deducted and withheld from the wages of his employees.

(d) If the Commissioner, in any case, has reason to believe that the collection of moneys, required by this Article to be withheld by the employer, is in jeopardy, he may require the employer to make such return and pay to the Commissioner such amounts required to be withheld at any time said Commissioner may designate therefor subsequent to the time when such amounts should have been deducted from wages and withheld.

(e) Every employer who fails to withhold or pay to the Commissioner any sums required by this Article to be withheld and paid shall be personally and individually liable therefor to the Commissioner; and any sum or sums withheld in accordance with the provisions of G.S. 105-163.2 shall be deemed to be held in trust for the Commissioner. (1959, c. 1259, s. 1.)

§ **105-163.7. Statement to employees; information to Commissioner.**—(a) Every employer required to deduct and withhold from an employee's wages under G.S. 105-163.2 shall furnish to each such employee in respect to the remuneration paid by such employer to such employee during the calendar year, on or before January 31 of the succeeding year, or, if his employment is terminated before the close of such calendar year, within 30 days from the date on which the last payment of remuneration is made, duplicate copies of a written statement showing the following:

(1) The name of such person;

(2) The name of the employee and his social security account number;

(3) The total amount of wages;

(4) The total amount deducted and withheld under G.S. 105-163.2.

(b) The written statement above referred to shall be furnished at such other times, shall contain such other information, and shall be in such form as the Commissioner may by regulations prescribe. Every employer shall file annual returns or reports setting forth such information as the Commissioner may require, and the Commissioner may require the filing of such additional copies of all written statements described above as he may deem necessary. On and after January 1, 1961, the annual returns or reports required to be made to the Commissioner under the provisions of this section shall be in lieu of such returns required under G.S. 105-154 as would furnish identical information. (1959, c. 1259, s. 1.)

§ **105-163.8. Liability of employer.**—An employer shall be liable for the payment to the Commissioner of the amounts required to be deducted and withheld under G.S. 105-163.2, and an employer who has withheld and paid such amounts to the Commissioner shall not otherwise be liable to any person for the amounts of any such payments. Upon failure of an employer to pay over

any amounts withheld or required to be withheld by said employer under this Article, the Commissioner may make assessments, issue warrants for the collection of such amounts, issue certificates of tax liability, collect by attachment or garnishment proceedings, or bring actions for the collection of such amounts and for penalties due under the provisions of G.S. 105-241.1, G.S. 105-242 and G.S. 105-243. (1959, c. 1259, s. 1.)

§ 105-163.9. Refund to employer; application.—(a) Where there has been an overpayment to the Commissioner by the employer or withholding agent under the provisions of this Article, refund shall be made to the employer or withholding agent, as the case may be, only to the extent that the amount of such overpayment was not deducted and withheld by the employer or withholding agent from the employee's wages, and such refund shall be paid together with interest thereon at the rate of four percent (4%) per annum; provided, that interest on any such refund shall be computed from a date 90 days after the date the overpayment was originally made by the employer or withholding agent.

(b) Unless written application for refund is received by the Commissioner from the employer within two years from the date the overpayment was made, no refund shall be allowed. (1959, c. 1259, s. 1.)

§ 105-163.10. Withheld amounts credited to individual for calendar year.—The amount deducted and withheld under G.S. 105-163.2 during any calendar year from the wages of any individual shall be allowed as a credit to such individual against the tax imposed by G.S. 105-136, for taxable years beginning in such calendar year. If more than one taxable year begins in such calendar year such amount shall be allowed as a credit against the tax for the last taxable year so beginning. As a prerequisite to obtaining the credit allowed herein, the individual taxpayer must file with the Commissioner one copy, and such other copies and information as may be required by regulation, of the withholding statement provided for by G.S. 105-163.7, and such withholding statement must accompany the annual income tax return required by G.S. 105-152. (1959, c. 1259, s. 1; 1967, c. 1110, s. 4.)

§ 105-163.11. Estimated declaration of income and income tax; contents; when and where filed; amendments to declaration; option of amendment.—(a) Every individual shall, for all taxable years beginning on and after January 1, 1960, and at the times prescribed in subsection (c) of this section, make a declaration of his estimated income and his estimated income tax for the taxable year:

(1) If no part of his income consists of wages, and his net taxable income can reasonably be expected to equal or exceed two hundred dollars ($200.00) for the taxable year, or

(2) If his income consists of wages and other income, and his net taxable income can reasonably be expected to equal or exceed two hundred dollars ($200.00) for the taxable year; provided, that no individual shall be required to file a declaration pursuant to this paragraph unless all of his income from whatever source, other than wages from which tax has been withheld under the provisions of this Article, which may be subject to an income tax under Article 4 of this Chapter can be reasonably expected to exceed, by two hundred dollars ($200.00) or more, the sum of:

a. All business-connected deductions allowable under the provisions of Article 4 to which the taxpayer can be reasonably expected to be entitled during the taxable year in the production of all income, other than wages earned by the taxpayer, and

b. The amount of all deductible dividends from stocks which can be reasonably expected to be earned by the taxpayer during the taxable year.

(b) In the declaration required under subsection (a) above, the individual shall state:

(1) The amount which he estimates as the amount of tax for which he will be liable under G.S. 105-136 for the taxable year, less any credits to which he can reasonably be expected to be entitled under G.S. 105-151;

(2) The amount which he estimates will be withheld, if any, from wages of the taxpayer for the taxable year under the provisions of G.S. 105-163.2;

(3) The excess of the amount estimated under subdivision (1) of this subsection over the amount estimated under subdivision (2) of this subsection, which excess for the purposes of this Article shall be considered the estimated tax for the taxable year to be paid to the Commissioner directly by the individual; and

(4) Such other information as may be required by the Commissioner.

(c) The declaration required under subsection (a) of this section shall be filed with the Commissioner on or before April 15 of the taxable year, except that if the requirements of subsection (a) of this section are first met:

(1) After April 1 and before June 2 of the taxable year, the declaration shall be filed on or before June 15 of the taxable year; or

(2) After June 1 and before September 2 of the taxable year, the declaration shall be filed on or before September 15 of the taxable year; or

(3) After September 1 of the taxable year, the declaration shall be filed on or before January 15 of the succeeding taxable year.

(d) An individual may make amendments of a declaration filed during the taxable year under regulations prescribed by the Commissioner.

(e) If on or before January 31 (or February 15, in the case of an individual referred to in subsection (f) below, relating to income from farming and commercial fishing) of the succeeding taxable year the taxpayer files a return, for the taxable year for which the declaration is required, and pays in full the amount computed on the return as payable, then—

(1) If the declaration is not required to be filed during the taxable year, but is required to be filed on or before January 15, such return shall be considered as such declaration; and

(2) If the tax shown on the return (reduced by the sum of all credits against tax to which the taxpayer may be entitled under the provisions of Article 4 and Article 4A of this Chapter) is greater than the estimated tax shown in a declaration previously made, or in the last amendment thereof, such return shall be considered as the amendment of the declaration permitted by subsection (d) to be filed on or before January 15.

In the application of this subsection in the case of a taxable year beginning on any date other than January 1, there shall be substituted, for the fifteenth or last day of the months specified in this subsection, the fifteenth or last day of the months which correspond thereto.

(f) Declaration of estimated tax required to be filed by this section from individuals whose estimated gross income from farming and commercial fishing (including oyster farming) for the taxable year is at least two thirds of the total estimated gross income from all sources for the taxable year may, in lieu of the time prescribed in subsection (c), be filed at any time on or before January 15 of the succeeding taxable year.

(g) The application of this section to taxable years of less than 12 months shall be in accordance with regulations prescribed by the Commissioner.

(h) In the application of this section to the case of a taxable year beginning on any date other than January 1, there shall be substituted, for the months

specified in this section, the months which correspond thereto. (1959, c. 1259, s. 1; 1963, c. 785, ss. 1, 2; 1967, c. 1110, s. 4.)

§ 105-163.12. Filing of declarations and amended declarations hereunder.—If the taxpayer is unable to make his own declarations, amended declarations, payments or any information returns required under the provisions of this Article, then the same shall be made by a duly authorized agent or by a guardian or other person charged with the care of the person or property of such taxpayer. (1959, c. 1259, s. 1.)

§ 105-163.13. Affirmation; penalty for false declaration.—Whenever any declaration, amended declaration, or information returns required under the provisions of this Article shall be furnished to the Commissioner, there shall be annexed thereto the affirmation of the taxpayer, or of any other person furnishing same, in the following form: "Under penalties prescribed by law, I hereby affirm that to the best of my knowledge and belief this return, including any accompanying schedules and statements, is true and complete. (If prepared by a person other than taxpayer, his affirmation is based on all information of which he has any knowledge.)" Any individual who willfully makes and subscribes a declaration, amended declaration, or return required by this Article, which he does not believe to be true and correct as to every material matter, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be subject to a fine not to exceed one thousand dollars ($1,000) or imprisonment not to exceed six months, or both, in the discretion of the court. The Commissioner shall cause to be prepared blank forms for the said declarations, amended declarations and returns, and shall cause them to be distributed throughout the State, and to be furnished upon application; but failure to receive or secure the form shall not relieve any taxpayer from the obligation of making any declaration, amended declaration or return herein required. (1959, c. 1259, s. 1; 1967, c. 1110, s. 4.)

§ 105-163.14. Payment of tax.—(a) The estimated income tax, as defined in G.S. 105-163.11 and with respect to which a declaration is required to be filed thereunder, shall be paid as follows:

(1) If the declaration is filed on or before April 15 of the taxable year, the estimated tax shall be paid in four equal installments. The first installment shall be paid at the time of the filing of the declaration, the second and third on June 15 and September 15, respectively, of the taxable year, and the fourth on January 15 of the succeeding taxable year.

(2) If the declaration is filed after April 15 and not after June 15 of the taxable year and is not required by subsection (c) of G.S. 105-163.11 to be filed on or before April 15 of the taxable year, the estimated tax shall be paid in three equal installments. The first installment shall be paid at the time of the filing of the declaration, the second on September 15 of the taxable year, and the third on January 15 of the succeeding taxable year.

(3) If the declaration is filed after June 15 and not after September 15 of the taxable year and is not required by subsection (c) of G.S. 105-163.11 to be filed on or before June 15 of the taxable year, the estimated tax shall be paid in two equal installments. The first installment shall be paid at the time of the filing of the declaration, and the second on January 15 of the succeeding taxable year.

(4) If the declaration is filed after September 15 of the taxable year, and is not required by subsection (c) of G.S. 105-163.11 to be filed on or before September 15 of the taxable year, the estimated tax shall be paid in full at the time of the filing of the declaration.

(5) If the declaration is filed after the time prescribed in G.S. 105-163.11,

there shall be paid at the time of such filing all installments of estimated tax which would have been payable on or before such time if the declaration had been filed within the time prescribed in subsection (c) of G.S. 105-163.11, and the remaining installments shall be paid at the times at which, and in the amounts in which, they would have been payable if the declaration had been filed on time.

(b) If any amendment of a declaration is filed, the remaining installments, if any, shall be ratably increased or decreased as the case may be, to reflect the respective increase or decrease in the estimated tax by reason of such amendment, and if any amendment is made after September 15 of the taxable year any increase in the estimated tax by reason thereof shall be paid at the time of making such amendment.

(c) At the election of the individual, any installment of the estimated tax may be paid prior to the date prescribed for its payment.

(d) Payment of estimated income tax, or any installment thereof, shall be considered payment on account of the income taxes imposed by Article 4 of this Chapter for the taxable year.

(e) The application of this section to taxable years of less than 12 months shall be in accordance with regulations prescribed by the Commissioner.

(f) In the application of this section to the case of a taxable year beginning on any date other than January 1, there shall be substituted, for the months specified in this section, the months which correspond thereto. (1959, c. 1259, s. 1.)

§ 105-163.15. Failure by individual to pay estimated income tax; penalty.— (a) In the case of any underpayment of the estimated tax by an individual, except as provided in subsection (d), there shall be added to the tax imposed under Article 4 for the taxable year an amount determined at the rate of six percent (6%) per annum upon the amount of the underpayment as determined under subsection (b), for the period of the underpayment, as determined under subsection (c) of this section.

(b) For the purposes of subsection (a), the amount of the underpayment shall be the excess of:

(1) The amount of the installment which would be required to be paid if the estimated tax were equal to seventy percent (70%) (sixty-six and two-thirds percent ($66^2/_3\%$) in the case of individuals referred to in G.S. 105-163.11(f), relating to income from farming and commercial fishing) of the tax shown on the return for the taxable year or, if no return was filed, seventy percent (70%) (sixty-six and two-thirds percent ($66^2/_3\%$) in the case of individuals referred to in G.S. 105-163.11(f), relating to income from farming) of the tax for such year, over

(2) The amount, if any, of the installment paid on or before the last date prescribed for such payment.

(c) The period of the underpayment shall run from the date the installment was required to be paid to whichever of the following dates is the earlier:

(1) The fifteenth day of the fourth month following the close of the taxable year.

(2) With respect to any portion of the underpayment, the date on which such portion is paid. For purposes of this paragraph, a payment of estimated tax on any installment date shall be considered a payment of any previous underpayment only to the extent such payment exceeds the amount of the installment determined under subsection (b)(1) for such installment date.

(d) Notwithstanding the provisions of the preceding subsections, the addition to the tax with respect to any underpayment of any installment shall not be imposed if the total amount of all payments of estimated tax made on or

before the last date prescribed for the payment of such installment equals or exceeds whichever of the following is the lesser:

(1) The amount which would have been required to be paid on or before such date if the estimated tax were whichever of the following is the least:

a. The tax shown on the return of the individual for the preceding taxable year, if a return showing a liability for tax was filed by the individual for the preceding taxable year and such preceding year was a taxable year of 12 months, or

b. An amount equal to the tax computed, at the rates applicable to the taxable year, on the basis of the taxpayer's status with respect to personal exemptions under Article 4 of the taxable year, but otherwise on the basis of the facts shown on his return for, and the law applicable to, the preceding taxable year, or

c. An amount equal to seventy percent (70%) (sixty-six and two-thirds percent ($66^2/_3\%$) in the case of individuals referred to in G.S. 105-163.11(f), relating to income from farming and commercial fishing) of the tax for the taxable year computed by placing on an annualized basis the taxable income for the months in the taxable year ending before the month in which the installment is required to be paid. For purposes of this subparagraph, the taxable income shall be placed on an annualized basis by:

1. Multiplying by 12 (or, in case of a taxable year of less than 12 months, the number of months in the taxable year) the taxable income (computed without deduction of personal exemptions) for the months in the taxable year ending before the month in which the installment is required to be paid.

2. Dividing the resulting amount by the number of months in the taxable year ending before the month in which such installment date falls, and

3. Deducting from such amount the deductions for personal exemptions allowable for the taxable year (such personal exemptions being determined as of the last date prescribed for payment of the installment); or

(2) An amount equal to ninety percent (90%) of the tax computed, at the rates applicable to the taxable year, on the basis of the actual taxable income for the months in the taxable year ending before the month in which the installment is required to be paid.

(e) For purposes of applying this section—

(1) The estimated tax shall be computed without any reduction for the amount which the individual estimates as his credit under G.S. 105-163.10 (relating to tax withheld at source on wages), and

(2) The amount of the credit allowed under G.S. 105-163.10 for the taxable year shall be deemed a payment of estimated tax, and an equal part of such amount shall be deemed paid on each installment date (as determined under G.S. 105-163.14) for such taxable year, unless the taxpayer establishes the dates on which all amounts were actually withheld, in which case the amounts so withheld shall be deemed payments of estimated tax on the dates on which such amounts were actually withheld.

(f) The application of this section to taxable years of less than 12 months shall be in accordance with regulations prescribed by the Commissioner.

(g) Except as otherwise provided in this Article, all provisions of Articles 4 and 9 of this Chapter relating to penalties for failure to file returns or pay taxes when due under said Articles shall apply with respect to returns,

declarations, and payments of tax by any individual, or failure to file returns or other records or make payment of withholding taxes or sums withheld from wages by any employer, pursuant to the provisions of this Article. The penalties provided by Articles 4 and 9 shall apply with respect to delinquencies for periods of time not specifically provided for in this Article. (1959, c. 1259, s. 1; 1963, c. 785, ss. 3, 4.)

§ **105-163.16. Overpayment refunded.**—(a) Where the amount of wages withheld at the source under G.S. 105-163.2 exceeds the taxes imposed by Article 4 of this Chapter against which the tax so withheld may be credited under G.S. 105-163.10, the amount of such excess shall be considered an overpayment by the employee, and, notwithstanding the provisions of G.S. 105-266 and G.S. 105-266.1, overpayment by the employee shall be refunded by the Commissioner under the provisions of this section.

(b) Where the amount of estimated tax paid under the provisions of G.S. 105-163.14 exceeds the taxes imposed by Article 4 of this Chapter against which the estimated tax so paid may be credited under the provisions of this Article, the amount of such excess shall be considered an overpayment by the taxpayer, and, notwithstanding the provisions of G.S. 105-266 and G.S. 105-266.1, such overpayment by the taxpayer shall be refunded by the Commissioner under the provisions of this section.

(c) Where there has been an overpayment (as specified in subsections (a) and (b) of this section) of any tax imposed under Article 4 of this Chapter, as disclosed by the taxpayer's annual return required to be filed by Article 4, the amount of such overpayment shall be refunded to the taxpayer; except that overpayments of less than one dollar ($1.00) shall be refunded only upon receipt by the Commissioner of a written demand for such refund from the taxpayer. Every refund authorized by this section shall be made as expeditiously as possible, and within six months from the date on which the annual return is filed or due to be filed, whichever is later, insofar as the same is practicable; except that no refunds for overpayment of estimated tax shall be made by the Commissioner prior to the date on which the final return is filed by the taxpayer. No interest shall be paid with respect to any such refund if the refund is made within the six months' period above referred to. Interest computed at the rate of four percent (4%) per annum shall be paid on refunds made after the expiration of said six months' period, such interest to be computed from the time of the expiration of said six months' period until paid. It shall not be necessary for the Attorney General or any member of his staff to approve such refund. The making of such refund does not absolve any taxpayer of any income tax liability which may in fact exist and the Commissioner may make any assessment for any deficiency in the manner provided in Article 4 of this Chapter. No overpayment of tax by the taxpayer shall be refunded irrespective of whether upon discovery or receipt of written demand if such discovery is not made or such demand is not received within three years from the date set by the statute for the filing of the annual return by the taxpayer or within six months of the payment of the tax alleged to be an overpayment, whichever date is the later. (1959, c. 1259, s. 1; 1967, c. 702, s. 2.)

§ **105-163.17. Enforcement.**—Except as otherwise provided in this Article, all provisions of Articles 4 and 9 of this Chapter relating to assessments, interest on delinquent payments, liens and collections with respect to taxes shall apply to all taxes and to the withholding of proper amounts from employees' wages for which an employer is responsible pursuant to this Article, and the procedure with respect thereto shall be the same as provided in said Articles 4 and 9 with respect to assessment and collection of taxes.

Any employer required under the provisions of this Article to deduct and withhold from wages and make returns and payment of amounts withheld to

the Commissioner, who fails to withhold such amounts, or to make such returns, or who fails to remit amounts collected to the Commissioner, or otherwise fails to remit to the Commissioner as required by this Article, shall be subject to a penalty equal to twenty-five percent (25%) of the amount that should have been properly withheld and paid over to the Commissioner for each such failure. Such penalty shall be assessed and collected by the Commissioner in the same manner as is provided with respect to penalties on delinquent income tax payments under the provisions of Articles 4 and 9 of this Chapter.

The withholding of the proper amounts of an employee's wages pursuant to this Article and the payment of proper amounts to the Commissioner as herein required, whether withheld in fact or not, shall be subject to all the provisions of Articles 4 and 9 of this Chapter relating to payment of income taxes, not inconsistent with this Article. (1959, c. 1259, s. 1.)

§ 105-163.18. Rules and regulations.—The Commissioner is hereby authorized to prescribe forms and make all rules and regulations which he deems necessary in order to achieve effective and efficient enforcement of this Article. (1959, c. 1259, s. 1.)

§§ 105-163.19 to 105-163.21: Repealed by Session Laws 1967, c. 1110, s. 4.

Editor's Note. — The repeals are effective for all taxable years beginning on or after Jan. 1, 1967.

Section 16, c. 1110, Session Laws 1967, provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

§ 105-163.22. Reciprocity.—The Commissioner of Revenue may, with the approval of the Attorney General, enter into agreements with the taxing authorities of states having income tax withholding statutes with such agreements to govern the amounts to be withheld from the wages and salaries of residents of such other state or states under the provisions of this Article when such other state or states grant similar treatment to the residents of this State. Such agreements may provide for recognition of the anticipated tax credits allowed under the provisions of G.S. 105-151 in determining the amounts to be withheld. (1959, c. 1259, s. 1.)

§ 105-163.23. Withholding from federal employees.—The Commissioner of Revenue is hereby designated as the proper official to make request for and enter into agreements with the Secretary of the Treasury of the United States to provide for the compliance with this Article by the head of each department or agency of the United States in withholding of State income taxes from wages of federal employees and paying the same to this State. The Commissioner is hereby authorized, empowered and directed to make request for and enter into such agreements. (1959, c. 1259, s. 1.)

§ 105-163.24. Construction of Article. — This Article shall be liberally construed in pari materia with Article 4 of this Chapter to the end that taxes levied by Article 4 shall be collected with respect to wages by withholding from wages by employers of the appropriate amounts herein provided for and by payments in installments by individuals of income tax with respect to income other than wages. (1959, c. 1259, s. 1.)

ARTICLE 4B.

Filing of Declarations of Estimated Income Tax and Installment Payments of Estimated Income Tax by Corporations.

§ 105-163.25. Definitions.—As used in this Article,

(1) "Commissioner" means the Commissioner of Revenue.

(2) "Corporation" includes joint-stock companies or associations.
(3) "Fiscal year" means an accounting period of 12 months ending on the last day of any month other than December.
(4) The words "taxable year" mean the calendar year or fiscal year upon the basis of which the net income is computed under Article 4; if no fiscal year has been established, they mean the calendar year. In the case of a return made for a fractional part of the year under the provisions of Article 4, or under regulations prescribed by the Commissioner, the words "taxable year" mean the period for which such return is made.
(5) The term "estimated tax" means the excess of the amount which the corporation estimates as the amount of the income tax imposed by Article 4 over the sum of one hundred thousand dollars ($100,000). (1959, c. 1259, s. 1A.)

§ 105-163.26. Declarations of estimated income tax by corporations.—(a) Every corporation subject to taxation under Article 4 shall, for all taxable years beginning on and after January 1, 1960, and at the times prescribed in G.S. 105-163.27, make a declaration of estimated tax under Article 4 for the taxable year if its income tax imposed by Article 4 for such taxable year reduced by the credits against the tax provided by Article 4 can reasonably be expected to exceed one hundred thousand dollars ($100,000).

(b) The declaration shall contain a statement of the amount which the corporation estimates as its total net income from all sources for the taxable year, the proportion of its total net income allocable to North Carolina, the amount which it estimates as the amount of tax for which it will be liable for the taxable year, and such other information as may be required by the Commissioner.

(c) A corporation may make amendments of a declaration filed during the taxable year under regulations prescribed by the Commissioner.

(d) The application of this section to taxable years of less than 12 months shall be in accordance with regulations prescribed by the Commissioner. (1959, c. 1259, s. 1A.)

§ 105-163.27. Time for filing declarations of estimated income tax by corporations.—(a) The declaration of estimated tax required of corporations by G.S. 105-163.26 shall be filed on or before the fifteenth day of the ninth month of the taxable year, except that if the requirements of G.S. 105-163.26 are first met after the last day of the eighth month and before the first day of the twelfth month of the taxable year, the declaration shall be filed on or before the fifteenth day of the twelfth month of the taxable year.

(b) If a declaration is filed before the fifteenth day of the twelfth month of the taxable year, an amendment of such declaration may be filed on or before such day.

(c) The application of this section to taxable years of less than 12 months shall be in accordance with regulations prescribed by the Commissioner. (1959, c. 1259, s. 1A.)

§ 105-163.28. Installment payments of estimated income tax by corporations.—(a) Notwithstanding the provisions of Article 4, fifty percent (50%) of the estimated tax, with respect to which a declaration is required under the provisions of this Article, shall be paid to the Commissioner during the taxable year in accordance with the provisions of this section.

(b) If the declaration is filed on or before the fifteenth day of the ninth month of the taxable year, the amount determined under subsection (a) above shall be paid in two equal installments. The first installment shall be paid on or before the fifteenth day of the ninth month of the taxable year, and the second installment shall be paid on or before the fifteenth day of the twelfth month of

the taxable year. If the declaration is filed after the fifteenth day of the ninth month of the taxable year, the amount determined under subsection (a) above shall be paid in full on or before the fifteenth day of the twelfth month of the taxable year.

(c) If any amendment of a declaration is filed, installments payable on the fifteenth day of the twelfth month, if any, shall be ratably increased or decreased, as the case may be, to reflect the increase or decrease, as the case may be, in the estimated tax by reason of such amendment.

(d) The application of this section to taxable years of less than 12 months shall be in accordance with regulations prescribed by the Commissioner.

(e) At the election of the corporation, any installment of the estimated tax may be paid prior to the date prescribed for its payment. (1959, c. 1259, s. 1A.)

§ 105-163.29. Payments of estimated income tax.—Payment of the estimated income tax, or any installment thereof, shall be considered payment on account of the income taxes imposed by Article 4 for the taxable year. (1959, c. 1259, s. 1A.)

§ 105-163.30. Failure by corporation to pay estimated income tax.—(a) In the case of any underpayment of estimated tax by a corporation, except as provided in subsection (d), there shall be added to the tax under Article 4 for the taxable year an amount determined at the rate of six percent (6%) per annum upon the amount of the underpayment (determined under subsection (b)) for the period of the underpayment (determined under subsection (c)).

(b) For the purposes of subsection (a), the amount of the underpayment shall be the excess of

(1) The amount of the installment which would be required to be paid if the estimated tax were equal to seventy percent (70%) of the tax shown on the return for the taxable year or, if no return was filed, seventy percent (70%) of the tax for such year, over

(2) The amount, if any, of the installment paid on or before the last day prescribed for payment.

(c) The period of the underpayment shall run from the date the installment was required to be paid to whichever of the following dates is the earlier—

(1) The fifteenth day of the third month following the close of the taxable year.

(2) With respect to any portion of the underpayment, the date on which such portion is paid. For purposes of this paragraph, a payment of estimated tax on the fifteenth day of the twelfth month shall be considered a payment of any previous underpayment only to the extent such payment exceeds the amount of the installment determined under subsection (b)(1) for the fifteenth day of the twelfth month.

(d) Notwithstanding the provisions of the preceding subsections, the addition to the tax with respect to any underpayment of any installment shall not be imposed if the total amount of all payments of estimated tax made on or before the last date prescribed for the payment of such installment equals or exceeds the amount which would have been required to be paid on or before such date if the estimated tax were whichever of the following is lesser—

(1) The tax shown on the return of the corporation for the preceding taxable year reduced by one hundred thousand dollars ($100,000), if a return showing a liability for tax was filed by the corporation for the preceding taxable year and such preceding year was a taxable year of 12 months.

(2) An amount equal to the tax computed at the rate applicable to the taxable year but otherwise on the basis of the facts shown on the return of the corporation for, and the law applicable to, the preceding taxable year.

(3) a. An amount equal to seventy percent (70%) of the tax for the taxable year computed by placing on an annualized basis the taxable income:

1. For the first six months or for the first eight months of the taxable year, in the case of the installment required to be paid in the ninth month, and
2. For the first nine months or for the first eleven months of the taxable year, in the case of the installment required to be paid in the twelfth month.

b. For purposes of this paragraph, the taxable income shall be placed on an annualized basis by—

1. Multiplying by twelve the taxable income referred to in subparagraph a, and
2. Dividing the resulting amount by the number of months in the taxable year (six or eight, or nine or eleven, as the case may be) referred to in subparagraph a.

(e) For purposes of subsections (b), (d)(2), and (d)(3), the term "tax" means the excess of the tax imposed by Article 4, over the sum of one hundred thousand dollars ($100,000).

(f) The application of this section to taxable years of less than 12 months shall be in accordance with regulations prescribed by the Commissioner. (1959, c. 1259, s. 1A.)

§ **105-163.31. Filing of declarations and other returns hereunder.**—The declarations, amended declarations or any information returns required under the provisions of this Article from any corporation shall be signed by either its president, vice-president, treasurer, assistant treasurer, secretary or assistant secretary. In a case where a receiver, trustee in bankruptcy, or assignee, by order of a court of competent jurisdiction, by operation of law or otherwise, has possession of or holds title to all or substantially all of the property or business of a corporation, whether or not such property or business is being operated, such receiver, trustee, or assignee shall make and sign the declarations, amended declarations or any information returns for such corporation in the same manner and form as corporations are required to make same. (1959, c. 1259, s. 1A.)

§ **105-163.32. Affirmation; penalties for false declaration.**—Whenever any declaration, amended declaration or information returns required under the provisions of this Article shall be furnished to the Commissioner, there shall be annexed thereto the affirmation of the person furnishing same, in the following form: "I hereby affirm that this declaration, amended declaration, or return, including any schedules and attachments thereto, has been examined by me, and, to the best of my knowledge and belief, is true and complete and is made in good faith covering the taxable period stated, pursuant to the Revenue Act of 1939, as amended, and the regulations issued under authority thereof, and that this affirmation is made under the penalties prescribed by law." Any individual who wilfully makes and subscribes a declaration, amended declaration, or return required by this Article, which he does not believe to be true and correct as to every material matter, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be subject to a fine not to exceed one thousand dollars ($1,000) or imprisonment not to exceed six months, or both, in the discretion of the court. The Commissioner shall cause to be prepared blank forms for the said declarations, amended declarations and returns, and shall cause them to be distributed throughout the State, and to be furnished upon application; but failure to receive or secure the form shall not relieve any taxpayer from the obligation of making any declaration, amended declaration or return herein required. (1959, c. 1259, s. 1A.)

§ **105-163.33. Overpayment refunded.**—Where there has been an

overpayment of estimated tax, such overpayment shall be credited to the taxpayer and applied to the tax imposed upon such taxpayer by Article 4. No refunds for overpayment of estimated tax shall be made by the Commissioner prior to the filing of the annual return required from the taxpayer under Article 4, but, after the annual return is filed, any overpayments shall be refunded in accordance with the provisions of Article 9. (1959, c. 1259, s. 1A; 1967, c. 1110, s. 5.)

§ **105-163.34. Enforcement.**—Except as otherwise provided in this Article, all provisions of Articles 4 and 9 of Chapter 105 of the General Statutes relating to assessments, liens and collections with respect to taxes shall apply to all payments for which a corporation is responsible under the provisions of this Article, and the procedure with respect thereto shall be the same as provided in Articles 4 and 9. (1959, c. 1259, s. 1A.)

§ **105-163.35. Wilful failure to pay estimated tax.**—Any person required under this Article to pay any estimated tax, who wilfully fails to pay such estimated tax, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor, and upon conviction thereof, shall be fined not more than five hundred dollars ($500.00) or imprisoned not exceeding six months, or punished by both such fine and imprisonment in the discretion of the court, within the limitations aforesaid. (1959, c. 1259, s. 1A.)

§ **105-163.36. Construction of Article.** — This Article shall be liberally construed in pari materia with Article 4 to the end that taxes levied by Article 4 shall be collected in installments during the taxable year in the manner and to the extent provided for by this Article. (1959, c. 1259, s. 1A.)

§ **105-163.37. Rules and regulations.** — The Commissioner is hereby authorized to prescribe forms and to make all rules and regulations which he deems necessary to achieve effective and efficient enforcement of this Article. (1959, c. 1259, s. 1A.)

Article 5.

Schedule E. Sales and Use Tax.

§ **105-164:** Repealed by Session Laws 1957, c. 1340, s. 5.

Division 1. Title, Purpose and Definitions.

§ **105-164.1. Short title.**—This Article shall be known as the "North Carolina Sales and Use Tax Act." (1957, c. 1340, s. 5.)

Editor's Note.—For case law survey on sales tax, see 41 N.C.L. Rev. 508 (1963).

Power of Legislature. — The power of the legislature to levy taxes of the character provided in this Article has long been settled. Duke v. State, 247 N.C. 236, 100 S.E.2d 506 (1957).

Distinction between Sales Tax and Use Tax.—A sales tax is assessed on the purchase price of property and is imposed at the time of sale; a use tax is assessed on the storage, use or consumption of property and takes effect only after such use begins. Colonial Pipeline Co. v. Clayton, 275 N.C. 215, 166 S.E.2d 671 (1969).

Sales Tax Is a Privilege or License Tax. — The legislature intended that the sales tax be primarily a privilege or license tax on retailers. Piedmont Canteen Serv., Inc. v. Johnson, 256 N.C. 155, 123 S.E.2d 582 (1962).

The sales tax statute levies a tax upon the sale of tangible personal property in this State by a "retail" merchant as a privilege tax for engaging or continuing in the business of a retail merchant. Piedmont Canteen Serv., Inc. v. Johnson, 256 N.C. 155, 123 S.E.2d 582 (1962).

Imposed on All Retailers, as a Class.—The North Carolina law imposes the sales tax on all retailers, as a class, and applies it alike in its exactions and exemptions to all persons belonging to the prescribed class. Piedmont Canteen Serv., Inc. v. Johnson, 256 N.C. 155, 123 S.E.2d 582 (1962).

Perfect equality in the collection of the tax by retailers from consumers is, as a practical matter, impossible as between almost any two or more retailers by reason of the differences in types of merchandise sold and selling methods.

Piedmont Canteen Serv., Inc. v. Johnson, 256 N.C. 155, 123 S.E.2d 582 (1962).

Construction of Former Provisions of Article. — As to the incidence of the sales tax where it is imposed upon a general class, as for instance retail merchants, the law is construed more strictly against the agency imposing the tax, and in favor of the taxpayer. Henderson v. Gill, 229 N.C. 313, 49 S.E.2d 754 (1948).

For other decisions under former laws, see Powell v. Maxwell, 210 N.C. 211, 186 S.E. 326 (1936); McCanless Motor Co. v. Maxwell, 210 N.C. 725, 188 S.E. 389 (1936); Leonard v. Maxwell, 216 N.C. 89, 3 S.E.2d 316 (1939).

§ **105-164.2. Purpose.**—The taxes herein imposed shall be in addition to all other license, privilege or excise taxes and the taxes levied by this Article are to provide revenue for the support of the public school system of this State and for other necessary uses and purposes of the government and State of North Carolina. (1957, c. 1340, s. 5.)

Quoted in Piedmont Canteen Serv., Inc. v. Johnson, 256 N.C. 155, 123 S.E.2d 582 (1962).

§ **105-164.3. Definitions.**—The words, terms and phrases when used in this Article shall have the meanings ascribed to them in this section except when the context clearly indicates a different meaning:

(1) "Business" shall include any activity engaged in by any person or caused to be engaged in by him with the object of gain, profit, benefit or advantage, either direct or indirect. The term "business" shall not be construed in this Article to include occasional and isolated sales or transactions by a person who does not hold himself out as engaged in business.

(2) "Commissioner" shall mean the Commissioner of Revenue of the State of North Carolina.

(3) "Consumer" shall mean and include every person storing, using or otherwise consuming in this State tangible personal property purchased or received from a retailer either within or without this State.

(4) "Cost price" means the actual cost of articles of tangible personal property without any deductions therefrom on account of the cost of materials used, cash discounts, labor or service costs, transportation charges or any expenses whatsoever.

(5) "Engaged in business" shall mean maintaining, occupying or using permanently or temporarily, directly or indirectly, or through a subsidiary or agent, by whatever name called, any office, place of distribution, sales or sample room or place, warehouse or storage place, or other place of business, for the selling or delivering of tangible personal property for storage, use or consumption in this State, or permanently or temporarily, directly or through a subsidiary, having any representative, agent, salesman, canvasser or solicitor operating in this State in such selling or delivering, and the fact that any corporate retailer, agent or subsidiary engaged in business in this State may not be legally domesticated or qualified to do business in this State shall be immaterial. It shall also mean the maintaining in this State, either permanently or temporarily, directly or through a subsidiary, tangible personal property for the purpose of lease or rental.

(6) "Gross sales" means the sum total of all retail sales of tangible personal property as defined herein, whether for cash or credit without allowance for cash discount and without any deduction on account of the cost of the property sold, the cost of materials used, labor or service costs, interest paid or any other expenses whatsoever and without any deductions of any kind or character except as provided in this Article.

(7) "In this (the) State" means within the exterior limits of the State of North Carolina and includes all territory within such limits owned by or ceded to the United States of America.

(8) "Lease or rental" means the leasing or renting of tangible personal property and the possession or use thereof by the lessee or rentee for a consideration without transfer of the title of such property.

(9) "Net taxable sales" shall mean and include the gross retail sales of the business of the retailer taxed under this Article after deducting therefrom exempt sales and nontaxable sales.

(10) "Nonresident retail or wholesale merchant" shall mean every person whose business establishment is located outside North Carolina and who engages in the business of buying or acquiring by consignment or otherwise any tangible personal property and selling the same at retail or wholesale outside this State and who has applied for and obtained from the Commissioner a certificate of registration in accordance with such rules and regulations as may be prescribed for the issuance thereof.

(11) "Person" includes any individual, firm, copartnership, joint venture, association, corporation, estate, trust, business trust, receiver, syndicate or other group, or combination acting as a unit, body politic, or political subdivision, whether public or private or quasi-public and the plural as well as the singular number.

(12) "Purchase" means acquired for a consideration whether

a. Such acquisition was effected by a transfer of title or possession, or both, or a license to use or consume;

b. Such transfer shall have been absolute or conditional and by whatever means it shall have been effected; and

c. Such consideration be a price or rental in money or by way of exchange or barter.

It shall also include the procuring of a retailer to erect, install or apply tangible personal property for use in this State.

(13) "Retail" shall mean the sale of any tangible personal property in any quantity or quantities for any use or purpose on the part of the purchaser other than for resale.

(14) "Retailer" means and includes every person engaged in the business of making sales of tangible personal property at retail, either within or without this State, or peddling the same or soliciting or taking orders for sales, whether for immediate or future delivery, for storage, use or consumption in this State and every manufacturer, producer or contractor engaged in business in this State and selling, delivering, erecting, installing or applying tangible personal property for use in this State notwithstanding that said property may be permanently affixed to a building or realty or other tangible personal property. Provided, however, that when in the opinion of the Commissioner it is necessary for the efficient administration of this Article to regard any salesmen, solicitors, representatives, consignees, peddlers, truckers or canvassers as agents of the dealers, distributors, consignors, supervisors, employers or persons under whom they operate or from whom they obtain the tangible personal property sold by them regardless of whether they are making sales on their own behalf or on behalf of such dealers, distributors, consignors, supervisors, employers or persons, the Commissioner may so regard them and may regard the dealers, distributors, consignors, supervisors, employers or persons as "retailers" for the purpose of this Article.

(15) "Sale" or "selling" shall mean any transfer of title or possession, or both, exchange, barter, lease, or rental of tangible personal property, conditional or otherwise, in any manner or by any means whatsoever, however effected and by whatever name called, for a consideration paid or to be paid, and includes the fabrication of tangible personal property for consumers by persons engaged in business

who furnish either directly or indirectly the materials used in the fabrication work, and the furnishing, preparing, or serving for a consideration of any tangible personal property consumed on the premises of the person furnishing, preparing, or serving such tangible personal property or consumed at the place at which such property is prepared, served or sold. A transaction whereby the possession of the property is transferred but the seller retains title or security for the payment of the price shall be deemed a sale.

(16) "Sales price" means the total amount for which tangible personal property is sold including charges for any services that go into the fabrication, manufacture or delivery of such tangible personal property and that are a part of the sale valued in money whether paid in money or otherwise and includes any amount for which credit is given to the purchaser by the seller without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or service costs, interest charged, losses or any other expenses whatsoever. Provided, however, that where a manufacturer, producer or contractor, erects, installs or applies tangible personal property for the account of or under contract with the owner of realty or other property, the sales price shall be the fair market value of such property at the time and place of such erection, installation or application. Provided, further:

a. The cost for labor or services rendered in erecting, installing or applying property sold when separately charged shall not be included as a part of the "sales price";

b. Finance charges, service charges or interest from credit extended under conditional sales contracts or other conditional contracts providing for deferred payments of the purchase price shall not be considered a part of the "sales price" when separately charged;

c. "Sales price" shall not include the amount of any tax imposed by the United States upon or with respect to retail sales whether imposed upon the retailer or consumer except that any manufacturers' or importers' excise tax shall be included in the term.

(17) "Storage" means and includes any keeping or retention in this State for any purpose except sale in the regular course of business of tangible personal property purchased from a retailer.

(18) "Use" means and includes the exercise of any right or power or dominion whatsoever over tangible personal property by a purchaser thereof and includes, but is not limited to, any withdrawal from storage, installation, affixation to real or personal property, exhaustion or consumption of tangible personal property by the owner or purchaser thereof, but shall not include the sale of tangible personal property in the regular course of business.

(19) "Storage" and "Use"; Exclusion.—"Storage" and "use" do not include the keeping, retaining or exercising any right or power over tangible personal property for the original purpose of subsequently transporting it outside the State for use thereafter solely outside the State and which purpose is consummated, or for the purpose of being processed, fabricated, or manufactured into, attached to or incorporated into, other tangible personal property to be transported outside the State and thereafter used solely outside the State.

(20) "Tangible personal property" means and includes personal property which may be seen, weighed, measured, felt or touched or is in any other manner perceptible to the senses. The term "tangible personal property" shall not include stocks, bonds, notes, insurance or other obligations or securities, nor shall it include electricity, gas or water delivered by or through main lines or pipes either for commercial or domestic use or consumption.

(21) "Taxpayer" means any person liable for taxes under this Article.

(22) "Use tax" means and includes the tax imposed by Part 3 in Division II of this Article.

(23) "Wholesale merchant" shall mean every person who engages in the business of buying or manufacturing any tangible personal property and selling same to registered retailers, wholesalers and nonresident retail or wholesale merchants for resale. It shall also include persons making sales of tangible personal property which are defined herein as wholesale sales. For the purposes of this Article any person, firm, corporation, estate or trust engaged in the business of manufacturing, producing, processing or blending any articles of commerce and maintaining a store or stores, warehouse or warehouses, or any other place or places, separate and apart from the place of manufacture or production, for the sale or distribution of its products (other than bakery products) to other manufacturers or producers, wholesale or retail merchants, for the purpose of resale shall be deemed a "wholesale merchant."

(24) "Wholesale sale" shall mean a sale of tangible personal property by a wholesale merchant to a manufacturer, or registered jobber or dealer, or registered wholesale or retail merchant, for the purpose of resale but does not include a sale to users or consumers not for resale. (1957, c. 1340, s. 5; 1959, c. 1259, s. 5; 1961, c. 1213, s. 1; 1967, c. 1110, s. 6.)

Cash Discounts Not Included in Use Tax Base Prior to July 1, 1967.—Prior to July 1, 1967, the effective date of the amendment to subdivision (4) by 1967 Session Laws, c. 1110, s. 6, cash discounts allowed a purchaser for payment within a specified time were not properly included in the use tax base. Colonial Pipeline Co. v. Clayton, 275 N.C. 215, 166 S.E.2d 671 (1969).

Meaning of "Contractor" under Subdivision (16). — The word "contractor" is not used in subdivision (16) to mean any person who enters into a contract, but one who, in the pursuit of an independent business, undertakes to perform a job, yet retains in himself the right to control the means, method, and manner of accomplishing the desired result. Long Mfg. Co. v. Johnson, 264 N.C. 12, 140 S.E.2d 744 (1965).

Burden on Lessor to Show That Leasing Transactions Constituted Sale for Resale. — A lessor of television sets who had not procured resale certificates from any of its customers had the burden to show that its leasing transactions constituted a sale for resale, entitling the lessor to an exemption from the sales tax. Telerent Leasing Corp. v. High, 8 N.C. App. 179, 174 S.E.2d 11 (1970).

Leasing of Television Set to Motel or Hotel Owner Not Sale for Resale.—Leasing of a television set to a motel or hotel owner for use in a room rented to transients is not a sale for resale as contemplated by the North Carolina Sales and Use Tax Act. Telerent Leasing Corp. v. High, 8 N.C. App. 179, 174 S.E.2d 11 (1970).

Meaning of "Sale" under Former Statute.—See Watson Indus. v. Shaw, 235 N.C. 203, 69 S.E.2d 505 (1952), holding that the word "sale" did not embrace a transaction whereby a radio broadcasting station was given temporary custody of transcription tape or records in order to rebroadcast the programs contained thereon.

Division II. Taxes Levied.

Part 1. Retail Sales Tax.

§ **105-164.4. Imposition of tax; retailer.** — There is hereby levied and imposed, in addition to all other taxes of every kind now imposed by law, a privilege or license tax upon every person who engages in the business of selling tangible personal property at retail, renting or furnishing tangible personal property or the renting and furnishing of rooms, lodgings and accommodations to transients, in this State, the same to be collected and the amount to be determined by the application of the following rates against gross sales and rentals, to wit:

(1) At the rate of three percent (3%) of the sales price of each item or article of tangible personal property when sold at retail in this State,

the tax to be computed on total net taxable sales as defined herein but for the purpose of computing the amount due the State each and every taxable retail sale, or retail sales upon which the tax has been collected, or the amount of tax actually collected, whichever be greater and whether or not erroneously collected, shall be included in the computation tax due the State. Provided, however, that in the case of the sale of any airplane, railway locomotive, railway car or the sale of any motor vehicle or boat, the tax shall be only at the rate of two percent (2%) of the sales price, but at no time shall the maximum tax with respect to any one such airplane, railway locomotive, railway car or motor vehicle or boat, including all accessories attached thereto at the time of delivery thereof to the purchaser, be in excess of one hundred twenty dollars ($120.00).

For the purposes of this section, the words "motor vehicle" mean any vehicle which is self-propelled and designed primarily for use upon the highways, any vehicle which is propelled by electric power obtained from trolley wires but not operated upon rails, and any vehicle designed to run upon the highways which is pulled by a self-propelled vehicle, but shall not include any implement of husbandry, farm tractor, road construction or maintenance machinery, or equipment, special mobile equipment as defined in G.S. 20-38, nor any vehicle designed primarily for use in work off the highway. For the purposes of this subdivision, the sale separately of a new motor vehicle chassis and a new motor vehicle body to be installed thereon, whether by the same retailer or different retailers, shall be subject only to the tax herein prescribed with respect to a single motor vehicle.

Provided further, in addition to all other taxes, there is hereby levied and imposed upon every person for the privilege of using the streets and highways of this State, a tax at the rate of two percent (2%) of the sales or purchase price of any motor vehicle, new chassis and/or new body as defined, described and limited in this section, including all accessories attached thereto at the time of delivery thereof to the purchaser, purchased or acquired for use on the streets and highways of this State, but at no time shall said tax exceed one hundred twenty dollars ($120.00) with respect to any one motor vehicle, and the same shall be paid to the Commissioner of Revenue at the time of applying for certificates of title or registration of such motor vehicle. No certificate of title or registration plate shall be issued for same unless and until said tax has been paid: Provided, however, if such person so applying for certificate of title or registration and license plate for such motor vehicle shall furnish to the Commissioner of Revenue a certificate from a motor vehicle dealer licensed to do business in this State, upon a form furnished by the Commissioner, certifying that such person has paid the tax thereon levied in this Article, the tax herein levied shall be remitted to such person to avoid in effect double taxation on said motor vehicle under this Article. It is not the intention of this section to impose any tax upon a body mounted upon the chassis of a motor vehicle which temporarily enters the State for the purpose of having such body mounted thereon by the manufacturer thereof.

The tax levied under this subdivision shall not apply to the owner of a motor vehicle who purchases or acquires said motor vehicle from some person, firm or corporation who or which is not a dealer in new and/or used motor vehicles if the tax levied under this Article has been paid with respect to said motor vehicle.

Provided further, the tax shall be only at the rate of one percent (1%) of the sales price on the following items:

a. Horses or mules by whomsoever sold.

b. Semen to be used in the artificial insemination of animals.

c. Sales of fuels to farmers to be used by them for any farm purposes other than preparing food, heating dwellings and other household purposes. The quantity of fuel purchased or used at any one time shall not in any manner be a determinative factor as to whether any sale or use of fuel is or is not subject to the one percent (1%) rate of tax imposed herein.

d. Sales of fuel to manufacturing industries and manufacturing plants for use in connection with the operation of such industries and plants other than sales of fuels to be used for residential heating purposes. The quantity of fuel purchased or used at any one time shall not in any manner be a determinative factor as to whether any sale or use of fuel is or is not subject to the one percent (1%) rate of tax imposed herein.

e. Sales of fuel to commercial laundries or to pressing and dry cleaning establishments for use in machinery used in the direct performance of the laundering or the pressing and cleaning service.

f. Sales to freezer locker plants of wrapping paper, cartons and supplies consumed directly in the operation of such plant.

Provided further, the tax shall be only at the rate of one percent (1%) of the sales price, subject to a maximum tax of eighty dollars ($80.00) per article, on the following items:

g. Sales of machines and machinery, whether animal or motor drawn or operated, and parts and accessories for such machines and machinery to farmers for use by them in the planting, cultivating, harvesting or curing of farm crops, and sales of machines and machinery and parts and accessories for such machines and machinery to dairy operators, poultry farmers, egg producers, and livestock farmers for use by them in the production of dairy products, poultry, eggs or livestock.

The term "machines and machinery" as used in this subdivision is defined as follows:

The term shall include all vehicular implements, designed and sold for any use defined in this subdivision, which are operated, drawn or propelled by motor or animal power, but shall not include vehicular implements which are operated wholly by hand, and shall not include any motor vehicles required to be registered under Chapter 20 of the General Statutes.

The term shall include all nonvehicular implements and mechanical devices designed and sold for any use defined in this subdivision, which have moving parts, or which require the use of any motor or animal power, fuel, or electricity in their operation but shall not include nonvehicular implements which have no moving parts and are operated wholly by hand.

The term shall also include metal flues sold for use in curing tobacco, whether such flues are attached to hand-fired furnaces or used in connection with mechanical burners.

h. Sales of mill machinery or mill machinery parts and accessories to manufacturing industries and plants.

i. Sales of central office equipment and switchboard and private branch exchange equipment to telephone and telegraph companies regularly engaged in providing telephone and telegraph service to subscribers on a commercial basis.

j. Sales to commercial laundries or to pressing and dry cleaning establishments of machinery used in the direct performance of the laundering or the pressing and cleaning service and of parts and accessories thereto.

k. Sales to freezer locker plants of machinery used in the direct operation of said freezer locker plant and of parts and accessories thereto.

l. Sales of broadcasting equipment and parts and accessories thereto and towers to commercial radio and television companies which are under the regulation and supervision of the Federal Communications Commission.

m. Sales to farmers of bulk tobacco barns and racks and all parts and accessories thereto and similar apparatus used for the curing and drying of any farm produce.

(2) At the rate of three percent (3%) of the gross proceeds derived from the lease or rental of tangible personal property as defined herein, where the lease or rental of such property is an established business, or the same is incidental or germane to said business; except that whenever a rate of less than three percent (3%) is applicable to a sale of property which is leased or rented, the lower rate of tax shall be due on such lease or rental proceeds.

(3) Operators of hotels, motels, tourist homes and tourist camps shall be considered "retailers" for the purposes of this Article. There is hereby levied upon every person, firm or corporation engaged in the business of operating hotels, and every person, firm or corporation engaged in the business of operating tourist homes, tourist camps and similar places of business, a tax of three percent (3%) of the gross receipts derived from the rental of any room or rooms, lodgings, or accommodations furnished to transients at any hotel, motel, inn, tourist camp, tourist cabin or any other place in which rooms, lodgings or accommodations are regularly furnished to transients for a consideration. The tax shall not apply, however, to any room, lodging or accommodation supplied to the same person for a period of 90 continuous days or more. Every person subject to the provisions of this section shall register and secure a license in the manner provided in subdivision (7) of this section, and, insofar as practicable, all other provisions of this Article shall also be applicable with respect to the tax herein provided for.

(4) Every person, firm or corporation engaged in the business of operating a pressing club, cleaning plant, hat blocking establishment, dry cleaning plant, laundry (including wet or damp wash laundries and businesses known as launderettes and launderalls), or any similar type business, or engaged in the business of renting clean linen or towels or wearing apparel, or any similar type business, or engaged in the business of soliciting cleaning, pressing, hat blocking, laundering or rental business for any of the aforenamed businesses, shall be considered "retailers" for the purposes of this Article. There is hereby levied upon every such person, firm or corporation a tax of three percent (3%) of the gross receipts derived from services rendered in engaging in any of the occupations or businesses named in this subdivision, and every person, firm or corporation subject to the provisions of this subdivision shall register and secure a license in the manner hereinafter provided in this section, and, insofar as practicable, all other provisions of this Article shall be applicable with respect to the tax herein provided for. The taxes levied in this subdivision are additional privilege or license taxes for the privilege of engaging in the

occupations or businesses named herein. Any person, firm or corporation engaged in cleaning, pressing, hat blocking, laundering for, or supplying clean linen or towels or wearing apparel to, another person, firm or corporation engaged in soliciting shall not be required to pay the three percent (3%) tax on its gross receipts derived through such solicitor, if the soliciting person, firm or corporation has registered with the Department, secured the license hereinafter required and has paid the tax at the rate of three percent (3%) of the total gross receipts derived from business solicited. Persons, firms and corporations required to be licensed under this Article and to pay the taxes imposed by this subdivision shall not hereafter be subject to the one percent (1%) of gross receipts taxes levied under G.S. 105-74 and 105-85, with respect to gross receipts collected on and after July 1, 1961.

(5) The said tax shall be collected from the retailer as defined herein and paid by him at the time and in the manner as hereinafter provided. Provided, however, that any person engaging or continuing in business as a retailer shall pay the tax required on the net taxable sales of such business at the rates specified when proper books are kept showing separately the gross proceeds of taxable and nontaxable sales of tangible personal property in such form as may be accurately and conveniently checked by the Commissioner or his duly authorized agent. If such records are not kept separately the tax shall be paid as a retailer on the gross sales of business and the exemptions and exclusions provided by this Article shall not be allowed.

(6) The tax so levied is and shall be in addition to all other taxes whether levied in the form of excise, license or privilege or other taxes.

(7) Any person who shall engage or continue in any business for which a privilege tax is imposed by this Article shall immediately after July 1, 1957, apply for and obtain from the Commissioner upon payment of the sum of one dollar ($1.00) a license to engage in and conduct such business upon the condition that such person shall pay the tax accruing to the State of North Carolina under the provisions of this Article and he shall thereby be duly licensed and registered to engage in and conduct such business. The license tax levied in this section shall be a continuing license until revoked for failure to comply with the provisions of this Article. Provided, however, that any person who has heretofore applied for and obtained such license and the same is in force and effect as of July 1, 1957, shall not be required to apply for and obtain a new license. (1957, c. 1340, s. 5; 1959, c. 1259, s. 5; 1961, c. 826, s. 2; 1963, c. 1169, ss. 3, 11; 1967, c. 1110, s. 6; c. 1116; 1969, c. 1075, s. 5; 1971, c. 887, s. 1.)

Editor's Note.—The 1969 amendment, effective July 1, 1969, substituted "two percent (2%)" for "one and one-half percent (1½%)" in the second sentence of the first paragraph and near the beginning of the third paragraph of subdivision (1). Session Laws 1969, c. 1075, s. 8, provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

The 1971 amendment added subparagraph m in subdivision (1).

The last sentence of subdivision (4) should be read in light of Session Laws 1961, c. 1080, which deleted language in §§ 105-74 and 105-85 pertaining to the levying of a tax on gross receipts at the rate of one percent (1%).

For article "Transferring North Carolina Real Estate Part I: How the Present System Functions," see 49 N.C.L. Rev. 413 (1971).

Distinctions between Sales and Use Taxes and Property Taxes.—See Sykes v. Clayton, 274 N.C. 398, 163 S.E.2d 775 (1968).

Sales and Use Taxes Differ' in Conception.—While a sales tax and a use tax in many instances may bring about the same result, they are different in conception. They are assessments upon different transactions and are bottomed on distinguishable taxable events. Atwater-Waynick Hosiery Mills, Inc. v. Clayton, 268 N.C. 673, 151 S.E.2d 574 (1966).

A sales tax is a tax on the freedom of purchase. Atwater-Waynick Hosiery Mills,

Inc. v. Clayton, 268 N.C. 673, 151 S.E.2d 574 (1966).

Hence, It Burdens Interstate Commerce. — A sales tax, when applied to interstate transactions, is a tax on the privilege of doing interstate business, creates a burden on interstate commerce, and runs counter to the Commerce Clause of the federal Constitution. Atwater-Waynick Hosiery Mills, Inc. v. Clayton, 268 N.C. 673, 151 S.E.2d 574 (1966).

But Use Tax Is Tax on Enjoyment after Sale Has Spent Interstate Character.—A use tax is a tax on the enjoyment of that which was purchased after a sale has spent its interstate character. Atwater-Waynick Hosiery Mills, Inc. v. Clayton, 268 N.C. 673, 151 S.E.2d 574 (1966).

The sales tax is a tax on the retailer. In re Newsom Oil Co., 273 N.C. 383, 160 S.E.2d 98 (1968).

And Is Privilege Tax.—Taxes under this section are not imposed upon the consumer, but are rather a privilege tax for engaging in business. Telerent Leasing Corp. v. High, 8 N.C. App. 179, 174 S.E.2d 11 (1970).

Double Taxation. —The sales/use tax is, by its terms, levied upon the "retailer." There is, perforce, no double levy on any one object of taxation, where the two different sections of the sales/use tax impose two separate taxes on two separate people for two separate transactions. Telerent Leasing Corp. v. High, 8 N.C. App. 179, 174 S.E.2d 11 (1970).

The imposition of a sales/use tax on the gross rental of a motel or hotel room as well as on the gross proceeds from the leasing of a television set located in that room does not constitute double taxation. Telerent Leasing Corp. v. High, 8 N.C. App. 179, 174 S.E.2d 11 (1970).

The taxable event for assessment of the sales tax occurs at the time of sale and purchase within the State. Colonial Pipeline Co. v. Clayton, 275 N.C. 215, 166 S.E.2d 671 (1969).

Provisos Create Class of Transactions Taxed at Lower Rate.—Provisos incorporated into this section create a class of transactions as to which the tax is computed at a smaller percentage of the sale price, coupled in some instances with a limitation of the maximum tax to be imposed on account of the sale of any single article within the category. Hatteras Yacht Co. v. High, 265 N.C. 653, 144 S.E.2d 821 (1965) (decided prior to the second 1967 amendment and holding sale of engine-driven pleasure yacht taxed at 3%).

And Are Strictly Construed.—A proviso in a statute taxing certain transactions at a lower rate than that made applicable in general, or providing that as to certain transactions the total tax shall not exceed a specified amount, there being no such limitation generally, is a partial exemption and is, therefore, to be strictly construed against the claim of such special or preferred treatment. Hatteras Yacht Co. v. High, 265 N.C. 653, 144 S.E.2d 821 (1965).

The expression "total net taxable sales" and expressions of similar purport, as used in this Article, means the total of all retail sales, except those excluded in whole or in part by Part 1 of Division II, which imposes and levies the tax, and except those which are exempt under § 105-164.13. Piedmont Canteen Serv., Inc. v. Johnson, 256 N.C. 155, 123 S.E.2d 582 (1962).

The language in subdivision (2) clearly contemplates a rental paid periodically in cash or in commodities or services having a monetary value. Long Mfg. Co. v. Johnson, 264 N.C. 12, 140 S.E.2d 744 (1965).

Retail merchants may themselves make retail purchases. Long Mfg. Co. v. Johnson, 264 N.C. 12, 140 S.E.2d 744 (1965).

Petitioner's sale of propane gas tanks to retailers, who bought them for the purpose of placing them on the premises of their retail gas customers, constituted retail sales upon which petitioner should have collected the sales tax from the retailers, who were not purchasing the particular property for resale or rental, but were the actual users and ultimate consumers of the tanks in question. Long Mfg. Co. v. Johnson, 264 N.C. 12, 140 S.E.2d 744 (1965).

And when they do, they must like any other purchaser, pay the retail sales tax. Long Mfg. Co. v. Johnson, 264 N.C. 12, 140 S.E.2d 744 (1965).

Lessor Has Burden to Show That Leasing Transactions Constituted Sale for Resale. — A lessor of television sets who had not procured resale certificates from any of its customers had the burden to show that its leasing transactions constituted a sale for resale, entitling the lessor to an exemption from the sales tax. Telerent Leasing Corp. v. High, 8 N.C. App. 179, 174 S.E.2d 11 (1970).

When Fuel Exempted from Sales and Use Taxes.—When fuel is the product of a mine and sold by the producer in its original unmanufactured state, it is exempt from sales and use taxes. Duke Power Co. v. Clayton, 274 N.C. 505, 164 S.E.2d 289 (1968).

Merchants are statutory agents for the collection of the tax on sales, which is definitely imposed upon the consumer, and their responsibility arises on the assumption that they must so collect. Henderson v. Gill, 229 N.C. 313, 49 S.E.2d 754 (1948).

Erroneous Advice of Agent of Department of Revenue.—The State is not estopped to collect the retail sales tax levied by this section by the action of an agent of the Department of Revenue in erroneously advising the merchant that certain sales were not subject to the tax, notwithstanding that the merchant was thereby deprived of the opportunity to collect the tax from his customers. Henderson v. Gill, 229 N.C. 313, 49 S.E.2d 754 (1948).

Building Materials.—For decisions under the former statute relating to tax on building

materials, see Watson Indus. v. Shaw, 235 N.C. 203, 69 S.E.2d 505 (1952); Robinson & Hale, Inc. v. Shaw, 242 N.C. 486, 87 S.E.2d 909 (1955).

Cited in Hajoca Corp. v. Clayton, 277 N.C. 560, 178 S.E.2d 481 (1971).

Part 2. Wholesale Tax.

§ **105-164.5. Imposition of tax; wholesale merchant.**—There is hereby levied and imposed, in addition to all other taxes of every kind now imposed by law, a privilege or license tax upon every person who engages in the business of selling tangible personal property at wholesale in this State as defined herein, the same to be collected and the amount to be determined in the following manner, to wit:

(1) Every wholesale merchant as defined in this Article shall apply for and obtain an annual license and pay tax therefor of ten dollars ($10.00). Such annual license shall be paid for in advance within the first 15 days of July in each year or, in the case of a new business, within 15 days after business is commenced. Manufacturers making wholesale sales, as defined in this Article, of their own manufactured products, directly and exclusively from the place where such articles of tangible personal property are manufactured, shall not be required to obtain an annual wholesale license.

(2) The sale of any tangible personal property by any wholesale merchant to anyone other than to a registered retailer, wholesale merchant or nonresident retail or wholesale merchant as defined for resale shall be taxable at the rate of tax provided in this Article upon the retail sale of tangible personal property.

(3) The sale of any tangible personal property by any wholesale merchant to a nonresident retail or wholesale merchant must be in strict compliance with such regulations as may be promulgated by the Commissioner and which are applicable to such sales. Any sale which does not conform to such regulations shall be taxable at the rate of tax provided in this Article upon the retail sale of tangible personal property.

(4) Every wholesale merchant who sells tangible personal property to retailers or nonresident retail or wholesale merchants for resale shall deliver to such customer a bill of sale for each sale of such tangible personal property whether sold for cash or on credit and shall make and retain a duplicate or carbon copy of each such bill of sale and shall keep on file all such duplicate bills of sale for at least three years from the date of sale. Failure to comply with the provisions of this subsection shall subject the wholesale merchant to liability for tax upon such sales at the rate of tax levied in this Article upon retail sales.

(5) The tax levied is and shall be in addition to all other taxes whether levied in the form of excise, license or privilege or other taxes. (1957, c. 1340, s. 5; 1959, c. 1259, s. 5; 1961, c. 826, s. 2; c. 1213, s. 2.)

Former statute held applicable to sales by a wholesale secondhand car dealer in this State to retail merchants of another state for the purpose of resale out of this State. Phillips v. Shaw, 238 N.C. 518, 78 S.E.2d 314 (1953).

§ **105-164.5A:** Repealed by Session Laws 1961, c. 1213, s. 3, effective July 1, 1961.

Editor's Note. — The repealed section had been amended by Session Laws 1959, c. 1259, s. 5, and Session Laws 1961, c. 826, s. 2.

Part 3. Use Tax.

§ **105-164.6. Imposition of tax.**—An excise tax is hereby levied and imposed

on the storage, use or consumption in this State of tangible personal property purchased within and without this State for storage, use or consumption in this State, the same to be collected and the amount to be determined by the application of the following rates against the sales price, to wit:

(1) At the rate of three percent (3%) of the cost price of each item or article of tangible personal property when the same is not sold but used, consumed, distributed or stored for use or consumption in this State; except that, whenever a rate of less than three percent (3%) is applicable under the sales tax schedule set out in G.S. 105-164.4 to the sale at retail of an item or article of tangible personal property, the same rate shall be used in computing any use tax due under this subdivision.

(2) At the rate of three percent (3%) of the monthly lease or rental price paid by the lessee or rentee, or contracted or agreed to be paid by the lessee or rentee, to the owner of the tangible personal property; except that, whenever a rate of less than three percent (3%) is applicable under the sales tax schedule set out in G.S. 105-164.4 to the sale at retail of an item or article of tangible personal property, then the same rate shall be used in computing any use tax due under this subdivision.

(3) There is hereby levied and there shall be collected from every person, firm, or corporation, an excise tax of three percent (3%) of the purchase price of all tangible personal property purchased or used which shall enter into or become a part of any building or other kind of structure in this State, including all materials, supplies, fixtures and equipment of every kind and description which shall be annexed thereto or in any manner become a part thereof. Provided, however, the taxes levied in this section shall be levied against the purchaser of the articles named. If purchases of building materials that are not exempt from tax are made by a contractor there shall be joint liability for the tax against both contractor and owner, but the liability of the owner shall be satisfied if affidavit is required of the contractor, and furnished by him, before final settlement is made, showing that the tax herein levied has been paid in full.

(4) Where a retail sales tax has already been paid with respect to said tangible personal property in this State by the purchaser thereof, said tax shall be credited upon the tax imposed by this Part. Where a retail sales or use tax has been paid with respect to said tangible personal property in another state by the purchaser thereof for storage, use or consumption in this State, said tax shall be credited upon the tax imposed by this Part. If the amount of tax paid to another state is less than the amount of tax imposed by this Part, the purchaser shall pay to the Commissioner an amount sufficient to make the tax paid to the other state and this State equal to the amount imposed by this Part. The Commissioner of Revenue shall require such proof of payment of tax to another state as he deems to be necessary and proper.

(5) Every person storing, using or otherwise consuming in this State tangible personal property purchased or received at retail either within or without this State shall be liable for the tax imposed by this Article and the liability shall not be extinguished until the tax has been paid to this State. Provided, however, that a receipt from a registered retailer engaged in business in this State given to the purchaser in accordance with the provisions of this Article shall be prima facie sufficient to relieve the purchaser from liability for the tax to which such receipt may refer and the liability of the purchaser shall be extinguished upon payment of the tax by any retailer from whom he has purchased said property.

(6) Except as provided herein the tax so levied is and shall be in addition to all other taxes whether levied in the form of excise, license, privilege or other taxes.

(7) Every retailer engaged in business in this State selling or delivering tangible personal property for storage, use or consumption in this State shall immediately after July 1, 1957, apply for and obtain from the Commissioner upon the payment of the sum of one dollar ($1.00) a license to engage in and conduct such business upon the condition that such person shall pay the tax accruing to the State of North Carolina under the provisions of this Article, and he shall thereby be duly licensed and registered to engage in and conduct such business. Provided, however, that any person who has heretofore applied for and obtained such license and the same is in force and effect as of July 1, 1957, shall not be required to apply for and obtain a new license.

(8) Notwithstanding any other provisions of this Article, a use tax, at the applicable use tax rate, as hereinbefore provided, is hereby levied upon the storage or use in this State of any motor vehicles, machines, machinery, tools or other equipment brought, imported or caused to be brought into this State for use in constructing, building or repairing any building, highway, street, sidewalk, bridge, culvert, sewer or water system, drainage or dredging system, electric or steam railway system, reservoir or dam, hydraulic or power plant, transmission line, tower, dock, wharf, excavation, grading or other improvement or structure, or any part thereof. The owner or, if the property is leased the lessee of any such motor vehicle, machine, machinery, tools or other equipment shall be liable for the tax provided for in this paragraph, to be computed as set out below. The useful life of such motor vehicles, machines, tools or other equipment shall be determined by the Commissioner in accordance with the experience and practices of the building and construction trades. Said use tax shall be computed on the basis of such proportion of the original purchase price of such property as the duration of time of use in this State bears to the total useful life thereof. Such tax shall become due immediately upon such property being brought into this State, and in the absence of satisfactory evidence as to the period of use intended in this State, it shall be presumed that such property will remain in this State for the remainder of its useful life. All provisions of this Article not directly in conflict with the provisions of this paragraph shall be applicable with respect to the matters herein set forth. The provisions of this paragraph shall not be applicable with respect to sales of such property within this State or to the use, storage or consumption of such property when purchased for use in this State, and in such cases the full sales or use tax shall be paid as in all other cases, irrespective of the period of intended use in this State. (1957, c. 1340, s. 5; 1959, c. 1259, s. 5; 1961, c. 826, s. 2; 1967, c. 1110, s. 6.)

Cross Reference.—See note to § 105-164.4.

Editor's Note.—Some of the cases in this annotation were decided under former statutes relating to the levy of compensating use taxes.

Opinions of Attorney General.—Mr. Eric L. Gooch, Director, Sales and Use Tax Division, N.C. Department of Revenue, 40 N.C.A.G. 887 (1969).

Constitutionality. — The constitutionality of a use tax has long been established. Colonial Pipeline Co. v. Clayton, 275 N.C. 215, 166 S.E.2d 671 (1969).

The purpose of the use tax is to remove, insofar as possible, the discrimination against local merchants resulting from the imposition of a sales tax, and to equalize the burden of the tax on property sold locally and that purchased without the State. Watson Indus. v. Shaw, 235 N.C. 203, 69 S.E.2d 505 (1952).

The use tax is not a sales tax. Its chief function is to prevent the evasion of the sales tax by persons purchasing tangible personal property outside of North Carolina for storage, use, or consumption within the State. Thus it

prevents unfair competition on the part of out-of-state merchants. Johnston v. Gill, 224 N.C. 638, 32 S.E.2d 30 (1944).

The purpose of the use tax is to impose the same burdens on out-of-state purchases as the sales tax imposes on purchases within the State. Colonial Pipeline Co. v. Clayton, 275 N.C. 215, 166 S.E.2d 671 (1969).

Sales Tax and Use Tax Are Complementary.—The use tax and the sales tax law, taken and applied together, provide a uniform tax upon either the sale or use of all tangible personal property irrespective of where it may be purchased. That is, the sales tax and the use tax are complementary and functional parts of one system of taxation. Johnston v. Gill, 224 N.C. 638, 32 S.E.2d 30 (1944).

The use tax is designed to complement the sales tax and to reach transactions which cannot be subject to a sales tax by reason of its burden on interstate commerce. Atwater-Waynick Hosiery Mills, Inc. v. Clayton, 268 N.C. 673, 151 S.E.2d 574 (1966).

But Differ from Each Other in Conception.—While a sales tax and a use tax in many instances may bring about the same result, they are different in conception. They are assessments upon different transactions and are bottomed on distinguishable taxable events. Atwater-Waynick Hosiery Mills, Inc. v. Clayton, 268 N.C. 673, 151 S.E.2d 574 (1966).

Distinctions between Sales and Use Taxes and Property Taxes.—See Sykes v. Clayton, 274 N.C. 398, 163 S.E.2d 775 (1968).

The use tax does not aim at or discriminate against interstate commerce. It is laid upon every purchaser, within the State, of goods for consumption, regardless of whether they have been transported in interstate commerce. Its only relationship to interstate commerce arises from the fact that immediately preceding the transfer of possession to the purchaser within the State, which is the taxable event regardless of the time and place of passing of title, the merchandise had been transported in interstate commerce and brought to its journey's end. Atwater-Waynick Hosiery Mills, Inc. v. Clayton, 268 N.C. 673, 151 S.E.2d 574 (1966).

A sales tax is a tax on the freedom of purchase and, when applied to interstate transactions, it is a tax on the privilege of doing interstate business, creates a burden on interstate commerce and runs counter to the Commerce Clause of the federal Constitution. Conversely, a use tax is a tax on the enjoyment of that which was purchased after a sale has spent its interstate character. Atwater-Waynick Hosiery Mills, Inc. v. Clayton, 268 N.C. 673, 151 S.E.2d 574 (1966).

A use tax does not discriminate against interstate commerce since it is laid upon every purchaser, within the State, of goods for consumption, regardless of whether they have been transported in interstate commerce. Colonial Pipeline Co. v. Clayton, 275 N.C. 215, 166 S.E.2d 671 (1969).

The provisions of this statute cannot be extended beyond the clear import of the language used, or their operation enlarged so as to embrace matters not specifically pointed out. Watson Indus. v. Shaw, 235 N.C. 203, 69 S.E.2d 505 (1952).

Taxable Event for Assessment of Use Tax. — Regardless of the time and place of passing title, the taxable event for assessment of the use tax occurs when possession of the property is transferred to the purchaser within the taxing state for storage, use or consumption. Colonial Pipeline Co. v. Clayton, 275 N.C. 215, 166 S.E.2d 671 (1969).

When Fuel Exempt from Sales and Use Taxes.—When fuel is the product of a mine and sold by the producer in its original unmanufactured state, it is exempt from sales and use taxes. Duke Power Co. v. Clayton, 274 N.C. 505, 164 S.E.2d 289 (1968).

Soliciting Orders. — Where one is engaged within this State in a regular business of soliciting orders for tailor-made clothing on commission, part of which he collects at the time the order is taken, and the clothes are shipped by the maker, who collects the balance of the price, directly from the purchaser, such transaction is subject to the use tax and the solicitor is a retailer and an agent for collecting the use tax, for which he is liable on his failure to do so. Johnston v. Gill, 224 N.C. 638, 32 S.E.2d 30 (1944).

Prerequisites to Assessment of Tax. — See Watson Indus. v. Shaw, 235 N.C. 203, 69 S.E.2d 505 (1952).

Dominion over, Possession of, or Title to Property Must Be Acquired by Purchaser. — See Watson Indus. v. Shaw, 235 N.C. 203, 69 S.E.2d 505 (1952).

Lease of Transcription Tape to Broadcasting Station. — The former statute could not be construed to impose a tax on a broadcasting station where it purchased the right to rebroadcast programs recorded on a transcription tape and was given temporary custody of the tape in order to make use of the purchase. Watson Indus. v. Shaw, 235 N.C. 203, 69 S.E.2d 505 (1952).

Statute of Limitations.—The collection of a use or excise tax being subject to the same statute of limitations, which applies to the collection of the sales tax, a use or excise tax which accrued in the year 1937 was held barred by the three-year statute of limitations when assessed in 1942. Standard Fertilizer Co. v. Gill, 225 N.C. 426, 35 S.E.2d 275 (1945).

Applied in Piedmont Canteen Serv., Inc. v. Johnson, 256 N.C. 155, 123 S.E.2d 582 (1962).

Cited in American Equitable Assurance Co. v. Gold, 249 N.C. 461, 106 S.E.2d 875 (1959).

Part 4. General Provisions.

§ 105-164.7. Sales tax part of purchase price.—Every retailer engaged in the business of selling or delivering or taking orders for the sale or delivery of tangible personal property for storage, use or consumption in this State shall at the time of selling or delivering or taking an order for the sale or delivery of said tangible personal property or collecting the sales price thereof or any part thereof, add to the sales price of such tangible personal property the amount of the tax on the sale thereof and when so added said tax shall constitute a part of such purchase price, shall be a debt from the purchaser to the retailer until paid and shall be recoverable at law in the same manner as other debts. Said tax shall be stated and charged separately from the sales price and shown separately on the retailer's sales records and shall be paid by the purchaser to the retailer as trustee for and on account of the State and the retailer shall be liable for the collection thereof and for its payment to the Commissioner and the retailer's failure to charge to or collect said tax from the purchaser shall not affect such liability. It is the purpose and intent of this Article that the tax herein levied and imposed shall be added to the sales price of tangible personal property when sold at retail and thereby be borne and passed on to the customer, instead of being borne by the retailer. (1957, c. 1340, s. 5.)

This section does not relieve the retailer of any tax liability; it provides him a ready legal means for recoupment. Piedmont Canteen Serv., Inc. v. Johnson, 256 N.C. 155, 123 S.E.2d 582 (1962).

Failure to Charge or Collect Tax Does Not Affect Retailer's Liability.—The tax must be added to the purchase price and constitutes a debt from purchaser to retailer until paid, but failure to charge or collect the tax from purchaser shall not affect retailer's liability. Piedmont Canteen Serv., Inc. v. Johnson, 256 N.C. 155, 123 S.E.2d 582 (1962).

The retailer is not to be excused from liability merely because it is to his advantage to make use of a method of selling which will not permit him to keep a proper record of sales or to make the collections required by law. Piedmont Canteen Serv., Inc. v. Johnson, 256 N.C. 155, 123 S.E.2d 582 (1962).

Notwithstanding that it is the intent of the law that the sales tax shall be passed on to the customer and that it not be borne by the retailer, the retailer is liable to the Commissioner for the tax if he fails to collect it from his vendee or, in a proper case, from his lessee. Long Mfg. Co. v. Johnson, 264 N.C. 12, 140 S.E.2d 744 (1965).

Quoted in In re Newsom Oil Co., 273 N.C. 383, 160 S.E.2d 98 (1968).

Cited in American Equitable Assurance Co. v. Gold, 249 N.C. 461, 106 S.E.2d 875 (1959).

§ 105-164.8. Retailer to collect tax regardless of place sale consummated.—Every retailer engaged in business in this State as defined in this Article shall collect said tax notwithstanding

(1) That the purchaser's order or the contract of sale is delivered, mailed or otherwise transmitted by the purchaser to the retailer at a point outside this State as a result of solicitation by the retailer through the medium of a catalogue or other written advertisement; or

(2) That the purchaser's order or the contract of sale is made or closed by acceptance or approval outside this State, or before said tangible personal property enters this State; or

(3) That the purchaser's order or the contract of sale provides that said property shall be or is in fact procured or manufactured at a point outside this State and shipped directly to the purchaser from the point of origin; or

(4) That said property is mailed to the purchaser in this State or a point outside this State or delivered to a carrier outside this State f.o.b. or otherwise and directed to the purchaser in this State regardless of whether the cost of transportation is paid by the retailer or by the purchaser; or

(5) That said property is delivered directly to the purchaser at a point outside this State; or

(6) Any combination in whole or in part of any two or more of the

foregoing statements of fact, if it is intended that the tangible personal property purchased be brought to this State for storage, use or consumption in this State. (1957, c. 1340, s. 5.)

§ 105-164.9. Advertisement to absorb tax unlawful.—Any retailer who shall by any character or public advertisement offer to absorb the tax levied in this Article or in any manner directly or indirectly advertise that the tax herein imposed is not considered an element in the price to the purchaser shall be guilty of a misdemeanor. Any violations of the provisions of this section reported to the Commissioner shall be reported by him to the Attorney General of the State to the end that such violations may be brought to the attention of the solicitor of the court of the county or district whose duty it is to prosecute misdemeanors in the jurisdiction. It shall be the duty of such solicitor to investigate such alleged violations and if he finds that this section has been violated prosecute such violators in accordance with the law. (1957, c. 1340, s. 5.)

Stated in Piedmont Canteen Serv., Inc. v. Johnson, 256 N.C. 155, 123 S.E.2d 582 (1962).

§ 105-164.10. Retail bracket system.—For the convenience of the retailer in collecting the tax due at the rate of three percent (3%) and to facilitate the administration of this Article, every retailer engaged in or continuing within this State in a business for which a license, privilege or excise tax is required by this Article shall add to the sale price and collect from the purchaser on all taxable retail sales an amount equal to the following:

(1) No amount on sales of less than 10¢.
(2) 1¢ on sales of 10¢ and over but not in excess of 35¢.
(3) 2¢ on sales of 36¢ and over but not in excess of 70¢.
(4) 3¢ on sales of 71¢ and over but not in excess of $1.16.
(5) Sales over $1.16—straight 3% with major fractions governing.

Use of the above bracket does not relieve the retailer from the duty and liability to remit to the Commissioner an amount equal to three percent (3%) of the gross receipts derived from all taxable retail sales subject to the three percent (3%) rate during the taxable period.

Whenever a sales or use tax is due at a rate of less than three percent (3%), the tax shall be computed by multiplying the sales or purchase price by the applicable rate and by rounding the result off to the nearest whole cent. The use of this method in computing the sales or use tax shall not relieve a taxpayer from the duty and liability of remitting to the Commissioner an amount equal to the applicable rates times gross receipts subject to taxation at the lesser rates. (1957, c. 1340, s. 5; 1961, c. 826, s. 2.)

Cross Reference.—See note to § 105-164.4.

Constitutionality.—This section does not render the sales tax unconstitutional as violating the due process clause of the State Constitution or the Fourteenth Amendment of the federal Constitution. Piedmont Canteen Serv., Inc. v. Johnson, 256 N.C. 155, 123 S.E.2d 582 (1962).

The seller of goods through vending machines was in no position to attack the sales tax statute as discriminatory in that no tax is collected on sales of less than 10¢, where approximately 76% of the seller's receipts came from items priced at 10¢ or above, and thus assuming the average sale to be 20¢, the seller must have collected 5% on more than three fourths of its total receipts. Piedmont Canteen Serv., Inc. v. Johnson, 256 N.C. 155, 123 S.E.2d 582 (1962).

The bracket system is for the convenience of the retailer. Piedmont Canteen Serv., Inc. v. Johnson, 256 N.C. 155, 123 S.E.2d 582 (1962).

The 1957 act made no material change in the effect of the bracket system, which had previously been in force pursuant to a regulation of the Commissioner of Revenue, and made no change in the nature of the tax by reason of the inclusion of the bracket system in the act itself. Piedmont Canteen Serv., Inc. v. Johnson, 256 N.C. 155, 123 S.E.2d 582 (1962).

Retailer Not Relieved of Liability. — The legislature was careful to state, in all instances where administrative provisions might be construed to shift the burden of the tax from retailer to purchaser, that such provisions do not relieve the retailer from his privilege tax liability. Piedmont Canteen Serv., Inc. v. Johnson, 256 N.C. 155, 123 S.E.2d 582 (1962).

Goods Not Exempt Because of Smallness of Unit Price. — This Article in no particular exempts goods from the tax on retailers because of smallness of unit price. Piedmont Canteen Serv., Inc. v. Johnson, 256 N.C. 155, 123 S.E.2d 582 (1962).

Section Has Reference to Sales, Not Unit Price of Goods. — The bracket system provides that a retailer shall collect from a purchaser "no amount on sales of less than 10¢," and it has reference to sales, not unit price of goods. Piedmont Canteen Serv., Inc. v. Johnson, 256 N.C. 155, 123 S.E.2d 582 (1962).

If a customer buys two or more items priced at less than ten cents each so that the sale amounts to ten cents or more, the retailer's failure to collect said tax from the purchaser shall not affect the retailer's liability to the State. Piedmont Canteen Serv., Inc. v. Johnson, 256 N.C. 155, 123 S.E.2d 582 (1962).

§ 105-164.11. Excessive and erroneous collections.—When the tax collected for any period is in excess of the total amount which should have been collected, the total amount collected must be paid over to the Commissioner less the compensation to be allowed the retailer as hereinafter set forth. When tax is collected for any period on exempt or nontaxable sales the tax erroneously collected shall be remitted to the Commissioner and no refund thereof shall be made to a taxpayer unless the purchaser has received credit for or has been refunded the amount of tax erroneously charged. This provision shall be construed with other provisions of this Article and given effect so as to result in the payment to the Commissioner of the total amount collected as tax if it is in excess of the amount which should have been collected. (1957, c. 1340, s. 5; 1959, c. 1259, s. 5; 1961, c. 826, s. 2.)

Cross Reference. — See note to § 105-164.4.

§ 105-164.12. Freight or delivery transportation charges.—Freight delivery, or other like transportation charges connected with the sale of tangible personal property are subject to the sales and use tax if title to the tangible personal property being transported passes to the purchaser at the destination point. Where title to the tangible personal property being transported passes to the purchaser at the point of origin, the freight or other transportation charges are not subject to the sales tax. For the purposes of this section it is immaterial whether the retailer or purchaser actually pays for any charges. Nothing in this section shall operate to exclude from the use tax any one for the other, or whether a credit or allowance is made or given for such charges. Nothing in this section shall operate to exclude from the use tax any freight delivery or other like transportation charges. Such charges shall be included as a portion of the cost price and subject to the use tax. (1957, c. 1340, s. 5; 1959, c. 1259, s. 5.)

Constitutionality. — This section, providing for the inclusion in the use tax base of transportation charges paid by a purchaser for transporting tangible personal property from the point of purchase outside North Carolina to a point of use within this State when the purchaser takes title to the purchased property at the point of origin outside the State, does not place a discriminatory burden on interstate commerce and is constitutional. Colonial Pipeline Co. v. Clayton, 275 N.C. 215, 166 S.E.2d 671 (1969).

Since the taxable event for assessment of the use tax occurs after purchase and after transportation into the taxing state for storage, use, or consumption, the State is at liberty to include transportation charges in the use tax base and has done so by enactment of this section. Colonial Pipeline Co. v. Clayton, 275 N.C. 215, 166 S.E.2d 671 (1969).

The net effect of including interstate transportation charges in the use tax base and excluding intrastate transportation charges from the sales tax base is to equalize the burden of the tax on property sold locally and property purchased out of State. Colonial Pipeline Co. v. Clayton, 275 N.C. 215, 166 S.E.2d 671 (1969).

The retail price upon which the sales tax is paid necessarily takes into account the transportation charges that have been paid on the goods to bring them to the retail outlet in North Carolina where the sale takes place. Colonial Pipeline Co. v. Clayton, 275 N.C. 215, 166 S.E.2d 671 (1969).

Division III. Exemptions and Exclusions.

§ 105-164.13. Retail sales and use tax.—The sale at retail, the use, storage or consumption in this State of the following tangible personal property is specifically exempted from the tax imposed by this Article:

Agricultural Group.

(1) Commercial fertilizer on which the inspection tax is paid and lime and land plaster used for agricultural purposes whether the inspection tax is paid or not.

(2) Seeds, feeds for livestock and poultry, rodenticides, insecticides, herbicides, fungicides, pesticides for livestock, poultry and agriculture, defoliants for use on cotton or other crops, plant growth inhibitors, regulators, or stimulators for agriculture including systemic and contact or other sucker control agents for tobacco and other crops.

(3) Products of farms, forests, and mines when such sales are made by the producers in their original or unmanufactured state.

(4) Cotton, tobacco, peanuts or other farm products sold to manufacturers for further manufacturing or processing.

(4.1) Baby chicks and poults sold for commercial poultry or egg production.

Industrial Group.

(5) Manufactured products produced and sold by manufacturers or producers to other manufacturers, producers, or registered wholesale or retail merchants, for the purpose of resale except as modified by Division I, G.S. 105-164.3, subdivision (23). Provided, however, this exemption shall not extend to or include retail sales to users or consumers not for resale.

(6) Ice, whether sold by the manufacturer, producer, wholesale or retail merchant.

(7) Sales of products of waters in their original or unmanufactured state when such sales are made by the producers. Fish and seafoods shall be likewise exempt when sold by the fishermen.

(8) Sales of tangible personal property to a manufacturer which enters into or becomes an ingredient or component part of tangible personal property which is manufactured.

(9) Sales of boats, fuel oil, lubricating oils, machinery, equipment, nets, rigging, paints, parts, accessories and supplies to commercial fishermen for use by them in the taking or catching commercially of shrimp, crab, oysters, clams, scallops, and fish, both edible and nonedible.

(10) Sales to commercial laundries or to pressing and dry cleaning establishments of articles or materials used for the identification of garments being laundered or dry cleaned, wrapping paper, bags, hangers, starch, soaps, detergents, cleaning fluids and other compounds or chemicals applied directly to the garments in the direct performance of the laundering or the pressing and cleaning service.

Motor Fuels Group.

(11) Gasoline or other motor fuel on which the tax levied in G.S. 105-434 and/or G.S. 105-435 of the General Statutes is due and has been paid, and the fact that a refund of the tax levied by either of said sections is made pursuant to the provisions of Subchapter V of Chapter 105 shall not make the sale or the seller of such fuels subject to the tax levied by this Article.

Medical Group.

(12) Crutches, artificial limbs, artificial eyes, hearing aids, false teeth, eyeglasses ground on prescription of physicians or optometrists, pulmonary respirators sold on prescription of physicians, whether

worn on the person or not, and other orthopedic appliances when the same are designed to be worn on the person of the owner or user.

(13) Medicines sold on prescription of physicians and dentists.

Printed Materials Group.

(14) Holy Bibles; public school books on the adopted list, the selling price of which is fixed by State contract.

Transactions Group.

(15) Accounts of purchases, representing taxable sales, on which the tax imposed by this Article has been paid, that are found to be worthless and actually charged off for income tax purposes may, at corresponding periods, be deducted from gross sales, provided, however, they must be added to gross sales if afterwards collected.

(16) Sales of used articles taken in trade, or a series of trades, as a credit or part payment on the sale of a new article, provided the tax levied in this Article is paid on the gross sales price of the new article. In the interpretation of this subsection, new article shall be taken to mean the original stock in trade of the merchant, and shall not be limited to newly manufactured articles. The resale of articles repossessed by the vendor shall likewise be exempt from gross sales taxable under this Article.

Exempt Status Group.

(17) Sales which a state would be without power to tax under the limitations of the Constitution or laws of the United States or under the Constitution of this State.

Unclassified Group.

(18) Funeral expenses, including coffins and caskets, not to exceed one hundred and fifty dollars ($150.00). All other funeral expenses, including gross receipts for services rendered, shall be taxable at the rate of three percent (3%). Where coffins, caskets or vaults are purchased direct and a separate charge is paid for services the provisions of this subsection shall apply to the total for both.

(19) Sales by concession stands operated by the State prison system within the confines of the prisons where such sales are made to prison inmates and guards therein while on duty.

(20) Sales by blind merchants operating under supervision of the Commission for the Blind.

(21) The lease or rental of motion picture films used for exhibition purposes where the lease or rental of such property is an established business or part of an established business or the same is incidental or germane to said business of the lessee.

(22) The lease or rental of films, motion picture films, transcriptions and recordings to radio stations and television stations operating under a certificate from the Federal Communications Commission.

(23) Sales of wrapping paper, labels, wrapping twine, paper, cloth, plastic bags, cartons, packages and containers, cores, cones or spools, wooden boxes, baskets, coops and barrels, including paper cups, napkins and drinking straws and like articles sold to manufacturers, producers and retailers, when such materials are used for packaging, shipment or delivery of tangible personal property which is sold either at wholesale or retail or when such articles constitute a part of the sale of such tangible personal property and are delivered with it to the customer.

(24) Sales of fuel and other items of tangible personal property for use or consumption by or on ocean-going vessels which ply the high seas in interstate or foreign commerce in the transport of freight and/or passengers for hire exclusively, when delivered to an officer or agent of such vessel for the use of such vessel; provided, however, that sales of fuel and other items of tangible personal property made to officers, agents, members of the crew or passengers of such vessels for their personal use shall not be exempted from payment of the sales tax.

(25) Sales by merchants on the Cherokee Indian Reservation when such merchants are authorized to do business on the Reservation and are paying the tribal gross receipts levy to the Tribal Council.

(26) Lunches to school children when such sales are made within school buildings and are not for profit.

(27) Meals and food products served to students in dining rooms regularly operated by State or private educational institutions or student organizations thereof.

(28) Sales of newspapers by newspaper street vendors and by newsboys making house to house deliveries.

(29) Sales to the North Carolina Museum of Art of paintings and other objects or works of art for public display, the purchases of which are financed in whole or in part by gifts or donations.

(30) Sales from vending machines when sold by the owner or lessee of said machines at a price of one cent (1¢) per sale. (1957, c. 1340, s. 5; 1959, c. 670; c. 1259, s. 5; 1961, c. 826, s. 2; cc. 1103, 1163; 1963, c. 1169, ss. 7-9; 1965, c. 1041; 1967, c. 756; 1969, c. 907; 1971, c. 990.)

Cross Reference. — See note to § 105-164.4.

Editor's Note. — Several of the cases cited to the paragraphs of this annotation were decided under the former law.

The 1969 amendment added at the end of subdivision (2) the provision as to defoliants, plant growth inhibitors, regulators or stimulators.

The 1971 amendment inserted "pulmonary respirators sold on prescription of physicians, whether worn on the person or not" in subdivision (12).

The power to exempt from taxation, as well as the power to tax, is an essential attribute of sovereignty. Sale v. Johnson, 258 N.C. 749, 129 S.E.2d 465 (1963).

Statutes Strictly Construed. — Statutes providing exemption from taxation are strictly construed. Sale v. Johnson, 258 N.C. 749, 129 S.E.2d 465 (1963).

Provisions in a tax statute granting exemptions from the tax thereby imposed are to be strictly construed in favor of the imposition of the tax and against the claim of exemption. Hatteras Yacht Co. v. High, 265 N.C. 653, 144 S.E.2d 821 (1965).

Exemption Is Never Presumed. — The general rule is that a grant of exemption from taxation is never presumed. Sale v. Johnson, 258 N.C. 749, 129 S.E.2d 465 (1963).

One who claims an exemption or exception from tax coverage has the burden of bringing himself within the exemption or exception. Piedmont Canteen Serv., Inc. v. Johnson, 256 N.C. 155, 123 S.E.2d 582 (1962).

For meaning of "original or unmanufactured state" in subdivision (3), see Duke Power Co. v. Clayton, 274 N.C. 505, 164 S.E.2d 289 (1968).

Sales Tax Is Unconstitutional if Transaction Is Interstate. — A sales tax is a tax on the freedom of purchase, and, when applied to interstate transactions, is a tax on the privilege of doing interstate commerce, creates a burden on interstate commerce, and runs counter to the Commerce Clause of the federal Constitution. Excel, Inc. v. Clayton, 269 N.C. 127, 152 S.E.2d 171 (1967).

Delivery to Carrier for Transportation Out of State Makes Property Immune from Local Taxation. — The unconditional commitment of property to a common carrier for transportation in regular course to another state or country is generally held to place it in the stream of interstate or foreign commerce, so as to render it immune from local taxation. Excel, Inc. v. Clayton, 269 N.C. 127, 152 S.E.2d 171 (1967).

But Principle Is Inapplicable to Deliveries to Purchasers in State. — The principle of law that the unconditional commitment of property to a common carrier for transportation in regular course to another state or country places it in the stream of interstate or foreign commerce, so as to render it immune from local taxation, is not applicable where the material was delivered to the purchasers in North Carolina, the taxing jurisdiction. Excel, Inc. v. Clayton, 269 N.C. 127, 152 S.E.2d 171 (1967).

Despite Intention to Use Goods Out of State. — The mere intention of the buyer and the seller that the goods sold be used outside of

the State does not make the sales transaction any less a local intrastate activity. Where the delivery of the goods sold is in the taxing state and is accepted within the taxing state, a sales tax may lawfully be imposed upon the transaction. Excel, Inc. v. Clayton, 269 N.C. 127, 152 S.E.2d 171 (1967).

Incidental interstate attributes do not transform purely local transactions into interstate transactions and thereby create a burden on interstate commerce and run counter to the Commerce Clause of the federal Constitution. Excel, Inc. v. Clayton, 269 N.C. 127, 152 S.E.2d 171 (1967).

Sales Held Intrastate and Subject to Sales Tax. — Sale of goods to interstate carriers for use by the carriers at terminals outside this State are intrastate transactions subject to the North Carolina sales tax when the goods are delivered to the carriers at the seller's plant in this State notwithstanding the carriers take the goods f.o.b. the seller's plant under bills of lading with themselves as consignees at the respective terminals, without transportation charges, and inspection of the goods is had at, and payment is forwarded from, such foreign terminals. The imposition of such tax does not offend the Commerce Clause of the federal Constitution. Excel, Inc. v. Clayton, 269 N.C. 127, 152 S.E.2d 171 (1967).

Purchases by Housing Authority. — Neither the Constitution of this State nor the Constitution and laws of the United States prohibit the collection of a sales tax on purchases of tangible personal property made by a housing authority duly created, organized and existing under and by virtue of the Housing Authorities Law (§ 157-1 et seq.) enacted in 1935 by the General Assembly of North Carolina. Housing Authority v. Johnson, 261 N.C. 76, 134 S.E.2d 121 (1964).

Insecticides. — This section does not define insecticides, so the term must be given its ordinary meaning. Olin Mathieson Chem. Corp. v. Johnson, 257 N.C. 666, 127 S.E.2d 262 (1962).

MH-30 is an agent for destroying weeds and plants — a herbicide. It is no more an insecticide than would be a forest fire which destroyed the balsam firs upon which the woolly aphids feed. Olin Mathieson Chem. Corp. v. Johnson, 257 N.C. 666, 127 S.E.2d 262 (1962).

The word "or" in subdivision (23) of this section must be taken conjunctively and construed as "and," and the manifest legislative intent of subdivision (23) is that the materials therein enumerated shall only be exempt from the sales tax "when such materials are used for packaging, shipment or delivery of tangible personal property which is sold either at wholesale or retail and when such articles constitute a part of the sale of such tangible personal property and are delivered with it to the customer." Sale v. Johnson, 258 N.C. 749, 129 S.E.2d 465 (1963).

Poultry Coops. — Where plaintiffs alleged that they "sell their coops to farmers, poultrymen, and persons, firms, and corporations engaged in the poultry business, and such coops are used for packaging, shipment, and delivery of tangible personal property which is sold either at wholesale or retail, or such coops are delivered with the chickens or turkeys to the customer," and defendant admitted "that the palintiffs sell their coops to farmers, poultrymen and persons, firms and corporations engaged in the poultry business, and that such coops are used by such customers in the delivery of live poultry, which is sold by such customers at either wholesale or retail," such allegations in the complaint and admissions in the answer are sufficient to exempt plaintiffs' sales of coops from the sales tax within the purview and intent of subdivision (23) of this section, since there was no allegation in the complaint to the effect that when plaintiffs' vendees sold poultry the coops constituted a part of the sale of such poultry and were delivered with the poultry to the customer. Sale v. Johnson, 258 N.C. 749, 129 S.E.2d 465 (1963).

Burden of Proof. — Where the tax coverage is challenged by virtue of an exemption or exception, the burden is upon the challenger to bring himself within the exemption or exception. Henderson v. Gill, 229 N.C. 313, 49 S.E.2d 754 (1948).

Flowers grown upon the vendors' own land are farm products within the meaning of the exemption of such products from the sales tax. Henderson v. Gill, 229 N.C. 313, 49 S.E.2d 754 (1948).

Sale by Florist of Flowers Grown on Own Land. — Plaintiffs operated a florist shop and sold therein flowers grown by themselves on their own land and also flowers purchased from wholesalers. It was held that the sale of flowers grown by them on their own land was not exempt from the sales tax, since even though such flowers are regarded as farm products, such sales were made by plaintiffs in their character and capacity of florists and not as farmers or producers. Henderson v. Gill, 229 N.C. 313, 49 S.E.2d 754 (1948).

Quoted in In re Halifax Paper Co., Inc., 259 N.C. 589, 131 S.E.2d 441 (1963).

Cited in Hajoca Corp. v. Clayton, 277 N.C. 560, 178 S.E.2d 481 (1971).

§ 105-164.14. Certain refunds authorized.—(a) Any person engaged in transporting persons or property in interstate commerce for compensation who is subject to regulation by, and to the jurisdiction of, the Interstate Commerce

Commission or the Civil Aeronautics Board and who is required by either such Commission or Board to keep records according to its standard classification of accounting may secure a refund from the Commissioner of Revenue with respect to sales or use tax paid by such person on purchases or acquisitions of lubricants, repair parts and accessories in this State for motor vehicles, railroad cars, locomotives, and airplanes operated by such person, upon the conditions described below. The Commissioner of Revenue shall prescribe the periods of time, whether monthly, quarterly, semiannually or otherwise, with respect to which refunds may be claimed, and shall prescribe the time within which, following such periods, an application for refund may be made. An applicant for refund shall furnish such information as the Commissioner may require, including detailed information as to lubricants, repair parts and accessories wherever purchased, whether within or without the State, acquired during the period with respect to which a refund is sought, and the purchase price thereof, detailed information as to sales and use tax paid in this State thereon, and detailed information as to the number of miles such motor vehicles, railroad cars, locomotives, and airplanes were operated both within this State, and without this State, during such period, together with satisfactory proof thereof. The Commissioner shall thereupon compute the tax which would be due with respect to all lubricants, repair parts and accessories acquired during the refund period as though all such purchases were made in this State, but only on such proportion of the total purchase prices thereof as the total number of miles of operation of such applicants' motor vehicles, railroad cars, locomotives, and airplanes within this State bears to the total number of miles of operation of such applicants' motor vehicles, railroad cars, locomotives and airplanes within and without this State, and such amount of sales and use tax as the applicant has paid in this State during said refund period in excess of the amount so computed shall be refunded to the applicant.

(b) The Commissioner of Revenue shall make refunds semiannually to hospitals not operated for profit (including hospitals and medical accommodations operated by an authority created under the Hospital Authorities Law, Article 12 of G.S. 131), educational institutions not operated for profit, churches, orphanages and other charitable or religious institutions and organizations not operated for profit of sales and use taxes paid under this Article by such institutions and organizations on direct purchases of tangible personal property for use in carrying on the work of such institutions or organizations. Sales and use tax liability indirectly incurred by such institutions and organizations on building materials, supplies, fixtures and equipment which shall become a part of or annexed to any building or structure being erected, altered or repaired for such institutions and organizations for carrying on their nonprofit activities shall be construed as sales or use tax liability incurred on direct purchases by such institutions and organizations, and such institutions and organizations may obtain refunds of such taxes indirectly paid. The refund provisions contained in this subsection shall not apply to organizations, corporations and institutions which are governmental agencies, owned and controlled by the federal, State or local governments; provided that hospitals and medical accommodations operated by an authority created under the Hospital Authorities Law, Article 12 of Chapter 131 of the General Statutes of North Carolina, shall not be excluded from the refund provisions contained in this subsection. In order to receive the refunds herein provided for, such institutions and organizations shall file a written request for refund covering the first six months of the calendar year on or before the fifteenth day of October next following the close of said period, and shall file a written request for refund covering the second six months of the calendar year on or before the fifteenth day of April next following the close of that period. Such requests for refund shall be substantiated by such proof as the Commissioner of Revenue may require, and no refund shall be

made on applications not filed within the time allowed by this section and in such manner as the Commissioner may require.

(c) The Commissioner of Revenue shall make refunds annually to all counties, incorporated cities and towns, sanitary districts and metropolitan sewerage districts in this State of sales and use taxes paid under this Article by said counties, incorporated cities and towns, sanitary districts and metropolitan sewerage districts on direct purchases of tangible personal property. Sales and use tax liability indirectly incurred by such counties, incorporated cities and towns, sanitary districts and metropolitan sewerage districts in this State on building materials, supplies, fixtures and equipment which shall become a part of or annexed to any building or structure being erected, altered or repaired for such counties, incorporated cities and towns, sanitary districts and metropolitan sewerage districts in this State shall be construed as sales or use tax liability incurred on direct purchases by such counties, incorporated cities and towns, sanitary districts and metropolitan sewerage districts, and such counties, incorporated cities and towns, sanitary districts and metropolitan sewerage districts may obtain refunds of such taxes indirectly paid. The refund provisions contained in this subsection shall not apply to any bodies, agencies or political subdivisions of the State not specifically named herein. In order to receive the refund herein provided for, counties, incorporated cities and towns, sanitary districts and metropolitan sewerage districts in this State shall file a written request for said refund within six months of the close of the fiscal year of the counties, incorporated cities and towns, sanitary districts and metropolitan sewerage districts seeking said refund, and such request for refund shall be substantiated by such records, receipts and information as the Commissioner may require. No refunds shall be made on applications not filed within the time allowed by this section and in such manner as the Commissioner may otherwise require.

(d) Refunds made pursuant to applications filed after the dates specified in subsections (b) and (c) above shall be subject to the following penalties for late filing: Applications filed within 30 days after said dates, twenty-five percent (25%); applications filed after 30 days but within six months after said dates, fifty percent (50%). However, refunds which are applied for after six months following said dates shall be barred. (1957, c. 1340, s. 5; 1961, c. 826, s. 2; 1963, cc. 169, 1134; 1965, c. 1006; 1967, c. 1110, s. 6; 1969, c. 1298, s. 1; 1971, cc. 89, 286.)

Cross Reference. — See note to § 105-164.4.

Editor's Note. — The 1969 amendment, effective Jan. 1, 1970, added subsection (d). Session Laws 1969, c. 1298, s. 6, provides that the act shall not have the effect of reviving any claims or applications for tax refunds previously barred.

The first 1971 amendment inserted references to metropolitan sewerage districts throughout subsection (c).

The second 1971 amendment substituted "semiannually" for "annually" in the first sentence of subsection (b) and deleted the former fourth sentence in that subsection, substituting the present fourth and fifth sentences in lieu thereof.

Denial of Refund to United States Is Void. — Those (but only those) provisions of the Sales and Use Tax Act and the regulations which operate to deny the United States a tax refund when an appropriate and timely request therefor is made are null and void. United States v. Clayton, 250 F. Supp. 827 (E.D.N.C. 1965).

Housing Authority Not Entitled to Refund. — A housing authority created pursuant to the provisions of the Housing Authorities Law (§ 157-1 et seq.) is a municipal corporation but is not an incorporated city or town, and is not entitled to the refund of sales taxes paid on purchases of tangible personal property pursuant to the provisions of subsection (c) of this section. Housing Authority v. Johnson, 261 N.C. 76, 134 S.E.2d 121 (1964).

A municipal corporation or public agency created, organized and existing under and by virtue of the laws of this State, more particularly the Housing Authorities Law, codified as § 157-1 et seq., is not a charitable organization within the meaning of the refund provisions of subsection (b) of this section. Housing Authority v. Johnson, 261 N.C. 76, 134 S.E.2d 121 (1964).

DIVISION IV. REPORTING AND PAYMENT.

§ 105-164.15. Commissioner shall provide forms. — The Commissioner shall design, prepare, print and furnish to all retailers and wholesale merchants all necessary forms for filing returns and instructions to insure a full collection from retailers and wholesale merchants and an accounting for taxes due. But the failure of any retailer or wholesale merchant to obtain or receive forms shall not relieve such taxpayer from the payment of said tax at the time and in the manner herein provided. (1957, c. 1340, s. 5.)

§ 105-164.16. Taxes due monthly; reports and payment of tax.—The taxes levied under the provisions of this Article shall be due and payable in monthly installments on or before the fifteenth day of the month next succeeding the month in which the tax accrues, except as otherwise provided herein. Every taxpayer liable for the tax imposed by this Article shall on or before the fifteenth day of the month next succeeding the month in which the tax accrues make out, prepare and render a return on the form prescribed by the Commissioner, containing a true and correct statement showing the total gross sales, accompanied by an itemized statement showing the amount of sales in each group of exemptions and exclusions covered by G.S. 105-164.13 which are not subject to the tax or are not used as a measurement of the taxes due by such taxpayer together with such other information as the Commissioner may require and at the time of making such monthly return such taxpayer shall compute the taxes due and shall pay to the Commissioner the amount of taxes shown to be due. When the total amount of tax for which a taxpayer is liable for any month is consistently less than five dollars ($5.00), such taxpayer may file a quarterly return with remittance of tax in lieu of a monthly return on or before the fifteenth day of January, April, July, and October of each year for the preceding three months' period upon making application to the Commissioner to use such basis of filing. Returns shall be signed by the retailer or his duly authorized agent.

Any return which does not conform strictly to the requirements in respect to its content shall not be a lawful return and the Commissioner shall require the immediate filing of a proper return in default of which he shall assess a deficiency as hereinafter provided. (1957, c. 1340, s. 5; 1967, c. 1110, s. 6.)

Cited in Colonial Pipeline Co. v. Clayton, 275 N.C. 215, 166 S.E.2d 671 (1969).

§ 105-164.17. Reports and payment of use tax.—Every person storing, using or consuming tangible personal property in this State shall file with the Commissioner a return for the preceding month or quarter, as provided in G.S. 105-164.16 of this Article, in such form as may be prescribed by him showing the total cost price of the tangible personal property purchased or received by such person during such preceding month or quarter, the storage, use or consumption of which is subject to the tax imposed by this Article and such other information as the Commissioner may deem necessary for the proper administration of this Article. The returns shall be accompanied by a remittance of the amount of tax herein imposed during the month or quarter covered by the return. Returns shall be signed by the person liable for the tax or his duly authorized agent. (1957, c. 1340, s. 5; 1967, c. 1110, s. 6.)

Cited in Colonial Pipeline Co. v. Clayton, 275 N.C. 215, 166 S.E.2d 671 (1969).

§ 105-164.18. Remittances; how made.—All remittances of taxes imposed by this Article shall be made to the Commissioner by bank draft, check, cashier's check, money order or money, who shall issue his receipts therefor to the taxpayers when requested and shall deposit daily all moneys received to the credit of the State Treasurer as required by law for other taxes. Provided, no payment other than cash shall be final discharge of liability for the tax herein

assessed and levied unless and until it has been paid in cash to the Commissioner; provided, further, that cash remittances must not be made by mail. The Commissioner shall keep full and accurate records of all moneys received by him and how disbursed and shall preserve all returns filed with him under this Article for a period of three years. (1957, c. 1340, s. 5.)

§ 105-164.19. Extension of time for making returns and payment.—The Commissioner for good cause may extend the time for making any return under the provisions of this Article and may grant such additional time within which to make such return as he may deem proper but the time for filing any such return shall not be extended beyond the fifteenth day of the month next succeeding the regular due date of such return. If the time for filing a return be extended, interest at the rate of one half of one percent (1/2 of 1%) per month from the time the return was due to be filed to the date of payment shall be added and paid. (1957, c. 1340, s. 5.)

§ 105-164.20. Cash or accrual basis of reporting.—Any retailer taxable under this Article having both cash and credit sales may report such sales on either the cash or accrual basis of accounting upon making application to the Commissioner for permission to use such basis of reporting under such rules and regulations as shall be promulgated from time to time by the Commissioner. Such permission shall continue in force and effect unless revoked by the Commissioner but he may grant written permission to any such taxpayer upon application therefor to change from one basis to another under such rules and regulations. (1957, c. 1340, s. 5.)

§ 105-164.21. Discount for payment of taxes when due.—Every retailer who pays the retail sales or use tax imposed by this Article shall be entitled to deduct from the amount of the tax for which he is liable and which he actually pays a discount of three percent (3%). Provided, however, the Commissioner may deny a taxpayer the benefits of this section for failure to pay the full tax when due as well as in cases of fraud, evasion, failure to keep accurate and clear records as hereinafter required. Provided, further, that in order to receive the discount the taxpayer must deduct the three percent (3%) at the time of making his monthly or quarterly remittance of tax to the Department of Revenue. (1957, c. 1340, s. 5; 1967, c. 1110, s. 6.)

Division V. Records Required to Be Kept.

§ 105-164.22. Retailer must keep records.—Every retailer shall keep and preserve suitable records of the gross income, gross receipts and/or gross receipts of sales of such business and such other books or accounts as may be necessary to determine the amount of tax for which he is liable under the provisions of this Article. And it shall be the duty of every retailer to keep and preserve for a period of three years all invoices of goods, wares and merchandise purchased for resale and all such books, invoices and other records shall be open for examination at all reasonable hours during the day by the Commissioner or his duly authorized agent. (1957, c. 1340, s. 5.)

Cited in Telerent Leasing Corp. v. High, 8 N.C. App. 179, 174 S.E.2d 11 (1970).

§ 105-164.23. Consumer must keep records.—Every consumer shall keep such records, receipts, invoices and other pertinent papers in such form as may be required by the Commissioner and all such books, invoices and other records shall be open for examination by the Commissioner or any of his duly authorized agents. In the event the retailer, user or consumer has imported the tangible personal property and fails to produce an invoice showing the cost price of the tangible personal property as defined in this Article which is subject to tax or the invoices do not reflect the true or actual cost as defined herein, then the Commissioner shall ascertain in any manner feasible the true

cost price and assess and collect the tax with interest, plus penalties, if such have accrued, on the true cost price as determined by him. (1957, c. 1340, s. 5.)

§ **105-164.24. Separate accounting required.**—Every retailer shall keep separate records disclosing sales of tangible personal property taxable under this Article and sales transactions not taxable because exempt under G.S. 105-164.13 or elsewhere excluded from taxation. Such records shall be kept in such form as may be accurately and conveniently checked by the Commissioner or his authorized agents and unless such records shall be kept the exemptions and exclusions provided in this Article shall not be allowed and it shall be the duty of the Commissioner or his agents to assess a tax upon the total gross sales at the rate levied upon retail sales and if records are not kept disclosing gross sales, it shall be the duty of the Commissioner to assess a tax upon an estimation of sales based upon the best information available. (1957, c. 1340, s. 5; 1959, c. 1259, s. 5.)

§ **105-164.25. Wholesale merchant must keep records.**—Every wholesale merchant selling tangible personal property to other merchants for resale or tangible personal property the sale of which is otherwise defined as a wholesale sale under the terms of this Article shall deliver to the customer a bill of sale for each sale of such tangible personal property whether sold for cash or on terms of credit, and shall make and retain a duplicate or carbon copy of each bill of sale and shall keep a file of all such duplicate bills of sale for at least three years from the date of sale. Such bills of sale shall contain and include the name and address of the purchaser, the date of the purchase, the article purchased and the price at which the article is sold to the customer. These records shall be kept for a period of three years and shall be open for inspection by the Commissioner or his duly authorized agents at all reasonable hours. Failure to comply with the provisions of this section shall subject the wholesale merchant to liability for tax upon such sales at the rate of tax levied in this Article upon retail sales. (1957, c. 1340, s. 5.)

§ **105-164.26. Presumption that sales are taxable.**—For the purpose of the proper administration of this division of this Article and to prevent evasion of the retail sales tax, it shall be presumed that all gross receipts of wholesale merchants and retailers are subject to the retail sales tax until the contrary is established by proper records as required herein. It shall be prima facie presumed that tangible personal property sold by any person for delivery in this State, however made, and by carrier or otherwise, is sold for storage, use or other consumption in this State, and a like presumption shall apply to tangible personal property delivered without this State and brought to this State by the purchaser thereof. (1957, c. 1340, s. 5.)

Burden of showing exemptions or exceptions from a taxing statute is upon the one asserting the exemption or exclusion. Telerent Leasing Corp. v. High, 8 N.C. App. 179, 174 S.E.2d 11 (1970).

Quoted in Piedmont Canteen Serv., Inc. v. Johnson, 256 N.C. 155, 123 S.E.2d 582 (1962).

Stated in Long Mfg. Co. v. Johnson, 264 N.C. 12, 140 S.E.2d 744 (1965).

§ **105-164.27:** Repealed by Session Laws 1961, c. 826, s. 2.

§ **105-164.28. Resale certificate.**—The burden of proof that a sale of tangible personal property is not a sale at retail is upon the wholesale merchant or retailer who makes the sale unless he takes from the purchaser a certificate to the effect that the property is for resale. With respect to sales for resale the certificate relieves the wholesale merchant from the burden of proof only if taken in good faith from a person who is engaged in the business of selling tangible personal property and who holds the license provided for in this Article. The certificate shall be signed by and bear the name and address of the purchaser, shall indicate the registration number issued to the purchaser and

shall indicate the general character of the tangible personal property generally sold by the purchaser in the regular course of business. The certificate of resale shall be in such form as the Commissioner shall prescribe. It shall be the duty of every wholesale merchant selling tangible personal property to a retailer for resale to make reasonable and prudent inquiry concerning the type and character of the tangible personal property as it relates to the principal business of the retailer. (1957, c. 1340, s. 5.)

Lessor Has Burden to Show That Leasing Transactions Constituted Sale for Resale. — A lessor of television sets who had not procured resale certificates from any of its customers had the burden to show that its leasing transactions constituted a sale for resale, entitling the lessor to an exemption from the sales tax. Telerent Leasing Corp. v. High, 8 N.C. App. 179, 174 S.E.2d 11 (1970).

Stated in Long Mfg. Co. v. Johnson, 264 N.C. 12, 140 S.E.2d 744 (1965).

§ 105-164.29. Application for licenses by wholesale merchants and retailers.—Every application for a license by a wholesale merchant or retailer shall be made upon a form prescribed by the Commissioner and shall set forth the name under which the applicant transacts or intends to transact business, the location of his place or places of business, and such other information as the Commissioner may require. The application shall be signed by the owner if a natural person; in the case of an association or partnership, by a member or partner; in the case of a corporation, by an executive officer or some other person specifically authorized by the corporation to sign the application, to which shall be attached the written evidence of his authority. Provided, however, that persons, firms, or corporations, whose business extends into more than one county shall be required to secure only one license under the provisions of this Article which license shall cover all operations of such company throughout the State of North Carolina.

When the required application has been made the Commissioner shall grant and issue to each applicant such license. A license is not assignable and is valid only for the person in whose name it is issued and for the transaction of business at the place designated therein. It shall be at all times conspicuously displayed at the place for which issued.

A retailer whose license has been previously suspended or revoked shall pay the Commissioner the sum of one dollar ($1.00) for the reissuance or renewal of such license. A wholesale merchant whose license has been previously suspended or revoked shall pay the Commissioner the sum of ten dollars ($10.00) for the reissuance or renewal of such license for the year or fraction thereof for which said license is reissued or renewed.

Whenever any wholesale merchant or retailer fails to comply with any provision of this Article or any rule or regulation of the Commissioner relating thereto, the Commissioner, upon hearing, after giving the wholesale merchant or retailer 10 days' notice in writing, specifying the time and place of hearing and requiring him to show cause why his license should not be revoked, may revoke or suspend the license held by such wholesale merchant or retailer. The notice may be served personally or by registered mail directed to the last known address of the person. All provisions with respect to review and appeals of the Commissioner's decisions as provided by G.S. 105-241.2, 105-241.3, and 105-241.4 of the General Statutes shall be applicable to this section.

Any wholesale merchant or retailer who engages in business as a seller in this State without a license or after his license has been suspended or revoked, and each officer of any corporation which so engages in business shall be guilty of a misdemeanor and subject to a fine of not exceeding five hundred dollars ($500.00) for each such offense. (1957, c. 1340, s. 5.)

Division VI. Examination of Records.

§ 105-164.30. Commissioner or agent may examine books, etc.—For the purpose of enforcing the collection of the tax levied by this Article, the

Commissioner or his duly authorized agent is hereby specifically authorized and empowered to examine at all reasonable hours during the day the books, papers, records, documents or other data of all retailers or wholesale merchants bearing upon the correctness of any return or for the purpose of making a return where none has been made as required by this Article, and may require the attendance of any person and take his testimony with respect to any such matter, with power to administer oaths to such person or persons. If any person summoned as a witness shall fail to obey any summons to appear before the Commissioner or his authorized agent, or shall refuse to testify or answer any material question or to produce any book, record, paper, or other data when required to do so, such failure or refusal shall be reported to the Attorney General or the district solicitor, who shall thereupon institute proceedings in the superior court of the county where such witness resides to compel obedience to any summons of the Commissioner or his authorized agent. Officers who serve summonses or subpoenas, and witnesses attending, shall receive like compensation as officers and witnesses in the superior courts, to be paid from the proper appropriation for the administration of this Article.

In the event any retailer or wholesale merchant shall fail or refuse to permit examination of his books, papers, accounts, records, documents or other data by the Commissioner or his authorized agents as aforesaid, the Commissioner shall have the power to proceed by citing said retailer or wholesale merchant to show cause before the superior court of the county in which said taxpayer resides or has its principal place of business as to why such books, records, papers, or documents should not be examined and said superior court shall have jurisdiction to enter an order requiring the production of all necessary books, records, papers, or documents and to punish for contempt of such order any person violating the same. (1957, c. 1340, s. 5.)

§ **105-164.31. Complete records must be kept for three years.**—Every retailer, wholesale merchant or consumer as defined by this Article shall secure, maintain and keep for a period of three years a complete record of tangible personal property received, used, sold at retail or wholesale, distributed or stored, leased or rented within this State by said retailer, wholesale merchant or consumer together with invoices, bills of lading and other pertinent papers and records as may be required by the Commissioner for the reasonable administration of this Article and all such records shall be open for inspection by the Commissioner or his duly authorized agent at all reasonable hours during the day. (1957, c. 1340, s. 5.)

§ **105-164.32. Incorrect returns; estimate.**—In the event any retailer, wholesale merchant or consumer fails to make a return and to pay the tax as provided by this Article or in case any retailer, wholesale merchant or consumer makes a grossly incorrect return or a report that is false or fraudulent, it shall be the duty of the Commissioner or his authorized agent to make an estimate for the taxable period of wholesale and/or retail sales of such retailer or wholesale merchant or of the gross proceeds of rentals or leases of tangible personal property by the retailer and to estimate the cost price of all articles of tangible personal property imported by the consumer for use, storage, or consumption in this State and to assess and collect the tax and interest, plus penalties, if such have accrued, upon the basis of such estimate. (1957, c. 1340, s. 5.)

Division VII. Failure to Make Returns; Overpayments.

§§ **105-164.33, 105-164.34:** Repealed by Session Laws 1963, c. 1169, s. 3, effective July 1, 1963.

§ **105-164.35. Excessive payments; recomputing tax.**—As soon as practicable after a return is filed, the Commissioner shall examine it. If it then

appears that the correct amount of tax is greater or less than the amount shown in the return, the tax shall be recomputed.

(1) Excessive Payments.—If the amount already paid exceeds that which should have been paid on the basis of the tax so recomputed, the excess shall be credited or refunded to the taxpayer in accordance with the provisions of this Article.

(2) to (5) Repealed by Session Laws 1959, c. 1259, s. 9. (1957, c. 1340, s. 5; 1959, c. 1259, s. 9.)

A taxpayer who has prepaid his liability is entitled to a refund or credit on subsequently accruing taxes. Park-N-Shop, Inc. v. Clayton, 264 N.C. 218, 141 S.E.2d 294 (1965).

§ **105-164.36:** Repealed by Session Laws 1959, c. 1259, s. 9.

§ **105-164.37. Bankruptcy, receivership, etc.** — If any taxpayer subject to the provisions of this Article goes into bankruptcy, receivership or turns over his stock of merchandise by voluntary transfer to creditors, the tax liability under this Article shall constitute a prior lien upon such stock of merchandise and shall become subject to levy under execution and it shall be the duty of the transferee in any such case to retain the amount of the tax due from the first sales of such stock of merchandise and pay the same to the Commissioner. (1957, c. 1340, s. 5.)

§ **105-164.38. Tax shall be a lien.** — The tax imposed by this Article shall be a lien upon the stock of goods and/or any other property of any person subject to the provisions of this Article who shall sell out or in any manner transfer his business or stock of goods or shall quit business, and such person shall be required to make out the return provided for under Division IV of this Article within 30 days after the date he sold out his business or stock of goods or quit business and his successor in business or the purchaser of the entire stock of goods shall be required to withhold sufficient of the purchase money or money's worth in the event there is an exchange of properties to cover the amount of said taxes due and unpaid until such time as the former owner shall produce a receipt from the Commissioner showing that the taxes have been paid or a certificate that no taxes are due. If the purchaser of a business or stock of goods shall fail to withhold purchase money as above provided, and the taxes shall be due and unpaid after the 30-day period allowed, he shall be personally liable for the payment of the taxes accrued and unpaid on account of the operation of the business by the former owner. The transferee shall be liable for payment of any sales and/or use taxes due by the transferor to the extent of the purchase price paid by the transferee or fair market value of the property transferred whichever is greater. The transferee or successor in business and the liability of the transferee or successor in business shall be subject to the provisions of G.S. 105-241.1, 105-241.2, 105-241.3, 105-241.4 and to other remedies for the collection of taxes to the same extent as if the transferee or successor in business had incurred the original tax liability. (1957, c. 1340, s. 5; 1963, c. 1169, s. 3.)

§ **105-164.39. Attachment.**—In the event any retailer or wholesale merchant is delinquent in the payment of the tax herein provided for, the Commissioner may give notice of the amount of such delinquency by registered mail to all persons having in their possession or under their control any credits or other personal property belonging to such retailer or wholesale merchant or owing any debts to such taxpayer at the time of the receipt by them of such notice and thereafter any person so notified shall neither transfer nor make any other disposition of such credits, other personal property or debts until the Commissioner shall have consented to a transfer or disposition or until 30 days shall have elapsed from and after the receipt of such notice. All persons so notified must within five days after receipt of such notice advise the Commissioner of any and all such credits, other personal property or debts in

their possession, under their control or owing by them as the case may be. The remedy provided by this section shall be cumulative and optional and in addition to all other remedies now provided by law for the collection of taxes due the State. (1957, c. 1340, s. 5.)

§ **105-164.40. Jeopardy assessment.** — If the Commissioner is of the opinion that the collection of any tax or any amount of tax required to be collected and paid to the State under this Article will be jeopardized by delay, he shall make an assessment of the tax or amount of tax required to be collected and shall mail or issue a notice of such assessment to the taxpayer together with a demand for immediate payment of the tax or of the deficiency in tax declared to be in jeopardy including interest and penalties. In the case of a tax for a current period, the Commissioner may declare the taxable period of the taxpayer immediately terminated and shall cause notice of such finding and declaration to be mailed or issued to the taxpayer together with a demand for immediate payment of the tax based on the period declared terminated and such tax shall be immediately due and payable, whether or not the time otherwise allowed by law for filing a return and paying the tax has expired. Assessments provided for in this section shall be immediately due and payable and proceedings for the collection shall commence at once and if any such tax, penalty or interest is not paid upon demand of the Commissioner, he shall forthwith cause a levy to be made on the property of the taxpayer or, in his discretion the Commissioner may require the taxpayer to file such indemnity bond as in his judgment may be sufficient to protect the interest of the State. (1957, c. 1340, s. 5.)

§ **105-164.41. Excess payments; refunds.** — If upon examination of any monthly or quarterly return made under this Article, it appears that an amount of tax has been paid in excess of that properly due, then the amount in excess shall be credited against any tax or installment thereof then due from the taxpayer, under any other subsequent monthly or quarterly return, or shall be refunded to the taxpayer by certificate of overpayment issued by the Commissioner to the State Auditor, and the Auditor shall issue his warrant on the Treasurer, which warrant shall be payable out of any funds appropriated for that purpose. (1957, c. 1340, s. 5; 1963, c. 1169, s. 3; 1967, c. 1110, s. 6.)

§ **105-164.42:** Repealed by Session Laws 1959, c. 1259, s. 9.

Division VIII. Administration and Enforcement.

§ **105-164.43. Commissioner to make regulations.** — Subject to the provisions of G.S. 105-262 the Commissioner shall from time to time promulgate such rules and regulations not inconsistent with this Article for making returns and for the ascertainment, assessment, and collection of the tax imposed hereunder as he may deem necessary to enforce its provisions, and upon request shall furnish any taxpayer with a copy of such rules and regulations. All provisions with respect to reviews and appeals from the Commissioner's decisions as provided by G.S. 105-241.2, 105-241.3 and 105-241.4 shall be applicable to this section. (1957, c. 1340, s. 5.)

Applied in Park-N-Shop, Inc. v. Clayton, 264 N.C. 218, 141 S.E.2d 294 (1965).

§ **105-164.44. Penalty and remedies of Article 9 applicable.** — All provisions not inconsistent with this Article in Article 9, entitled "General Administration—Penalties and Remedies" of Subchapter I of Chapter 105 of the General Statutes, including but not limited to, administration, auditing, making returns, promulgation of rules and regulations by the Commissioner, additional taxes, assessment procedure, imposition and collection of taxes and the lien thereof, assessments, refunds and penalties are hereby made a part of this Article and shall be applicable thereto. (1957, c. 1340, s. 5.)

Division IX. Local Option Sales and Use Taxes.

§§ 105-164.45 to 105-164.58: Repealed by Session Laws 1971, c. 77, s. 1.

Cross Reference. — As to local government sales and use taxes, see §§ 105-463 to 105-474.

Editor's Note. — The repealed sections derived from Session Laws 1969, c. 1228.

§§ 105-165 to 105-176: Repealed by Session Laws 1957, c. 1340, s. 5.

§§ 105-177, 105-178: Repealed by Session Laws 1951, c. 643, s. 5.

§ 105-179: Repealed by Session Laws 1957, c. 1340, s. 5.

§ 105-180: Repealed by Session Laws 1951, c. 643, s. 5.

§ 105-181: Repealed by Session Laws 1957, c. 1340, s. 5.

§ 105-182: Repealed by Session Laws 1955, c. 1350, s. 19.

§§ 105-183 to 105-187: Repealed by Session Laws 1957, c. 1340, s. 5.

Article 6.

Schedule G. Gift Taxes.

§ 105-188. Gift taxes; classification of beneficiaries; exemptions; rates of tax.—(a) State gift taxes, as hereinafter prescribed, are hereby levied upon the shares of the respective beneficiaries in all property within the jurisdiction of this State, real, personal and mixed, and any interest therein which shall in any one calendar year pass by gift made after March 24, 1939.

(b) The taxes shall apply whether the gift is in trust or otherwise and whether the gift is direct or indirect. In the case of a gift made by a nonresident, the taxes shall apply only if the property is within the jurisdiction of this State. The taxes shall not apply to gifts made prior to March 24, 1939.

(c) The tax shall not apply to the passage of property in trust where the power to revest in the donor title to such property is vested in the donor, either alone or in conjunction with any person not having substantial adverse interest in the disposition of such property or the income therefrom, but the relinquishment or termination of such power (other than by the donor's death) shall be considered to be a passage from the donor by gift of the property subject to such power, and any payment of the income therefrom to a beneficiary other than the donor shall be considered to be a passage by donor of such income by gift.

(d) Gifts to any one donee not exceeding a total value of three thousand dollars ($3,000) in any one calendar year shall not be considered gifts taxable under this Article, and where gifts are made to any one donee in any one calendar year in excess of three thousand dollars ($3,000), only that portion of said gifts exceeding three thousand dollars ($3,000) in value shall be subject to the tax levied by this Article. The three thousand dollars ($3,000) exclusion herein provided shall not apply to gifts of future interests in property. For the purposes of determining the exclusion herein provided, no part of a gift to an individual, or in trust for an individual, who has not attained the age of 21 years on the date of such transfer shall be considered a gift of a future interest in property if the property and the income therefrom may be expended by, or for the benefit of, the donee before his attaining the age of 21 years, and will to the extent not so expended pass to the donee on his attaining the age of 21 years, and in the event the donee dies before attaining the age of 21 years, be payable to the estate of the donee or as he may appoint under a general power of appointment.

(e) The tax shall be based on the aggregate sum of the net gifts made by the donor to the same donee, and shall be computed as follows:

(1) Determine the aggregate sum of the net gifts to the donee for the calendar year and the net gifts to the same donee for each of the preceding calendar years since January 1, 1948.

(2) Compute the tax upon said aggregate sum by applying the rates hereinafter set out.

(3) From the tax thus computed, deduct the total gift tax, if any, paid with respect to gifts to the same donee in any prior year or years since January 1, 1948. The sum thus ascertained shall be the gift tax due.

The term "net gifts" shall mean the sum of the gifts made by a donor to the same donee during any stated period of time in excess of the annual exclusion and the applicable specific exemption.

(f) The rates of tax, which are based on the relationship between the donor and the donee, shall be as follows:

(1) Where the donee is lineal issue, or lineal ancestor, or husband, or wife of the donor, or child adopted by the donor in conformity with the laws of this State, or of any of the United States, or of any foreign kingdom or nation, or stepchild of the donor (for each one hundred dollars ($100.00) or fraction thereof):

First $	10,000	above exemption		1 percent
Over $	10,000	and to $	25,000	2 percent
Over $	25,000	and to $	50,000	3 percent
Over $	50,000	and to $	100,000	4 percent
Over $	100,000	and to $	200,000	5 percent
Over $	200,000	and to $	500,000	6 percent
Over $	500,000	and to	$1,000,000	7 percent
Over	$1,000,000	and to	$1,500,000	8 percent
Over	$1,500,000	and to	$2,000,000	9 percent
Over	$2,000,000	and to	$2,500,000	10 percent
Over	$2,500,000	and to	$3,000,000	11 percent
Over	$3,000,000			12 percent

(2) Where the donee is the brother or sister, or descendant of the brother or sister, or is the uncle or aunt by blood of the donor (for each one hundred dollars ($100.00) or fraction thereof):

First $	5,000			4 percent
Over $	5,000	and to $	10,000	5 percent
Over $	10,000	and to $	25,000	6 percent
Over $	25,000	and to $	50,000	7 percent
Over $	50,000	and to $	100,000	8 percent
Over $	100,000	and to $	250,000	10 percent
Over $	250,000	and to $	500,000	11 percent
Over $	500,000	and to	$1,000,000	12 percent
Over	$1,000,000	and to	$1,500,000	13 percent
Over	$1,500,000	and to	$2,000,000	14 percent
Over	$2,000,000	and to	$3,000,000	15 percent
Over	$3,000,000			16 percent

(3) Where the donee is in any other degree of relationship than is hereinbefore stated, or shall be a stranger in blood to the donor, or shall be a body politic or corporate (for each one hundred dollars ($100.00) or fraction thereof):

First $	10,000			8 percent
Over $	10,000	and to $	25,000	9 percent
Over $	25,000	and to $	50,000	10 percent
Over $	50,000	and to $	100,000	11 percent
Over $	100,000	and to $	250,000	12 percent
Over $	250,000	and to $	500,000	13 percent
Over $	500,000	and to	$1,000,000	14 percent

Over $1,000,000 and to $1,500,000 ..... 15 percent
Over $1,500,000 and to $2,500,000 ..... 16 percent
Over $2,500,000 ..... 17 percent

(g) A donor shall be entitled to a total exemption of twenty-five thousand dollars ($25,000) to be deducted from gifts made to donees named in subdivision (1) of subsection (f), less the sum of amounts claimed and allowed as an exemption in prior calendar years. The exemption, at the option of the donor, may be taken in its entirety in a single year, or may spread over a period of years. When this exemption has been exhausted, no further exemption is allowable. When the exemption or any portion thereof is applied to gifts to more than one donee in any one calendar year, said exemption shall be apportioned against said gifts in the same ratio as the gross value of the gifts to each donee is to the total value of said gifts in the calendar year in which said gifts are made. No exemption shall be allowed to a donor for gifts made to donees named in subdivisions (2) and (3) of subsection (f).

(h) It is expressly provided, however, that the tax levied in this Article shall not apply to so much of said property as shall so pass exclusively:

(1) For state, county or municipal purposes within this State;

(2) To or for the exclusive benefit of charitable, educational, or religious organizations located within this State, no part of the net earnings of which inures to the benefit of any private shareholder or individual;

(3) To or for the exclusive benefit of charitable, religious and educational corporations, foundations and trusts, not conducted for profit, incorporated or created or administered under the laws of any other state, when such other state levies no gift taxes upon property similarly passing from residents of such state to charitable, educational or religious corporations, foundations and trusts incorporated or created or administered under the laws of this State, or when such corporation, foundation or trust receives and disburses funds donated in this State for religious, charitable and educational purposes. (1939, c. 158, s. 600; 1943, c. 400, s. 7; 1945, c. 708, s. 7; 1947, c. 501, s. 6; 1957, c. 1340, s. 6.)

Editor's Note. — For comment on enactment, see 17 N.C.L. Rev. 389. For comment on the 1947 amendment which rewrote subsection (e), see 25 N.C.L. Rev. 467. For article on gift taxes, see 16 N.C.L. Rev. 194. For article on planning for North Carolina death and gift taxes, see 27 N.C.L. Rev. 114.

Payments by an employer to the widow of a deceased executive were authorized and allowable as deductions under § 105-147(23) in computing employer's net income, and were not taxable as gifts under this section. Boylan-Pearce, Inc. v. Johnson, 257 N.C. 582, 126 S.E.2d 492 (1962). See note to § 105-147.

§ 105-188.1. Powers of appointment.—(a) For purposes of this Article "general power of appointment" shall mean any power of appointment which is exercisable in favor of the individual possessing the power (hereinafter in this section referred to as the "possessor"), his estate, his creditors, or the creditors of his estate; except that:

(1) A power to consume, invade, or appropriate property for the benefit of the possessor which is limited by an ascertainable standard relating to the health, education, support or maintenance of the possessor shall not be deemed a general power of appointment.

(2) In the case of a power of appointment which is exercisable by the possessor only in conjunction with another person:

a. If the power is not exercisable by the possessor except in conjunction with the creator of the power, such power shall not be deemed a general power of appointment.

b. If the power is not exercisable by the possessor except in conjunction with a person having a substantial interest, in the property subject to the power, which is adverse to exercise of

the power in favor of the possessor, such power shall not be deemed a general power of appointment. For the purposes of this clause a person who, after the death of the possessor, may be possessed of a power of appointment (with respect to the property subject to the possessor's power) which he may exercise in his own favor shall be deemed as having an interest in the property and such interest shall be deemed adverse to such exercise of the possessor's power.

c. If (after the application of clauses a and b) the power is a general power of appointment and is exercisable in favor of such other person, such power shall be deemed a general power of appointment only in respect of a fractional part of the property subject to such power, such part to be determined by dividing the value of such property by the number of such persons (including the possessor) in favor of whom such power is exercisable.

d. For purposes of clauses b and c, a power shall be deemed exercisable in favor of a person if it is exercisable in favor of such person, his estate, his creditors, or the creditors of his estate.

(b) Any person having a general power of appointment with respect to any interest in property shall for gift tax purposes be deemed to be the owner of such interest, and accordingly:

(1) If in connection with any gift of property the donor shall give to any person a general power of appointment with respect to any interest in such property, the donor shall be deemed to have given such person such interest in such property.

(2) If any person holding a general power of appointment with respect to any interest in property shall exercise such power in favor of any other person or persons, he shall be deemed to have made a gift of such interest to such person or persons.

(3) If any person holding a general power of appointment with respect to any interest in property shall relinquish such power, he shall be deemed to have made a gift of such interest to the person or persons who shall benefit by such relinquishment.

(c) Neither the exercise nor the relinquishment of a special power of appointment with respect to an interest in property shall be deemed to constitute a gift of such interest in such property.

(d) If in connection with any gift of property the donor shall give to any person a special power of appointment with respect to any interest in such property, the donor shall be deemed for gift tax purposes to have given such interest in equal shares to those persons, not more than two, among the possible appointees and takers in default of appointment whom the donor or his executor or administrator may designate in the gift tax return filed with respect to such gift. But the tax shall be computed according to the relationship of the donee of the power to the person designated if:

(1) The possible appointees and takers in default of appointment include any persons more closely related to the donee of the power than to the donor, and

(2) Such computation would produce a higher tax. (1963, c. 942; 1967, c. 1110, s. 7.)

§ 105-189. Transfer for less than adequate and full consideration.— Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this Article, be deemed a gift and shall be included in computing the amount of gifts made during the calendar year. (1939, c. 158, s. 601.)

§ **105-190. Gifts made in property.**—If the gift is made in property, the fair market value thereof at the date of the gift shall be considered the amount of the gift. (1939, c. 158, s. 602.)

§ **105-191. Manner of determining tax; time of payment; application to Department of Revenue for correction of assessment.**—The tax imposed by this Article shall be paid by the donor on or before the fifteenth day of April following the close of the calendar year.

Reports of the gifts shall be made by the donor to the State Department of Revenue on blank forms prepared by the State Department of Revenue and furnished on application to any taxpayer, and the amount of tax due shall be paid at the time such report is made. The Department of Revenue shall audit the returns made under this Article, and if it is found that the amount of tax paid is less than the amount lawfully due under the provisions of this Article shall forward a statement of the taxes determined to the person or persons primarily chargeable with the payment thereof, such additional taxes to be collected under the same rules and regulations contained in this Subchapter for the collection of other taxes. If an overpayment should be found to have been made, refund of such overpayment shall be made to the taxpayer within 60 days of the discovery thereof if the amount of the overpayment is three dollars ($3.00) or more. If such overpayment is less than three dollars ($3.00), the overpayment shall be refunded only upon receipt by the Commissioner of a written demand for such refund from the taxpayer. No overpayment shall be refunded, irrespective of whether based upon discovery or receipt of written demand, if such discovery was not made or such demand was not received within three years from the date set by the statute for the filing of the return or within six months of payment of the tax, whichever is the later. Within one year after the tax has been determined, any person aggrieved by the determination, may apply in writing to the Department of Revenue, which may make such corrections of the taxes as it may determine proper: Provided, that a taxpayer aggrieved by the rejection of the application in whole or in part by the Department of Revenue may seek administrative review or appeal under the provisions of G.S. 105-241.2, 105-241.3 or 105-241.4. (1939, c. 158, s. 603; 1955, c. 22, s. 1; c. 1350, s. 20; 1957, c. 1340, s. 14.)

§ **105-192:** Repealed by Session Laws 1959, c. 1259, s. 9.

§ **105-193. Lien for tax; collection of tax.**—The tax imposed by this Article shall be a lien upon all gifts that constitute the basis for the tax for a period of 10 years from the time they are made. If the tax is not paid by the donor when due, each donee shall be personally liable, to the extent of their respective gifts, for so much of the tax as may have been assessed, or may be assessable thereon. Any part of the property comprised in the gift that may have been sold by the donee to a bona fide purchaser for an adequate and full consideration in money or money's worth shall be divested of the lien hereby imposed and the lien, to the extent of the value of such gift, shall attach to all the property of the donee (including after-acquired property) except any part sold to a bona fide purchaser for an adequate and full consideration in money or money's worth.

If the tax is not paid within 30 days after it has become due, the Department of Revenue may use any of the methods authorized in this Subchapter for the collection of other taxes to enforce the payment of taxes assessed under this Article.

In any proceeding by warrant or otherwise to enforce the collection of said tax, the donor shall be liable for the full amount of the tax due by reason of all the gifts constituting the basis for such tax, and each donee shall be liable only for so much of said tax as may be due on account of his respective gift. (1939, c. 158, s. 605.)

§ **105-194. Death of donor within three years; time of assessment.** — Where a donor dies within three years after filing a return, gift taxes may be assessed at any time within said three years, or on or before the date of final settlement of donor's State inheritance taxes, whichever is later. (1939, c. 158, s. 606; 1947, c. 501, s. 6; 1959, c. 1259, s. 10.)

§ **105-195. Tax to be assessed upon actual value of property; manner of determining value of annuities, life estates and interests less than absolute interest.**—Said taxes shall be assessed upon the actual value of the property at the time of the transfer by gift. If the gift subject to said tax be given to a donee for life or for a term of years, or upon condition or contingency, with remainder to take effect upon the termination of the life estate or term of years or the happening of the condition or contingency, the tax on the whole amount shall be due and payable as in other cases, and said tax shall be apportioned between such life tenant or tenant for years and the remainderman, such apportionment to be made by computation based upon the mortuary and annuity tables set out in G.S. 8-46 and 8-47 of the General Statutes, and upon the basis of six per centum (6%) of the gross value of the property for the period of expectancy of the life tenant or for the term of years in determining the value of the respective interests. When property is transferred or limited in trust or otherwise, and the rights or interests of the transferees or beneficiaries are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended, or abridged, a tax shall be imposed upon said transfer at the highest rate, within the discretion of the Commissioner of Revenue, which on the happening of any of the said contingencies or conditions would be possible under the provisions of this section, and such tax so imposed shall be due and payable forthwith by the donor, and the Commissioner of Revenue shall assess the tax on such transfers. (1939, c. 158, s. 607; 1943, c. 400, s. 7; 1955, c. 1353, s. 1.)

§ **105-196. Application for relief from taxes assessed; appeal.**—A taxpayer may apply to the Commissioner of Revenue for revision of the tax assessed against him at any time within three years from the time of the filing of the return or from the date of the notice of assessment of any additional tax. The Commissioner shall grant a hearing thereon, and if upon such hearing he shall determine that the tax is excessive or incorrect, he shall resettle the same according to law and the facts, and adjust the computation of tax accordingly. The Commissioner shall notify the taxpayer of his determination, and shall refund to the taxpayer the amount, if any, paid in excess of the tax found by him to be due. The provisions of G.S. 105-241.2, 105-241.3 and 105-241.4 with respect to review and appeal shall be available to any taxpayer aggrieved by the Commissioner's decision. (1939, c. 158, s. 698; 1955, c. 1350, s. 20.)

§ **105-197. Returns; time of filing; extension of time for filing.** — Any person who within the calendar year 1939, after March 24, 1939, or any calendar year thereafter, makes any gift or gifts taxed by this Article shall report in duplicate, under oath, to the Department of Revenue, on forms provided for that purpose, showing therein an itemized schedule of all such gifts, the name and residence of each donee and the actual value of the gift to each, the relationship of each of such persons to the donor, and any other information which the Department of Revenue may require. Such returns shall be filed on or before the fifteenth day of April following the close of the calendar year. The Department of Revenue may grant a reasonable extension of time for filing a report whenever in its judgment good cause exists. (1939, c. 158, s. 609; 1955, c. 22, s. 1.)

ARTICLE 7.

Schedule H. Intangible Personal Property.

§ 105-198. Intangible personal property. — The intangible personal properties enumerated and defined in this Article or schedule are hereby classified under authority of Sec. 3, Article V of the Constitution, and the taxes levied thereon are for the benefit of the State and the political subdivisions of the State as hereinafter provided and said taxes so levied for the benefit of the political subdivisions of the State are levied for and on behalf of said political subdivisions of the State to the same extent and manner as if said levies were made by the governing authorities of the said subdivisions for distribution therein as hereinafter provided. (1939, c. 158, s. 700.)

Editor's Note.—Provisions similar to former Article V, § 3, Const. 1868, referred to in this section, now appear in N.C. Const., Art. V, § 2.

For comment on Article, see 17 N.C.L. Rev. 390.

Intangible tax receipts of a county may not be treated by it as nontax revenue which it may spend for an unnecessary purpose without a vote, since the State levies and collects such taxes for and on behalf of its political subdivisions. Yokley v. Clark, 262 N.C. 218, 136 S.E.2d 564 (1964).

County Board of Education Denied Recovery of Funds Allocated to Municipality from Tax.—In Board of Educ. v. Wilson, 215 N.C. 216, 1 S.E.2d 544 (1939), it was held that the county board of education was not entitled to recover from municipality funds allocated to it by State from intangible tax provided by this section, even though municipality is in nowise liable for maintenance of constitutional school term, since it could not expend the funds as agent of the municipality in discharging the debts of the municipality for school purposes since the municipality had no such debt, nor could it expend such funds for school purposes in any of its districts since there was no district coterminous with the municipal limits and such expenditure would take taxes collected from citizens of the municipality and expend same in part for the benefit of those living outside its limits, and since the act does not provide for distribution of the funds to the county board of education in such cases and such provisions may not be interpolated therein, and since by a proper construction of the act the provision for expenditure for school purposes may relate to counties rather than to cities and towns.

Cited in Jamison v. City of Charlotte, 239 N.C. 682, 80 S.E.2d 904 (1954).

§ 105-199. Money on deposit. — All money on deposit (including certificates of deposit and postal savings) with any bank or other corporation, firm or person doing a banking business, whether such money be actually in or out of this State, having a business, commercial or taxable situs in this State, shall be subject to an annual tax, which is hereby levied, of ten cents (10¢) on every one hundred dollars ($100.00) of the total amount of such deposit without deduction for any indebtedness or liabilities of the taxpayer.

For the purpose of determining the amount of deposits subject to this tax every such bank or other corporation, firm or person doing a banking business shall set up the credit balance of each depositor on the fifteenth day of each February, May, August, and November in the calendar year next preceding the due date of tax return, and the average of such quarterly credit balances shall constitute the amount of deposit of each depositor subject to the tax herein levied; for the purposes of this section accounts having an average of quarterly balances for the year of less than three hundred dollars ($300.00) may be disregarded.

The tax levied in this section upon money on deposit shall be paid by the cashier, treasurer or other officer or officers of every such bank or other corporation, firm or person doing a banking business in this State by report and payment to the Commissioner of Revenue on or before April 15 of each year; any taxes so paid as agent for the depositor shall be recovered from the owners thereof by the bank or other corporation, firm or person doing a banking business in this State by deduction from the account of the depositor on November 16 of each year or on such date thereafter as in the ordinary course of business it becomes convenient to make such charge. The bank may immediately report and pay the tax due on any account closed out during any

quarter in which the bank has withheld the amount of the tax. The tax on deposits represented by time certificates shall be chargeable to the original depositor unless such depositor has given notice to the depository bank of transfer of such certificate of deposit. Accounts that have been closed during the year, leaving no credit balance against which the tax can be charged, may be reported separately to the Commissioner of Revenue and the tax due on such accounts shall become a charge directly against the depositor, and such tax may be collected by the Commissioner of Revenue from the depositor in the same manner as other taxes levied in this act; the bank or other corporation, firm or person doing a banking business in this State shall not be held liable for the payment of the tax due on accounts so reported. None of the provisions of this section shall be construed to relieve any taxpayer of liability for a full and complete return of postal savings and of all money on deposit outside this State having business, commercial or taxable situs in this State.

The tax levied in this section shall not apply to deposits by one bank in another bank, nor to deposits of the United States, State of North Carolina, political subdivisions of this State or agencies of such governmental units. Deposits representing the actual payment of benefits to World War veterans by the federal government, when not reinvested, shall not be subject to the tax levied in this section. Further, deposits in North Carolina banks by nonresident individuals and foreign corporations, when such deposits are not related to business activities in this State, shall not be subject to the tax levied in this section. The tax levied in this section shall not apply to deposits of foreign and alien insurance companies which pay the two and one-half percent(2½%) gross premium tax levied by G.S. 105-228.5 (1939, c. 158, s. 701; 1945, c. 708, s. 8; 1947, c. 501, s. 7; 1949, c. 392, s. 5; 1955, c. 19, s. 1.)

Editor's Note.—The word "act" in the fourth sentence of the third paragraph of this section probably should read "Subchapter."

For brief comment on the 1949 amendment which added the last sentence, see 27 N.C.L. Rev. 485.

§ **105-200. Money on hand.** — All money on hand (including money in safe deposit boxes, safes, cash registers, etc.) on December 31 of each year, having a business, commercial or taxable situs in this State, shall be subject to an annual tax, which is hereby levied, of twenty-five cents (25¢) on every one hundred dollars ($100.00) of the total amount of such money on hand without deduction for any indebtedness or liabilities of the taxpayer; except that taxpayers reporting on a fiscal year basis for income tax purposes under the provisions of Article 4 shall report all money on hand on the last day of such fiscal year ending during the year prior to that December 31 as of which such property would otherwise be reported. (1939, c. 158, s. 702; 1957, c. 1340, s. 7.)

§ **105-201. Accounts receivable.**—All accounts receivable on December 31 of each year, having a business, commercial or taxable situs in this State, shall be subject to an annual tax, which is hereby levied, of twenty-five cents (25¢) on every one hundred dollars ($100.00) of the face value of such accounts receivable, except that taxpayers reporting on a fiscal year basis for income tax purposes under the provisions of Article 4 shall report accounts receivable on the last day of such fiscal year ending during the year prior to that December 31 as of which such property would otherwise be reported: Provided, that from the face value of such accounts receivable there may be deducted the accounts payable of the taxpayer as of the valuation date of the accounts receivable: Provided further, that no deduction in any case shall be allowed under this section of any indebtedness of the taxpayer on account of capital outlay, permanent additions to capital or purchase of capital assets.

The term "accounts payable" as used in this section shall not include:

(1) Reserves, secondary liabilities or contingent liabilities except upon satisfactory showing that the taxpayer will actually be compelled to pay the debt or liability;

(2) Taxes of any kind owing by the taxpayer;
(3) Debts owed to a corporation of which the taxpayer is parent or subsidiary or with which the taxpayer is closely affiliated by stock ownership or with which the taxpayer is subsidiary of same parent corporation unless the credits created by such debts are listed if so required by law for ad valorem or property taxation, for taxation at the situs of such credits; or
(4) Debts incurred to purchase assets which are not subject to taxation at the situs of such assets.

From the total face value of accounts receivable returned to this State for taxation by or in behalf of any taxpayer who or which also owns other such accounts receivable as have situs outside of this State, accounts payable of the taxpayer may be deducted only in the proportion which the total face value of accounts receivable taxable under this section bears to the total face value of all accounts receivable of the taxpayer.

The term "accounts payable" as used in this section shall be deemed to include current notes payable of the taxpayer incurred to secure funds which have been actually paid on his current accounts payable within 120 days prior to the date as of which the intangible tax return is made.

Indebtedness of commercial factors incurred directly for the purchase of accounts receivable may be deducted from the total value of such accounts receivable.

Indebtedness of securities brokers directly incurred in connection with the purchase or sale of stocks, bonds or other securities from which such brokers derive accounts receivable taxable under this Article may be deducted from the total value of such accounts receivable. (1939, c. 158, s. 703; 1941, c. 50, s. 8; 1951, c. 643, s. 6; 1957, c. 1340, s. 7; 1959, c. 1259, s. 6; 1971, c. 988, s. 1.)

Editor's Note.—The 1971 amendment added the last paragraph.

Intangibles Tax; Accounts Receivable; Corporations Reporting Income on Fiscal Year Basis; Dissolved Corporations; Date of Levy.—See opinion of Attorney General to Mr. Allen Paschal, Director, Intangibles Tax Division, Department of Revenue, 40 N.C.A.G. 848 (1969).

Intangibles Tax; Accounts Receivable; Transfers between Parent and Subsidiary Corporations. — See opinion of Attorney General to Mr. Frank S. Goodrum, Jr., Intangibles Tax Division, Department of Revenue, 40 N.C.A.G. 850 (1969).

Bonuses Not Approved for Payment before End of Taxable Year May Not Be Deducted from Accounts Receivable for Taxable Year. — See opinion of Attorney General to Honorable I.L. Clayton, Commissioner of Revenue, 41 N.C.A.G. 208 (1971).

Gasoline taxes held for remittance to the Commissioner of Revenue are certainly "taxes of any kind owing by the taxpayer," and thus are not deductible from accounts receivable under this section in computing intangible tax liability. In re Newsom Oil Co., 273 N.C. 383, 160 S.E.2d 98 (1968).

§ 105-202. Bonds, notes, and other evidences of debt.—All bonds, notes, demands, claims, deposits or investments in out-of-state building and loan and savings and loan associations and other evidences of debt however evidenced whether secured by mortgage, deed of trust, judgment or otherwise, or not so secured, having a business, commercial or taxable situs in this State on December 31 of each year shall be subject to annual tax, which is hereby levied, of twenty-five cents (25¢) on every one hundred dollars ($100.00) of the actual value thereof, except that taxpayers reporting on a fiscal year basis for income tax purposes under the provisions of Article 4 shall report evidences of debt on the last day of such fiscal year ending during the year prior to the December 31 as of which such property would otherwise be reported: Provided, that from the actual value of such bonds, notes, demands, claims and other evidences of debt there may be deducted like evidences of debt owed by the taxpayer as of the valuation date of the receivable evidences of debt. The term "like evidences of debt" deductible under this section shall not include:

(1) Accounts payable;

(2) Taxes of any kind owing by the taxpayer;
(3) Reserves, secondary liabilities or contingent liabilities except upon satisfactory showing that the taxpayer will actually be compelled to pay the debt or liability;
(4) Evidences of debt owed to a corporation of which the taxpayer is parent or subsidiary or with which the taxpayer is closely affiliated by stock ownership or with which the taxpayer is subsidiary of same parent corporation, unless the credits created by such evidences of debt are listed, if so required by law for ad valorem or property taxation, for taxation at the situs of such credits; or
(5) Debts incurred to purchase assets which are not subject to taxation at the situs of such assets.

From the total actual value of bonds, notes, demands, claims and other evidences of debt returned to this State for taxation by or in behalf of any taxpayer who or which also owns other such evidences of debt as have situs outside of this State, like evidences of debt owed by the taxpayer may be deducted only in the proportion which the total actual value of evidences of debt taxable under this section bears to the total actual value of all like evidences of debt owned by the taxpayer.

The tax levied in this section shall not apply to bonds, notes and other evidences of debt of the United States, State of North Carolina, political subdivisions of this State or agencies of such governmental units, or of nonprofit educational institutions organized or chartered under the laws of the State of North Carolina, but the tax shall apply to all bonds and other evidences of debt of political subdivisions and governmental units other than those specifically excluded herein.

In every action or suit in any court for the collection on any bonds, notes, demands, claims or other evidences of debt, the plaintiff shall be required to allege in his pleadings or to prove at any time before final judgment is entered
(1) That such bonds, notes or other evidences of debt have been assessed for taxation for each and every tax year, under the provisions of this Article, during which the plaintiff was owner of same, not exceeding five years prior to that in which the suit or action is brought; or
(2) That such bonds, notes or other evidences of debt sued upon are not taxable hereunder in the hands of the plaintiff; or
(3) That the suitor has not paid, or is unable to pay such taxes, penalties and interest as might be due, but is willing for the same to be paid out of the first recovery on the evidence of debt sued upon.

When in any action at law or suit in equity it is ascertained that there are unpaid taxes, penalties and interest due on the evidence of debt sought to be enforced, and the suitor makes it appear to the court that he has not paid or is unable to pay said taxes, penalties and interest, but is willing for the same to be paid out of the first recovery on the evidence of debt, the court shall have authority to enter as a part of any judgment or decretal order in said proceedings that the amount of taxes, penalties and interest due and owing shall be paid to the proper officer out of the first collection on said judgment or decree. The title to real estate heretofore or hereafter sold under a deed of trust shall not be drawn in question upon the ground that the holder of the notes secured by such deed of trust did not list and return the same for taxation as required by this Article. (1939, c. 158, s. 704; 1947, c. 501, s. 7; 1957, c. 1340, s. 7; 1959, c. 1259, s. 6; 1963, c. 1169, s. 4; 1965, c. 834.)

Drafts Payable As Deduction from Intangibles Tax Liability. — See opinion of Attorney General to Honorable I.L. Clayton, Commissioner of Revenue, 41 N.C.A.G. 202 (1971).

Judgment Provision as to Payment of Taxes.—Nonpayment of taxes on a note in suit is nullified by a provision in the judgment on the note that taxes, penalties and interest due shall be paid to the proper officers out of the

first collections on the judgment. This is in accord with this section. Roberts v. Grogan, 222 N.C. 30, 21 S.E.2d 829 (1942).

Former Law; Failure to List Solvent Credits.—The failure to list solvent credits as required by an earlier statute did not destroy the cause of action, but postponed recovery thereon until they were listed and the tax thereon was paid; this was because the statute did not make the failure to list such credits an absolute bar to their recovery. Martin v. Knight, 147 N.C. 564, 61 S.E. 447 (1908). The court said: "It was not the purpose of the legislature to release the debtor for failure to list by the creditor, but to postpone the recovery of the debt, if subject to taxation, until the tax is paid."

Same; Failure to List Debt Did Not Work Forfeiture.—Public Laws 1927, c. 71, s. 64, was not construed to work a forfeiture, and did not prevent a recovery on evidence of debt not listed, but postponed the recovery of judgment thereon until listed and the taxes paid, and where in an action on a note this defense was pleaded, the trial court had the power to allow the plaintiff to list it and pay taxes thereon during the trial and give judgment. Wooten v. Bell, 196 N.C. 654, 146 S.E. 705 (1929).

Same; How Pleaded.—Under an earlier statute it was held that unless the failure to list a note and due bill for taxation, "with a view to evade the payment of taxes thereon," was pleaded, it could not be made the subject of an issue. Martin v. Knight, 147 N.C. 564, 61 S.E. 447 (1908). Whether or not this was an affirmative defense which must be set up in the answer or whether it might be taken advantage of upon the general denial was left undecided.

Same; Payment of Taxes into Court.—The amount of taxes due upon solvent credits could be paid into court, Corey v. Hooker, 171 N.C. 229, 88 S.E. 236 (1916), and when this was done it permitted the party to proceed to judgment. Hyatt v. Holloman, 168 N.C. 386, 84 S.E. 407 (1915).

A possessory action to recover a horse secured by chattel mortgage, brought by the assignee of the mortgage not against one to whom the mortgagee had sold the horse, was not an action upon the note upon which the former statute required that the taxes be given in and paid before the owner was permitted to sue thereon. Hyatt v. Holloman, 168 N.C. 386, 84 S.E. 407 (1915).

An amount set apart by a mutual insurance company as a reserve for the rebate of unearned premiums to its policyholders upon cancellation of policies in accordance with its bylaws was properly deducted by the insurance company in listing its solvent credits for taxation. Hardware Mut. Fire Ins. Co. v. Stinson, 210 N.C. 69, 185 S.E. 449 (1936), construing former statute.

§ **105-203. Shares of stock.**—All shares of stock owned by residents of this State or having a business, commercial or taxable situs in this State on December 31 of each year, with the exception herein provided, shall be subject to an annual tax, which is hereby levied, of twenty-five cents (25¢) on every one hundred dollars ($100.00) of the total fair market value of such stock on December 31 of each year less such proportion of such value as is equal to the proportion of the dividends upon such stock deductible by such taxpayer in computing his income tax liability under the provisions of G.S. 105-130.7 and 105-147(7).

The tax herein levied shall not apply to shares of stock in building and loan associations which pay a tax as levied under Article 8D of Chapter 105 of the General Statutes, nor to shares of stock owned by any corporation which has its commercial domicile in North Carolina, where such corporation owns more than fifty percent (50%) of the outstanding voting stock.

Indebtedness incurred directly for the purchase of shares of stock may be deducted from the total value of such shares; provided, the specific shares of stock so purchased are pledged as collateral to secure said indebtedness; provided further, that only so much of said indebtedness may be deducted as is in the same proportion as the taxable value of said shares of stock is to the total value of said shares of stock. (1939, c. 158, s. 705; 1941, c. 50, s. 8; 1945, c. 708, s. 8; c. 752, s. 4; 1947, c. 501, s. 7; 1951, c. 937, s. 5; 1955, c. 1343, s. 2; 1957, c. 1340, s. 9; 1969, c. 1122.)

Editor's Note.—The 1969 amendment, effective for all taxable years beginning on and after Jan. 1, 1969, added the reference to G.S. 105-130.7 at the end of the first paragraph and added all the language in the second paragraph following "General Statutes."

For article on joint ownership of corporate securities in North Carolina, see 44 N.C.L. Rev. 290 (1966).

For brief comment on the 1951 amendment which changed the second paragraph, see 29 N.C.L. Rev. 415.

Situs of Stock under Former Law.—Under an earlier statute it was held that the property in shares of stock in a corporation doing business outside the corporate limits of a town, and owned by persons residing therein, did not follow and was not fixed by the situs of the residence of its owner, but was fixed by the legislature prescribing where and how it should be listed and taxed, i.e., at the principal place of business of the corporation. Wiley v. Commissioners of Salisbury, 111 N.C. 397, 16 S.E. 542 (1892).

Cited in Ervin v. Clayton, 278 N.C. 219, 179 S.E.2d 353 (1971).

§ 105-204. Beneficial interest in foreign trusts. — The beneficial or equitable interest on December 31 of each year of any resident of this State, or of a nonresident having a business, commercial or taxable situs in this State, in any trust, trust fund or trust account (including custodian accounts) held by a foreign fiduciary, shall be subject to an annual tax, which is hereby levied, of twenty-five cents (25¢) on every one hundred dollars ($100.00) of the total actual value thereof less, however, the proportion of such value as is equal to the proportion of the beneficiary's income from the trust, trust fund, or trust account (including custodian accounts) that is attributable to (i) interest received by the fiduciary on bonds, notes or other evidences of debt of the United States, State of North Carolina, subdivisions of this State, or agencies of such governmental units and (ii) dividends received by the fiduciary on shares of stock which, or to the extent that the same, are deductible by the beneficiary in computing his income tax liability under the provisions of subdivision (7) of G.S. 105-147; provided, however, that a resident beneficiary of a foreign trust shall be allowed a credit against any tax due under this section for any foreign intangibles tax paid on his beneficial interest in a foreign trust.

The value of the corpus of such trust, trust fund or trust account shall not be considered in computing taxable value hereunder, unless the person subject to the tax:

(1) Has the right to the present possession of an interest therein, and then only to the extent of the value of such present interest; or

(2) Has the present right to receive a part or all of the income realized from the corpus of such trust, and then only to the extent of the present value of such income interest; or

(3) Has created the trust and reserved for himself an income, reversionary or remainder interest therein, and then only to the extent of the present value of such interest. (1939, c. 158, s. 706; 1941, c. 50, s. 8; 1947, c. 501, s. 7; 1967, c. 701, s. 1; c. 788; 1969, c. 1114.)

Editor's Note.—The 1969 amendment added the proviso at the end of the first paragraph.

§ 105-205. Funds on deposit with insurance companies. — All funds on deposit with insurance companies on December 31 of each year, belonging to or held in trust for a resident of this State or having acquired a taxable situs in this State, shall be subject to an annual tax, which is hereby levied, of ten cents (10¢) on every one hundred dollars ($100.00) thereof. The term "funds on deposit" as used in this section shall mean all funds accrued or accruing by virtue of the death of the insured or the original maturity of a policy contract where the party or parties entitled to receive such funds might withdraw same at their option upon stipulated notice; provided, that in the determination of the tax liability under this section the first twenty thousand dollars ($20,000) of such funds on deposit or paid over to and held by a bank as trustee shall be disregarded where such funds on deposit are payable wholly and exclusively to a widow and/or children of the person deceased whose death created such funds on deposit.

The tax levied in this section shall be paid by the treasurer, cashier or other

officer or officers of every insurance company doing business in this State by report and payment to the Commissioner of Revenue on or before April 15 of each year; any taxes so paid as agent for the party or parties entitled to receive such funds shall be recovered from the owners thereof by deduction from the account of the owner on December 31 of each year or at such other time as in the ordinary course of business it becomes convenient to make such charge. (1939, c. 158, s. 707; 1941, c. 50, s. 8; 1947, c. 501, s. 7; 1955, c. 19, s. 1.)

§ 105-206. When taxes due and payable; date lien attaches; nonresidents; forms for returns; extensions.—All taxes levied in this Article or schedule shall become due and payable on the fifteenth day of April of each year, and the lien of such taxes shall attach annually to all real estate of the taxpayer within this State as of December 31 next preceding the date that such taxes become due and payable, regardless of the time at which liability for the tax may arise or the exact amount thereof be determined; and said lien shall continue until such taxes, with any interest, penalty and costs which shall accrue thereon, shall have been paid.

Every person, firm, association, corporation, clerk of court, guardian, trustee, executor, administrator, receiver, assignee for creditors, trustee in bankruptcy or other fiduciary owning or holding any intangible personal properties defined and classified and/or liable for or required to pay any tax levied, in this Article or schedule, either as principal or agent, shall make and deliver to the Commissioner of Revenue in such form as he may prescribe a full, accurate and complete return of such tax liability; such return, together with the local amount of tax due, shall be filed on or before the fifteenth day of April in each year.

For the purpose of protecting the revenue of this State and to avoid discrimination and prevent evasion of the tax imposed by this Article, every resident or nonresident person, firm, association, trustee or corporation, foreign or domestic, engaged in this State, either as principal or as agent or representative of or on behalf of another, in buying, selling, collecting, discounting, negotiating or otherwise dealing in or handling any of the intangible property defined in this Article, shall be deemed to be doing business in this State for the purposes of this Article, and the principal, superior or person on whose behalf such business is carried on in this State shall likewise be deemed to be doing business in this State, for the purpose of this Article, and where such business is carried on in this State by a corporation, foreign or domestic, it and its parent corporation or the corporation which substantially owns or controls it, by stock ownership or otherwise, shall be deemed to be doing business in this State, for the purpose of this Article, and in all such cases the said intangible property acquired in the conduct of such business in this State, and outstanding on December 31 of each year, shall be deemed to have a situs in this State and subject to the tax imposed by this Article, notwithstanding any transfer between any of such parties and notwithstanding that the same may be kept or may then be outside of this State, and any of the intangible property defined in this Article and acquired in the conduct of any business carried on in this State, and/or having a business, commercial or taxable situs in this State, shall be subject to said tax and returned for taxation by the owner thereof or by the agent, person, or corporation in this State employed by such owner to handle or collect the same.

The Commissioner of Revenue shall cause to be prepared blank forms for said returns and shall cause them to be distributed throughout the State, and to be furnished upon application; but failure to receive or secure forms shall not relieve any taxpayer from the obligation of making full and complete return of intangible personal properties as provided in this Article or schedule.

The return required by this Article or schedule shall be due on or before the date specified unless written application for extension of time in which to file, containing reasons therefor, is made to the Commissioner of Revenue on or

before due date of return. The Commissioner of Revenue for good cause may extend the time for filing any such return, provided interest at the rate of six percent (6%) per annum from due date of return is paid upon the total amount of tax due. (1939, c. 158, s. 708; 1941, c. 50, s. 8; 1953, c. 1302, s. 6; 1955, c. 19, s. 1.)

Intangibles Tax; Accounts Receivable; Transfers between Parent and Subsidiary Corporations. — See opinion of Attorney General to Mr. Frank S. Goodrum, Jr., Intangibles Tax Division, Department of Revenue, 40 N.C.A.G. 850 (1969).

Responsibilities of Personal Representative. — The personal representative is responsible for the intangible personal property owned by the decedent and for the payment of intangibles tax thereon during the temporary period the intangibles are held and controlled by him in the course of his active administration of the estate. Ervin v. Clayton, 278 N.C. 219, 179 S.E.2d 353 (1971).

Funds in Custodia Legis; Listing by Clerk under Former Law.—The clerk of the court was both a "receiver" and an "accounting officer" of funds paid into his hands in the course of litigation, within the meaning of a former statute, and thereunder should properly list such funds for taxation, when no adjudication as to the rightful owners had been made. Edgecombe County v. Walston, 174 N.C. 55, 93 S.E. 460 (1917).

Quoted in Allen v. Currie, 254 N.C. 636, 119 S.E.2d 917 (1961).

§ **105-207. Fiduciaries to pay taxes.** — It shall be the duty of every guardian, executor, administrator with the will annexed, agent, trustee, receiver, or other fiduciary in whose care or control any property or estate, real or personal, may be, to pay the taxes thereon out of the trust funds in his hands, if any there be; and if he fail so to do he shall become personally liable for such taxes, and such liability may be enforced by an action against him in the name of the sheriff. If he permit such property to be sold by reason of his negligence to pay the taxes when he has funds in hand, he shall be liable to his ward, principal, or cestui que trust for all actual damages incident to such neglect. This section shall not have the effect of relieving the estates held in trust or under the control of fiduciaries from the lien of such taxes. (1762, c. 69, s. 14; R. C., c. 54, s. 27; 1868-9, c. 201, s. 32; 1879, c. 71, s. 53; Code, ss. 1595, 3698; Rev., s. 2862; C. S., s. 7985; 1971, c. 806, s. 2.)

Editor's Note. — This section was formerly § 105-412. It was transferred to its present position by Session Laws 1971, c. 806, s. 2.

Former § 105-207 was repealed by Session Laws 1959, c. 1259, s. 9.

§ **105-208:** Repealed by Session Laws 1959, c. 1259, s. 9.

§ **105-209. Information from the source.**—In addition to the other requirements of this Article or schedule it shall be the duty of every domestic corporation and every foreign corporation doing business and/or owning property in this State, the shares of stock and bonds of which are subject to tax under the provisions of this Article or schedule, to report not later than the fifteenth day of April of each year to the Commissioner of Revenue, in such form and manner as he may prescribe, the name and address of each registered stockholder or bondholder resident in this State as of the thirty-first day of December of each year; such report shall also include the number of shares of stock and/or the number of bonds, the par or face value of each, the dividends or interest paid on each such security during the calendar year next preceding date of report, all transfers of record made from residents of this State between the first and thirty-first days of December next preceding the date of the report herein required, and such other and further information as the Commissioner of Revenue may require. (1939, c. 158, s. 711; 1955, c. 19, s. 1; c. 1350, s. 21.)

§ **105-210. Moneyed capital coming into competition with the business of banks.** — On all moneyed capital coming into competition with the business of banks, whether State or national, there is hereby annually levied a tax at the

same rate as is assessed upon the shares of stock of such banks located in this State at the place of residence of such banks, less deduction of real estate otherwise taxed in this State, to the same extent and under the same corresponding conditions as this deduction is allowed in the assessment of such shares of stock of banks located in this State: Provided, that bonds, notes or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business shall not be deemed moneyed capital within the meaning of this section.

In cases where the Commissioner of Revenue shall find moneyed capital, as specified in the preceding paragraph, to be in competition with banks, such moneyed capital shall be assessed by the same methods as applicable to the shares of banks, and shall be taxed at the same rates as are applicable to the shares of banks in the same locality where such moneyed capital is found to be in competition with banks. The rates of tax thus applied shall be in lieu of the rates of tax specified in this Article. (1939, c. 158, s. 712; 1945, c. 708, s. 8.)

§ 105-211. Conversion of intangible personal property to evade taxation not to defeat assessment and collection of proper taxes; taxpayer's protection. — Any taxpayer who shall, for the purpose of evading taxation under the provisions of this Article or schedule, within 30 days prior to December 31 of any year or other taxable dates, namely February 15, May 15, August 15, and November 15, either directly or indirectly, convert any intangible personal property taxable under the provisions of this Article or schedule, or with like intent shall, either directly or indirectly, convert such intangible personal property into a class of property which is taxable in this State at a lower rate than the intangible personal property so converted, shall be taxable on such intangible personal property as if such conversion had not taken place; the fact that such taxpayer within 30 days after December 31 of any year, either directly or indirectly, converts such property nontaxable in this State or taxable at the lower rate in this State into intangible personal property taxable at the higher rate shall be prima facie evidence of intent to evade taxation by this State, and the burden of proof shall be upon such taxpayer to show that the first conversion was for a bona fide purpose of investment and not for the purpose of evading taxation by this State.

Taxpayers making a complete return on or before April 15 of each year of all their holdings of intangible personal property as provided by this Article or schedule (or by similar provisions of prior Revenue Act) shall not thereafter be held liable for failure to list such intangible personal property with the local taxing units of this State in previous years; the taxes levied in this Article or schedule shall be in lieu of all other property taxes in this State on such intangible personal property. (1939, c. 158, s. 713; 1945, c. 708, s. 8; 1955, c. 19, s. 1.)

Transaction Made in Good Faith. — A former statute which made it a misdemeanor for "any person to evade the payment of taxes by surrendering or exchanging certificates of deposit in any bank of this State or elsewhere for nontaxpaying securities" did not apply to the purchase before the tax listing date of nontaxable United States or State bonds by funds subject to taxation, and thereafter selling the bonds and redepositing the amount, when the transaction was made in good faith and the bonds were bought and sold on the open market and the title thereto passed absolutely in both transactions, and the purchaser of the bonds could not be taxed on the purchase price. Wachovia Bank & Trust Co. v. Nash County, 196 N.C. 704, 146 S.E. 861 (1929).

§ 105-212. Institutions exempted; conditional and other exemptions.— None of the taxes levied in this Article or schedule shall apply to religious, educational, charitable or benevolent organizations not conducted for profit, nor to trusts established for religious, educational, charitable or benevolent purposes where none of the property or the income from the property owned by such trust may inure to the benefit of any individual or any

organization conducted for profit, nor to any funds held irrevocably in trust exclusively for the maintenance and care of places of burial; nor, on or after January 1, 1942, to any funds, evidences of debt, or securities held irrevocably in pension, profit sharing, stock bonus, or annuity trusts, or combinations thereof, established by employers for the purpose of distributing both the principal and income thereof exclusively to eligible employees, or the beneficiaries of such employees, if such trusts qualify for exemption from income tax under the provisions of G.S. 105-161(f)(1)a; insurance companies reporting premiums to the Commissioner of Insurance of this State and paying a tax thereon under the provisions of Article 8B, Schedule I-B shall not be subject to the provisions of G.S. 105-201, 105-202 and 105-203; building and loan associations paying a tax under the provisions of Article 8D of Chapter 105 of the General Statutes shall not be subject to the provisions of G.S. 105-201, 105-202 and 105-203; State credit unions organized pursuant to the provisions of Subchapter III, Chapter 54, paying the supervisory fees required by law, shall not be subject to any of the taxes levied in this Article or schedule; banks, banking associations and trust companies shall not be subject to the tax levied in this Article or schedule on evidences of debt held by them when said evidences of debt represent investment of funds on deposit with such banks, banking associations and trust companies: Provided, that each such institution must, upon request by the Commissioner of Revenue, establish in writing its claim for exemption as herein provided. The exemptions in this section shall apply only to those institutions, and only to the extent, specifically mentioned, and no other.

Any corporation or trust doing business in North Carolina which in the opinion of the Commissioner of Revenue of North Carolina qualifies as a "regulated investment company" under the provisions of United States Code Annotated Title 26, § 851, or as a "real estate investment trust" under the provisions of United States Code Annotated Title 26, § 856, and which files with the North Carolina Department of Revenue its election to be treated as a "regulated investment company" or "real estate investment trust," shall not be subject to any of the taxes levied in this Article or schedule.

If any intangible personal property held or controlled by a fiduciary domiciled in this State is so held or controlled for the benefit of a nonresident or nonresidents, or for the benefit of any organization exempt under this section from the tax imposed by this Article, such intangible personal property shall be partially or wholly exempt from taxation under the provisions of this Article in the ratio which the net income distrubuted or distributable to such nonresident, nonresidents or organization, derived from such intangible personal property during the calendar year for which the taxes levied by this Article are imposed, bears to the entire net income derived from such intangible personal property during such calendar year. "Net income" shall be deemed to have the same meaning that it has in the income tax Article. Where the intangible personal property for which this exemption is claimed is held or controlled with other property as a unit, allocation of appropriate deductions from gross income shall be made to that part of the entire gross income which is derived from the intangible personal property by direct method to the extent practicable; and otherwise by such other method as the Commissioner of Revenue shall find to be reasonable: Provided, that each fiduciary claiming the exemption provided in this paragraph shall, upon the request of the Commissioner of Revenue, establish in writing its claim to such exemption. No provision of law shall be construed as exempting trust funds or trust property from the taxes levied by this Article except in the specific cases covered by this section.

A clerk of any court of this State may, upon written application therefor, obtain from the Commissioner of Revenue a certificate relieving the depository bank of such clerk from the duty of collecting the tax levied in this Article or

schedule from deposits of said clerk: Provided, that such clerk of court shall be liable under his official bond for the full and proper remittance to the Commissioner of Revenue under the provisions of this Article or schedule of taxes due on any deposits so handled. (1939, c. 158, s. 714; 1943, c. 400, s. 8; 1945, c. 708, s. 8; 1947, c. 501, s. 7; 1951, c. 937, s. 2; 1957, c. 1340, ss. 7, 9; 1967, c. 1110, s. 13; 1971, c. 827.)

Editor's Note.—The 1971 amendment in the second paragraph substituted "corporation or trust doing business in North Carolina" for "North Carolina corporation," substituted "§ 851" for "§ 361," inserted "or as a 'real estate investment trust' under the provisions of United States Code Annotated Title 26, § 856," and inserted "or 'real estate investment trust.'"

By virtue of Session Laws 1943, c. 170, "Commissioner of Insurance" has been substituted for "Insurance Commissioner" near the middle of the first paragraph.

For brief comment on the 1951 amendment which added the second paragraph, see 29 N.C.L. Rev. 415.

For discussion of the 1947 amendment which added the third paragraph, see 25 N.C.L. Rev. 473.

Purpose of 1947 Amendment.—The purpose of the 1947 amendment to this section was not to exempt any intangibles theretofore subject to the intangible personal property tax, but to dispel any idea that intangibles, otherwise exempt, would be subject to the intangible personal property tax because a fiduciary domiciled in this State held and controlled such intangibles. Allen v. Currie, 254 N.C. 636, 119 S.E.2d 917 (1961).

The 1947 amendment was intended to apply to an established or continuing trust, not to intangibles constituting general assets of an estate in process of administration. Allen v. Currie, 254 N.C. 636, 119 S.E.2d 917 (1961).

Intent of Exemption of Intangibles Held for Nonresident.—The intent and purpose of the exemption of intangible personal property held or controlled for the benefit of a nonresident by a fiduciary domiciled in this State was not to exempt any intangibles theretofore subject to the intangible personal property tax but to dispel any idea that intangibles otherwise exempt would be subject to the intangible personal property tax because a fiduciary domiciled in this State held and controlled such intangibles. Ervin v. Clayton, 278 N.C. 219, 179 S.E.2d 353 (1971).

Nature of Trustee Named Will Not Affect Interests of Nonresident Beneficiaries.—A resident or nonresident creator of a trust, consisting wholly or in part of intangibles, can name as fiduciary a person, bank, or trust company domiciled in North Carolina with the assurance that the interests of nonresident beneficiaries of the trust will not suffer on account thereof. Ervin v. Clayton, 278 N.C. 219, 179 S.E.2d 353 (1971).

Exemption of Intangibles Held for Nonresident Applies to Established Trust. —The exemption of intangible property held by a fiduciary for a nonresident was intended to apply to an established or continuing trust, not to intangibles constituting general assets of an estate in process of administration. Ervin v. Clayton, 278 N.C. 219, 179 S.E.2d 353 (1971).

And Not to Intangibles Held by Personal Representative of Decedent. — The exemption from intangibles tax provided for intangible property held by a fiduciary for a nonresident does not apply to intangibles held and controlled by the personal representative of a resident decedent during the period such personal representative is engaged in the active administration of the estate in accordance with law. Ervin v. Clayton, 278 N.C. 219, 179 S.E.2d 353 (1971).

During Process of Administration.—The exemption of intangible property held by a fiduciary for a nonresident was not intended to apply, and does not apply, to intangibles constituting general assets held and controlled by an executor of an estate during the process of administration, and this is so whether or not specific property was bequeathed to the nonresident. Ervin v. Clayton, 278 N.C. 219, 179 S.E.2d 353 (1971).

The fiduciary obligation of the personal representative of a decedent is distinguishable from that of the trustee (by whatever name called) of an established or continuing trust. Ervin v. Clayton, 278 N.C. 219, 179 S.E.2d 353 (1971).

Status of Intangibles Remains Unsettled Until Representative Performs Duties. — The personal representative of a decedent must ascertain and pay the funeral expenses and debts, including inheritance and estate taxes as well as taxes on income received by the decedent prior to death and on income received by him as personal representative, and until this has been done, the status of intangibles constituting assets of the estate remains unsettled. Ervin v. Clayton, 278 N.C. 219, 179 S.E.2d 353 (1971).

What intangibles, if any, a particular beneficiary is entitled to receive cannot be determined with exactitude until the estate is ready for final settlement. Ervin v. Clayton, 278 N.C. 219, 179 S.E.2d 353 (1971).

And He Must Pay Intangibles Tax During Administration.—The personal representative is responsible for the intangible personal

property owned by the decedent and for the payment of intangibles tax thereon during the temporary period the intangibles are held and controlled by him in the course of his active administration of the estate. Ervin v. Clayton, 278 N.C. 219, 179 S.E.2d 353 (1971).

§ 105-213. Separate records by counties; disposition and distribution of taxes collected; purpose of tax.—The Commissioner of Revenue shall keep a separate record by counties of the taxes collected under the provisions of this Article and shall, as soon as practicable after the close of each fiscal year, certify to the State Disbursing Officer and to the State Treasurer the amount of such taxes to be distributed to each county and municipality in the State. The State Disbursing Officer shall thereupon issue a warrant on the State Treasurer to each county and municipality in the amount so certified.

In determining the amount to be distributed there shall be deducted from net collections (total collections less refunds) the following:

(1) The tax credit specified in the second paragraph of G.S. 105-122(d), and

(2) The cost to the State to administer and collect the taxes levied under this Article for the preceding fiscal year, and

(3) The cost to the State for the operation of the State Board of Assessment for the preceding fiscal year.

The net amount after such deductions shall be distributed to the counties and municipalities of the State as follows:

The amount distributable to each county and to the municipalities therein from the revenue collected under G.S. 105-200, 105-201, 105-202, 105-203 and 105-204 shall be determined upon the basis of the amounts collected in each county; and the amount distributable to each county and to the municipalities therein from the revenue collected under G.S. 105-199 and 105-205 shall be determined upon the basis of population in each county as shown by the latest federal decennial census. The amounts so allocated to each county shall in turn be divided between the county and all municipalities therein in proportion to the total amount of ad valorem taxes levied by each during the fiscal year preceding such distribution.

It shall be the duty of the chairman of the board of county commissioners of each county and the mayor of each municipality therein to report to the Commissioner of Revenue such information as he may request for his guidance in making said allotments. In the event any county or municipality fails to make such report within the time prescribed, the Commissioner of Revenue may disregard such defaulting unit in making said allotments. The amounts so allocated to each county and municipality shall be distributed and used by said county or municipality in proportion to other property tax levies made for the various funds and activities of the taxing unit receiving said allotment. (1939, c. 158, s. 715; 1941, c. 50, s. 8; 1947, c. 501, s. 7; 1957, c. 1340, s. 7; 1967, c. 1196, s. 5; 1971, c. 298, s. 3.)

Local Modification. — Anson: 1965, c. 305; Burke: 1963, c. 994; Carteret: 1963, c. 759, s. 6; Lincoln: 1965, c. 566; Montgomery: 1963, c. 130; Polk: 1965, c. 234.

Editor's Note.—The 1971 amendment rewrote this section as amended by the 1967 amendment which rewrote the provisions of the former first paragraph relating to deductions from total collections less refunds and distribution of net collections after such deductions.

Cited in Great Am. Ins. Co. v. Johnson, 257 N.C. 367, 126 S.E.2d 92 (1962).

§ 105-214. Minimum tax for requirement of filing returns.—When the combined tax of any taxpayer required to be paid under G.S. 105-200, 105-201, 105-202, 105-203, 105-204 and 105-205 does not exceed a tax of five dollars ($5.00), no return shall be required to be filed. This section shall not be construed to affect the provisions of G.S. 105-199, and the minimum tax herein provided shall not apply to said section. (1963, c. 1010.)

§ 105-215. Unconstitutionality or invalidity; interpretation; repeal.—If

any clause, sentence, paragraph, or part of this Article or schedule shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this Article or schedule, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered. No caption of any section or set of sections shall in any way affect the interpretation of this Article or any part thereof. All acts and parts of acts inconsistent with the provisions of this Article or schedule is/are held invalid, then the particular class or classes of

§ **105-216. Reversion to local units in case of invalidity.** — If any clause, sentence, paragraph, or part of this Article or schedule shall for any reason be adjudged by any court of competent jurisdiction to be invalid, and if by virtue of said judgment any one or all of the several taxes classified and levied in this Article or schedule is/are held invalid, then the particular class or classes of intangible personal property affected by said judgment shall become subject to listing, assessment and taxation by the county, municipality, and other taxing jurisdictions in which said intangible personal property has situs in the same manner and at the same rates as applicable to real estate and other tangible properties: Provided, that in such case said listing, assessment and taxation of such intangible personal property by said local taxing units shall become valid and effective as of the tax listing date next preceding March 24, 1939, and shall continue thereafter with full force and effect as if such properties were made taxable by the local taxing units by direct statutory enactment. (1939, c. 158, s. 718.)

§ **105-217. Power of attorney.** — The Commissioner of Revenue shall have authority to require a proper power of attorney of each and every agent for any taxpayer under this Article or schedule. (1939, c. 158, s. 719.)

Article 8.

Schedule I. Compensating Use Tax.

§§ **105-218 to 105-228:** Repealed by Session Laws 1957, c. 1340, s. 5.

Cross Reference.—For present statutes relating to use tax, see § 105-164.1 et seq.

Article 8A.

Schedule I-A. Gross Earnings Taxes in Lieu of Ad Valorem Taxes.

§ **105-228.1. Defining taxes levied and assessed in this Article.** — The purpose of this Article is to levy a fair and equal tax under authority of Article V, Sec. 3 of the Constitution of North Carolina and to provide a practical means for ascertaining and collecting it. The taxes levied and assessed in this schedule shall be upon the gross earnings as defined in the Article, and shall be in lieu of ad valorem taxes upon the properties of individuals, firms, or corporations so taxed herein. (1954, c. 400, s. 8.)

Editor's Note.—Provisions similar to former Article V, § 3, Const. 1868, referred to in this section, now appear in N.C. Const., Art. V, § 2.

For comment on Article, see 21 N.C.L. Rev. 364.

§ **105-228.2. Tax upon freight car line companies.** — (a) For purposes of taxation under this section the property of freight line companies as defined is declared to constitute a special class of property. In lieu of all ad valorem taxes by either or both the State government and the respective local taxing jurisdictions, a tax upon gross earnings in the State as elsewhere defined shall be imposed.

(b) Any person or persons, joint-stock association or corporation, wherever organized or incorporated, engaged in the business of operating cars

or engaged in the business of furnishing or leasing cars not otherwise listed for taxation in this State, for the transportation of freight (whether such cars be owned by such company or any other person or company), over any railway or lines, in whole or in part, within this State, such line or lines not being owned, leased or operated by such company, whether such cars be termed box, flat, coal, ore, tank, stock, gondola, furniture, or refrigerator car or by some other name, shall be deemed a freight line company.

(c) For the purposes of taxation under this section all cars used exclusively within the State, or used partially within and without the State, and a proportionate part of the intangible values of the business as a going concern, are hereby declared to have situs in this State.

(d) Every freight line company, as hereinbefore defined, shall pay annually a sum in the nature of a tax at three per centum (3%) upon the total gross earnings received from all sources by such freight line companies within the State, which shall be in lieu of all ad valorem taxes in this State of any freight company so paying the same.

(e) The term "gross earnings received from all sources by such freight line companies within the State" as used in this Article is hereby declared and shall be construed to mean all earnings from the operation of freight cars within the State for all car movements or business beginning and ending within the State and a proportion, based upon the proportion of car mileage within the State to the total car mileage, or earnings on all interstate car movements or business passing through, or into or out of the State.

(f) Every railroad company using or leasing the cars of any freight line company shall, upon making payment to such freight line company for the use or lease, after June 30, 1943, of such cars withhold so much thereof as is designated in this section. On or before March first of each year such railroad company shall make and file with the Commissioner of Revenue a statement showing the amount of such payment for the next preceding 12-month period ending December 31, and of the amounts so withheld by it, and shall remit to the Commissioner of Revenue the amounts so withheld. If any railroad company shall fail to make such report or fail to remit the amount of tax herein levied, or shall fail to withhold the part of such payment hereby required to be withheld, such railroad company shall become liable for the amount of the tax herein levied and shall not be entitled to deduct from its gross earnings for purposes of taxation the amounts so paid by it to freight line companies.

It is not the purpose of this subsection to impose an unreasonable burden of accounting on railroad companies operating in this State, and the Commissioner of Revenue is hereby authorized, upon the application of any railroad company, to approve any method of accounting which he finds to be reasonably adequate for determining the amount of mileage earnings by any car line company whose equipment is operated within the State by or on the lines of such railroad company. Further, if in the opinion of the Revenue Commissioner the tax imposed by this section can be satisfactorily collected direct from the freight line companies, he is hereby authorized to fix rules and regulations for such direct collection, with the authority to return at any time to the method of collection at source above provided in this subsection.

(g) Every car line company shall file such additional reports annually, and in such form and as of such date as the Commissioner of Revenue may deem necessary to determine the equitable amount of tax levied under this section.

(h) Upon the filing of such reports it shall be the duty of the Commissioner of Revenue to inspect and verify the same and assess the amount of taxes due from freight line companies therein named. Any freight line company against which a tax is assessed under the provisions of this Article may at any time within 15 days after the last day for the filing of reports by railroad companies, appear before the Commissioner of Revenue at a hearing to be granted by the

Commissioner and offer evidence and argument on any matter bearing upon the validity or correctness of the tax assessed against it, and the Commissioner shall review his assessment of such tax and shall make his order confirming or modifying the same as he shall deem just and equitable, and if any overpayment is found to have been made it shall be refunded by the Commissioner. Provided, however that such payment if in the amount of three dollars ($3.00) or more shall be refunded to the taxpayer within 60 days of the discovery thereof; if the amount of overpayment is less than three dollars ($3.00) then such overpayment shall be refunded only upon receipt by the Commissioner of Revenue of a written demand for such refund from the taxpayer. Provided further, that no overpayment shall be refunded irrespective of whether upon discovery or receipt of written demand if such discovery is not made or such demand is not received within three years from the filing date of the return or within six months of the payment of the tax alleged to be an overpayment, whichever date is the later.

(i) If any such freight line company or railroad company shall fail to pay the tax levied herein when due a penalty of ten percent (10%) thereof shall immediately accrue and thereafter one percent (1%) per month shall be added to such tax and penalty while such tax remains unpaid. All provisions of laws for enforcing payment of taxes levied in this Article shall be applicable to the gross earnings taxes of freight line companies. Any freight line company against which a tax is assessed under the provisions of this Article may appear and defend in any action brought for the collection of such tax.

(j) The provisions of this Article shall apply to all freight line gross earnings accruing from and after June 30, 1943. (1943, c. 400, s. 8; 1957, c. 1340, s. 14.)

Article 8B.

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Schedule I-B. Taxes upon Insurance Companies.

§ 105-228.3. To whom this Article shall apply.—The provisions of this Article shall apply to every person, firm, corporation, association, society, or order operating in this State, hereinafter to be referred to as insurance company, which contracts or offers on his, their, or its account to issue any policy or contract for annuities or insurance as defined in G.S. 58-3, or to exchange or issue reciprocal or interinsurance contracts, or to function as a rate-making bureau or association, or to serve as an underwriters agency. Said provisions shall likewise apply to any person, firm or corporation who or which shall be a broker, organizer, manager, or agent, whether local, special or general, of any insurance company, and to self-insurers under the provisions of the Workmen's Compensation Act. (1945, c. 752, s. 2.)

Cited in Lenoir Fin. Co. v. Currie, 254 N.C. 129, 118 S.E.2d 543 (1961).

§ 105-228.4. Annual registration fees for insurance companies.—(a) Each and every insurance company shall, as a condition precedent for doing business in this State, on or before the first day of March of each year apply for and obtain from the Commissioner of Insurance a certificate of registration, or license, effective the first day of July, and shall pay for such certificate the following annual fees except as hereinafter provided in subsections (b) and (c):

For each domestic farmer's mutual assessment fire insurance company or association, and each branch thereof	$ 10.00
For each fraternal order	25.00
For each of all other insurance companies, except mutual burial associations taxed under G.S. 105-121.1	300.00

The fees levied above shall be in addition to those specified in G.S. 58-63.

(b) When the paid-in capital stock and/or surplus of an insurance company other than a farmer's mutual assessment company or a fraternal order does

not exceed one hundred thousand dollars ($100,000), the fee levied in this section shall be one half the amount above specified.

(c) Upon payment of the fee specified above and the fees and taxes elsewhere specified each insurance company, exchange, bureau, or agency, shall be entitled to do the types of business specified in Chapter 58, of the General Statutes of North Carolina as amended, to the extent authorized therein, except that: Insurance companies authorized to do either the types of business specified for (i) life insurance companies, or (ii) for fire and marine companies, or (iii) for casualty and fidelity and surety companies, in G.S. 58-77, which shall also do the types of business authorized in one or both of the other of the above classifications shall in addition to the fees above specified pay one hundred dollars ($100.00) for each such additional classification of business done.

(d) Any rating bureau established by action of the General Assembly of North Carolina shall be exempt from the fees above levied. (1945, c. 752, s. 2; 1947, c. 501, s. 8; 1955, c. 179, s. 5.)

§ **105-228.5. Taxes measured by gross premiums.** — Each and every insurance company shall annually pay to the Commissioner of Insurance at the time and at the rates hereinafter specified, a tax measured by gross premiums as hereinafter defined from business done in this State during the preceding calendar year.

Gross premiums from business done in this State in the case of life insurance and annuity contracts, including any supplemental contracts thereto providing for disability benefits, accidental death benefits, or other special benefits, shall for the purposes of the taxes levied in this section mean any and all premiums collected in the calendar year (other than for contracts for reinsurance) for policies the premiums on which are paid by or credited to persons, firms or corporations resident in this State, or in the case of group policies for any contracts of insurance covering persons resident within this State, with no deduction for considerations paid for annuity contracts which are subsequently returned except as below specified, and with no other deduction whatsoever except for premiums returned under one or more of the following conditions; premiums refunded on policies rescinded for fraud or other breach of contract; premiums which were paid in advance on life insurance contracts and subsequently refunded to the insured, premium payer, beneficiary or estate; and in the case of group annuity contracts the premiums returned by reason of a change in the composition of the group covered. Said gross premiums shall be deemed to have been collected for the amounts as provided in the policy contracts for the time in force during the year, whether satisfied by cash payment, notes, loans, automatic premium loans, applied dividend or in any other manner whatsoever, except in the case of premiums waived by any of said companies pursuant to a contract for waiver of premium in case of disability.

Gross premiums from business done in this State in the case of contracts for fire insurance, casualty insurance, and any other type of insurance except life and annuity contracts as above specified, including contracts of insurance required to be carried by the Workmen's Compensation Act, shall for the purposes of the taxes levied in this section mean any and all premiums written during the calendar year, or the equivalent thereof in the case of self-insurers under the Workmen's Compensation Act, for contracts covering property or risks in this State, other than for contracts of reinsurance, whether such premiums are designated as premiums, deposits, premium deposits, policy fees, membership fees, or assessments. Gross premiums shall be deemed to have been written for the amounts as provided in the policy contracts, new and renewal, becoming effective during the year irrespective of the time or method of making payment or settlement for such premiums, and with no deduction for dividends whether returned in cash or allowed in payment or reduction of premiums or for additional insurance, and without any other deduction except for return of premiums, deposits, fees or assessments for adjustment of policy rates or for cancellation or surrender of policies.

In determining the amount of gross premiums from business in this State all gross premiums received in this State, or credited to policies written or procured in this State, or derived from business written in this State shall be

deemed to be for contracts covering persons, property or risks resident or located in this State except for such premiums as are properly reported and properly allocated as being received from business done in some other nation, territory, state or states, and except for premiums from policies written in federal areas for persons in military service who pay premiums by assignment of service pay.

On the basis of the gross amount of premiums, as above defined, each company or self-insurer shall pay as to:

The amounts collected on contracts applicable to liabilities under the Workmen's Compensation Act, a tax at the rate of one and six-tenths percent (1.6%) in the case of domestic insurance companies and domestic self-insurers or self-insurers domesticated and doing business in North Carolina; and on the amounts collected on contracts applicable to liabilities under the Workmen's Compensation Act in the case of foreign and alien insurance companies, or the equivalent thereof in the case of foreign and alien self-insurers, except those which have been domesticated and are doing business in North Carolina, a tax at the rate of four percent (4%).

The amounts collected on annuities and all other contracts of insurance issued by domestic life insurance companies a tax at the rate of one and one-half percent (1½%).

The amounts collected on contracts of insurance issued by domestic insurance companies other than life insurance companies and other than corporations organized under Chapter 57 of the General Statutes, a tax of one percent (1%) or, in lieu thereof, any such company shall pay an income tax computed as in the case of other corporations, whichever is the greater. Any domestic life insurance company collecting more than half of its annual gross premiums from lines of business other than those described in G.S. 58-72(1) and (2) may, prior to the return due date, elect to be taxed as a domestic casualty insurance company under the provisions of this paragraph.

The amounts collected on annuities and all other contracts of insurance a tax at the rate of two and one-half percent (2½%) in the case of foreign and alien companies.

The amounts collected on contracts of insurance applicable to fire and lightning coverage (marine and automobile policies not being included), a tax at the rate of one percent (1%). This tax shall be in addition to all other taxes imposed by G.S. 105-228.5.

The premium tax rates herein provided shall be applicable with respect to all premiums collected during the calendar year, 1955, and each subsequent year.

The taxes levied herein measured by premiums shall be in lieu of all other taxes upon insurance companies except: Fees and licenses under this Article, or as specified in Chapter 58 of the General Statutes of North Carolina as amended; taxes imposed by Chapter 118 of the General Statutes of North Carolina; taxes imposed by Article 5 of Chapter 105 of the General Statutes of North Carolina as amended; and ad valorem taxes upon real property and personal property owned in this State.

For the tax above levied as measured by gross premiums the president, secretary, or other executive officer of each insurance company doing business in this State shall within the first 15 days of March in 1946 and in each year thereafter file with the Commissioner of Insurance a full and accurate report of the total gross premiums as above defined collected in this State during the preceding calendar year. The report shall be in such form and contain such information as the Commissioner of Insurance may specify, and the report shall be verified by the oath of the company official transmitting the same or by some principal officer at the home or head office of the company or association in this country. At the time of making such report the taxes above levied with respect to the gross premiums shall be paid to the Commissioner of Insurance. The provisions above shall likewise apply as to reports and taxes for any firm, corporation, or association exchanging reciprocal or interinsurance contracts, and said reports and taxes shall be transmitted by their attorneys in fact.

The provisions as to reports and taxes as measured by gross premiums shall not apply to farmer's mutual assessment fire insurance companies above specified or to fraternal orders or societies that do not operate for a profit and do not issue policies on any person except members.

With respect to the taxes levied in this section on the equivalent of premiums of self-insurers under the provisions of the Workmen's Compensation Act, the reports required herein shall be transmitted to and the taxes collected by the North Carolina Industrial Commission as provided in subsection (j) of G.S. 97-100 of the General Statutes of North Carolina. (1945, c. 752, s. 2; 1947, c. 501, s. 8; 1951, c. 643, s. 8; 1955, c. 1313, s. 5; 1957, c. 1340, s. 12; 1959, c. 1211; 1961, c. 783; 1963, c. 1096; 1969, c. 1221.)

Editor's Note.—The 1969 amendment added the second sentence of the eighth paragraph.

For discussion of the 1947 amendment which added to the section, see 25 N.C.L. Rev. 471.

Constitutionality. — See Great Am. Ins. Co. v. High, 264 N.C. 752, 142 S.E.2d 681 (1965); Great Am. Ins. Co. v. Johnson, 257 N.C. 367, 126 S.E.2d 92 (1962).

Former Law; Validity.—The license tax imposed by a former statute upon the gross receipts of insurance companies on business written within the borders of our State was held not in contravention of the Fourteenth Amendment to the Constitution of the United States, as to due process and equal protection of the law, nor a burden upon interstate commerce, being restricted to intrastate commerce, and not extending beyond the boundaries of the State. Pittsburg Life & Trust Co. v. Young, 172 N.C. 470, 90 S.E. 568 (1916).

Former Law; Nature of Tax.—A tax imposed by a former statute upon the gross earnings of foreign life insurance companies doing business within this State, derived within this State, was a license or occupation tax. Pittsburg Life & Trust Co. v. Young, 172 N.C. 470, 90 S.E. 568 (1916).

A tax on the gross receipts of an insurance company is a privilege tax. Wilmington Underwriters Ins. Co. v. Stedman, 130 N.C. 221, 41 S.E. 279 (1902).

Former Law; Gross Receipts from Business Done in State.—The former tax on gross receipts applied to all receipts from business done in the State, whether the money was paid here or forwarded to the main office. Pittsburg Life & Trust Co. v. Young, 172 N.C. 470, 90 S.E. 568 (1916).

Legislative History of Section. — See Great Am. Ins. Co. v. Johnson, 257 N.C. 367, 126 S.E.2d 92 (1962).

Validity of Section Tested by § 105-267.—The validity of provisions of this section can be tested only by the exclusive procedure set out in § 105-267. Great Am. Ins. Co. v. Gold, 254 N.C. 168, 118 S.E.2d 792 (1961).

§ 105-228.6. Taxes in case of withdrawal from State. — Any insurance company which for any cause withdraws from this State or ceases to register and transact new business in this State shall be liable for the taxes specified in G.S. 105-228.5 with respect to gross premiums collected in the calendar year in which such withdrawal may occur. In case any company which was formerly licensed or registered in this State and which subsequently ceased to do business therein, may apply to reenter this State, application for reentry or renewal of registration shall be denied unless and until said company shall have paid all taxes, together with any penalties and interest, due as to premiums collected in the year of withdrawal and also taxes as specified in G.S. 105-228.5 for gross premiums collected in the calendar year next preceding the year in which such application for renewal of registration is made. (1945, c. 752, s. 2.)

§ 105-228.7. Registration fees for agents, brokers and others. — Each and every manager, organizer, adjuster, broker or agent of whatever kind representing in this State any company referred to in this Article and every motor vehicle damage appraiser as defined by G.S. 58-39.4 shall on or before the first day of April of each year apply for and obtain from the Commissioner of Insurance an annual certificate of registration, or license, and shall pay for said certificate an annual fee at the following rates, with no additional fee for affixing of seal to the certificate:

Insurance agent	
(local for each company represented	$ 5.00
General agent or manager, for each company represented	6.00
Special agent or organizer, for each company represented	5.00
Insurance broker	2.50
Nonresident broker	25.00

Insurance adjuster (other than adjuster for hail damage to crops)	25.00
Insurance adjuster for hail damage to crops	5.00
Motor vehicle damage appraiser	25.00

The above fees shall be in lieu of any and all other license fees.

In cases where temporary license may be issued pursuant to law the fee for a temporary certificate shall be at the same rates as above specified, and any amounts so paid for temporary license may be credited against the fees required for issuance of the annual license or certificate.

Any person not registered who is required by law or regulation to pass examination as a condition for securing of license shall upon application for registration pay to the Commissioner of Insurance an examination fee of ten dollars ($10.00), and in case more than two examinations in any one kind of insurance are requested, an additional fee of ten dollars ($10.00) shall be paid for each added examination above two for the same kind of insurance. The requirement for examination and examination fee shall not apply to agents for domestic farmers' mutual assessment fire insurance companies or associations specified in G.S. 105-228.4.

In the event a certificate issued under this section is lost or destroyed the Commissioner of Insurance for a fee of fifty cents ($0.50) may certify to its issuance, giving number, date, and form, which may be used by the original party named thereon in lieu of the annual certificate. There shall be no charge for the seal attached to such certification. (1945, c. 752, s. 2; 1947, c. 1023, s. 2; 1949, c. 958, s. 2; 1951, c. 105, s. 2; 1955, c. 1313, s. 5; 1971, c. 757, s. 9.)

Editor's Note.—The 1971 amendment inserted "every motor vehicle damage appraiser as defined by G.S. 58-39.4" in the introductory language, added "Motor vehicle damage appraisers ... 25.00" to the schedule, and inserted "or regulation" in the first sentence of the next-to-last paragraph.

§ 105.228.8. Uniformity of taxes.—No fees or taxes imposed in this Article shall be increased on account of any retaliatory law now in effect in this or any other state, but such fees and taxes shall apply to all insurance companies alike, as specified in this Article, without regard to state, territory or country of domicile or location of home office, and without regard to any fees or taxes which may be levied by any jurisdiction in which any company may be domiciled or have its home office. (1945, c. 752, s. 2.)

§ 105-228.9. Powers of the Commissioner of Insurance. — All provisions of this Chapter, not inconsistent with this Article, relating to administration, auditing and making returns, the imposition and collection of tax and the lien thereof, assessments, refunds and penalties, shall be applicable to the fees and taxes imposed by this Article; and with respect thereto, the Commissioner of Insurance is hereby given the same power and authority as is given to the Commissioner of Revenue under the provisions of this Chapter. The Commissioner of Insurance may, from time to time, make, prescribe, and publish such rules and regulations, not inconsistent with law, as may be needful to enforce the provisions of this Article. (1945, c. 752, s. 2; 1955, c. 1350, s. 22.)

Applied in Great Am. Ins. Co. v. Gold, 254 N.C. 168, 118 S.E.2d 792 (1961).

§ 105-228.10. No additional local taxes. — No county, city, or town shall be allowed to impose any additional tax, license, or fee, other than ad valorem taxes, upon any insurance company or association paying the fees and taxes levied in this Article. (1945, c. 752, s. 2.)

ARTICLE 8C.

Schedule I-C. Excise Tax on Banks.

§ **105-228.11. To whom this Article shall apply.**—The provisions of this Article shall apply to every bank or banking association, including each national banking association, that is organized and operating in this State as a commercial bank, an industrial bank, a savings bank, a trust company, or any combination of such facilities or services, and whether such bank or banking association, hereinafter to be referred to as a bank or banks, be organized, under the laws of the United States or the laws of North Carolina, in the corporate form or in some other form of business organization. (1957, c. 1340, s. 8.)

Cited in Lenoir Fin. Co. v. Currie, 254 N.C. 129, 118 S.E.2d 543 (1961).

§ **105-228.12. Imposition of an excise tax.**—An annual excise tax is hereby levied on every bank located and doing business within this State, including each national banking association, for the privilege of transacting business in this State during the calendar year, according to or measured by its entire net income as defined herein received or accrued from all sources during the preceding calendar year hereinafter referred to as taxable year, at the rate of six percent (6%) of such entire net income. The minimum tax assessable to any one bank shall be ten dollars ($10.00). The liability for the tax imposed by this section shall arise upon the last day of each preceding taxable year, and shall be based upon and measured by the entire net income of each bank or trust company for such preceding taxable year, including all income received from government securities (whether or not taxable under Article 4 of this Chapter) in such year except for any interest that may be allowed as deductible from gross income under G.S. 105-228.16; provided, that the tax herein levied shall not be collectible for any year from any bank or trust company which fails to engage in business for any part of the year for which levied. This section shall be effective on and after December 31, 1959, so that the excise tax for 1960 shall be measured by net incomes for the taxable year 1959 and the liability therefor shall arise on December 31, 1959. In the case of a merger of two or more banks during the preceding calendar year the tax of the resultant bank shall be measured by the entire net income of all constituent banks during such preceding calendar year. As used in this Article the words "taxable year" shall mean the calendar year next preceding the calendar year for which and during which the excise tax is levied. (1957, c. 1340, s. 8; 1959, c. 1259, s. 7; 1969, c. 1075, s. 6.)

Editor's Note.—The 1969 amendment, effective July 1, 1969, substituted "six percent (6%)" for "four and one-half percent (4½%)" near the end of the first sentence. Session Laws 1969, c. 1075, s. 8, provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

§ **105-228.13. Method of taxation adopted.** — The State of North Carolina hereby adopts the method of taxation of banks authorized by an act of Congress relating to taxation of national banks, being method number (4) as provided in § 548, as amended, of Title 12 of the Code of Laws of the United States, formerly known as § 5219, of the Revised Statutes of the United States.

The excise tax levied under G.S. 105-228.12 shall be in lieu of the intangible personal property tax levied under Article 7 of this Chapter, the franchise tax imposed by Article 3 of this Chapter, the income tax levied by Article 4 of this Chapter, taxes levied upon the shares of stock of banks assessed under G.S. 105-346, and taxes levied upon tangible personal property by local taxing jurisdictions. All real property of each bank located or doing business within this State, including national banking associations, shall be assessed and taxed (in the same manner as other real estate is taxed in this State) by the counties, municipalities, and other local taxing jurisdictions in which such real estate is located.

It is the purpose and intent of the General Assembly to levy taxes on banks so that all banks, both State and national, doing business in this State will be taxed uniformly in a just and equitable manner in accordance with the provisions of § 548 of Title 12 of the Code of the United States cited above and Article V, Sec. 3 of the Constitution of North Carolina. The intent in this Article is to exercise the powers of classification and of taxation on property, franchises, and trades conferred by the above constitutional provision cited in this section. (1957, c. 1340, s. 8.)

Editor's Note.—Section 105-346, referred to in this section, formerly appeared in Subchapter II of Chapter 105, which was revised and rewritten by Session Laws 1971, c. 806. For similar provisions, see now § 105-360.

Provisions similar to former Article V, § 3, Const. 1868, referred to in this section, now appear in N.C. Const., Art. V, § 2.

Property Leased by Bank Exempt from Ad Valorem Taxes.—See opinion of Attorney General to Mr. Thomas C. Posey, Lenoir County Tax Superior, 41 N.C.A.G. 41 (1970).

§ 105-228.14. Entire net income defined.—The words "entire net income" shall mean the gross income of a taxpayer less the deductions allowed by this Article. (1957, c. 1340, s. 8.)

§ 105-228.15. Gross income defined.—For purposes of this Article the words "gross income" shall mean the income of a bank received or accrued from whatever source during the taxable year as follows: Interest and discount on loans; interest from bonds, notes, mortgages and other investments, including interest from all government bonds issued direct by any level of government or through any government agency, any exclusion provided in Article 4 of Chapter 105 notwithstanding; dividends from securities owned; service charges; collection fees; exchange charges; trust department earnings; rents; commissions; gains or profits from the sale or other disposition of property, either real or personal, tangible or intangible; recoveries from losses previously written off or deducted from income in prior taxable years; and all other recoveries, gains, profits, income, or receipts regardless of nature and from whatever source derived, except that gifts received shall be excluded from gross income. (1957, c. 1340, s. 8.)

§ 105-228.16. Deductions from gross income.—In computing entire net income there shall be allowed as deductions the following items:

(1) All ordinary and necessary expenses paid or accrued during the taxable year.

(2) Rental expense paid or accrued during the taxable year.

(3) All unearned discount and interest paid during the taxable year except interest paid in connection with income exempt from taxation under this Article and except interest deemed excessive under G.S. 105-130.6.

(4) Taxes paid or accrued except taxes based on net income, taxes assessed for local benefit of a kind tending to increase the value of the property assessed and any other taxes not deductible for corporate income tax purposes under the provisions of Division I of Article 4.

(5) Dividends received from stock issued by any corporation to the extent provided in G.S. 105-130.7.

(6) Net economic losses to the extent provided in G.S. 105-130.8 and other losses as provided in Division I of Article 4.

(7) Loans or debts ascertained to be worthless and actually charged off during the taxable year, if connected with business and if the amount has previously been included in gross income in a return under this Article; or, in the discretion of the Commissioner of Revenue, a reasonable addition to a reserve for bad debts. Provided, that amounts which are deductible for federal income tax purposes shall be prima facie allowable hereunder.

(8) A reasonable allowance for depreciation and obsolescence to the extent provided for corporation income tax purposes in Division I of Article 4.

(9) Contributions to religious, charitable, educational, literary and like organizations to the extent provided in subdivision (1) of G.S. 105-130.9.

(10) Contributions to the State of North Carolina, any of its institutions, instrumentalities, agencies, or political subdivisions, and contributions to educational institutions located within North Carolina as provided in subdivision (2) of G.S. 105-130.9.

(11) Reasonable contributions to qualified employees' pension trusts within the taxable year.

(12) Premiums paid by banks upon the purchase of bonds to the following extent:

a. Amortization of bond premiums on tax-exempt bonds shall be mandatory for all taxpayers. Amortization for the taxable year shall be accomplished by lowering the basis or adjusted basis of the bond, with no deduction against gross income for the year.

b. Amortization of bond premiums on taxable bonds shall be elective for all taxpayers. The amortizable premium for the taxable year may be deducted from gross income only if an adjustment is made to the basis of the bond.

c. For purposes of this subdivision, the term "bond" means any bond, debenture, note, or certificate or other evidences of indebtedness issued by any corporation and bearing interest and includes any like obligation issued by any government or political subdivision thereof.

(13) Interest upon the obligations of the State of North Carolina or a political subdivision thereof received or accrued during the taxable year. Provided, that the deduction of accrued interest shall be permitted only if the taxpayer has included accrued income in his gross income for the taxable year. Provided further, that in the event that any court of competent jurisdiction shall rule that the deduction of the interest of the obligations of the State of North Carolina or a political subdivision thereof from the base of the tax levied by this Article violates the Constitution of this State or the Constitution of the United States, such deduction shall be disallowed and such interest shall be included in the entire net income of the taxpayer.

(14) Reasonable payments made to the beneficiaries or to the estate of a deceased employee, paid by reason of the death of the employee to the extent provided for corporate income tax purposes in Division I of Article 4.

(15) Deduction of accrued expenses, contributions, taxes, rental expense, or interest expense shall be subject to the limitations inposed upon corporate income taxpayers by Article 4. (1957, c. 1340, s. 8; 1967, c. 1110, s. 8.)

§ 105-228.17. Returns and payment of the excise tax.—On or before March 15 of each year, the executive officer or officers of each bank, or trust company, located and doing business in this State, shall file with the Commissioner of Revenue a full and accurate report of all income as defined in G.S. 105-228.15 received or accrued during the taxable year, and also an accurate record of the legal deductions in the same calendar year as allowed by G.S. 105-228.16 to the end that the correct entire net income of the bank may be determined. This report shall be in such form and contain such information as the Commissioner of Revenue may specify, and shall contain such information with respect to branch offices as the Commissioner

of Revenue may designate. At the time of making such report by each bank, the taxes levied by this Article with respect to an excise tax on banks shall be paid to the Commissioner of Revenue. (1957, c. 1340, s. 8; 1969, c. 1282.)

Editor's Note. — The 1969 amendment substituted "March 15" for "June 1" near the beginning of this section.

§ 105-228.18. Effective date.—The initial report and payment for each bank shall be made on June 1, 1958, and shall be based on the calendar year of 1957. In the interim each bank shall make a return to the State Board of Assessment for 1957 with respect to the value of shares as of December 31, 1956, as provided in G.S. 105-346, and said Board shall determine the value of shares and certify such values to the respective local taxing jurisdictions. Each bank shall in turn pay the tax on its shares, in case of liability, for levies made by the respective North Carolina local tax jurisdiction during or prior to August, 1957. After the 1957 levies on the shares of banks, such shares shall not be taxable so long as the excise tax levied by this Article remains in effect and no longer. (1957, c. 1340, s. 8.)

Editor's Note. — Section 105-346, referred to in this section, formerly appeared in Subchapter II of Chapter 105, which was revised and rewritten by Session Laws 1971, c. 806. For similar provisions, see now § 105-360.

§ 105-228.19. Powers of the Commissioner of Revenue.—All provisions of Subchapter I of this Chapter, not inconsistent with this Article, relating to administration, auditing and making returns, the imposition and collection of tax and the lien thereof, assessments, refunds, penalties, and appeal and review, shall be applicable to the tax imposed by this Article. The Commissioner of Revenue may, from time to time, make, prescribe and publish such rules and regulations, not inconsistent with law, as may be needful to enforce the provisions of this Article. (1957, c. 1340, s. 8.)

§ 105-228.20. Competing moneyed capital.—It is not the intent of this Article to tax banks at a greater effective rate than competing moneyed capital. In case the Commissioner of Revenue or a court of competent jurisdiction, should find as a fact that any individual, firm or corporation, who or which is competing in major respects with the banks and trust companies taxed herein, is taxed at a lower rate than banks, including national banks, the Commissioner of Revenue shall assess and levy a tax under this Article upon any such individual, firm, or corporation. (1957, c. 1340, s. 8.)

§ 105-228.21: Omitted.

ARTICLE 8D.

Schedule I-D. Taxation of Building and Loan Associations and Savings and Loan Associations.

§ 105-228.22. To whom this Article shall apply.—The provisions of this Article shall apply to every building and loan association or savings and loan association organized under the laws of this State or organized under the laws of another state and which maintains one or more places of business in this State and to every savings and loan association organized and existing under the "Home Owners Loan Act of 1933" and which maintains one or more places of business in this State, all such associations hereinafter to be referred to as building and loan associations. (1957, c. 1340, s. 9.)

Cited in Lenoir Fin. Co. v. Currie, 254 N.C. 129, 118 S.E.2d 543 (1961).

§ 105-228.23. Capital stock tax.—There is hereby imposed upon every building and loan association for the privilege of conducting business in this

State a tax of seven and one-half cents (7½¢) on each one hundred dollars ($100.00) of the liability of such association on its shares of stock outstanding on December 31 of the preceding year. For purposes of this Article "liability of such association on its shares of stock outstanding" shall mean the aggregate dollar amount which such association is obligated to pay to its shareholders in cancellation of outstanding shares of capital stock of the association at any designated date. The words "capital stock of the association" shall mean all classes and kinds of stock which the association is authorized by its charter to issue from time to time, including, but not limited to, full paid shares, optional shares, and serial shares. (1957, c. 1340, s. 9; 1969, c. 1075, s. 7.)

Editor's Note. — The 1969 amendment, effective July 1, 1969, substituted "seven and one-half cents (7½¢)" for "six cents (6¢)" in the first sentence. Session Laws 1969, c. 1075, s. 8, provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

§ **105-228.24. Excise tax.**—In addition to the taxes levied under G.S. 105-228.23 every building and loan association shall pay annually an excise tax equivalent to seven and one-half percent (7½%) of the net taxable income, as herein defined, of such corporation during the income year. For purposes of this Article "net taxable income" shall mean net income as the same is defined for purposes of the income tax levied against corporations as provided in Article 4 of Subchapter I of Chapter 105 of the General Statutes less all dividends paid or accrued by an association during the income year on all of its outstanding shares of capital stock. "Dividends" shall mean the amounts paid to, or credited to the accounts of shareholders, if such amounts paid or credited are withdrawals on demand subject only to customary notice of intention to withdraw. The words "income year" shall mean the calendar year or fiscal year upon the basis of which the net taxable income is computed under this Article. (1957, c. 1340, s. 9; 1969, c. 1075, s. 7.)

Editor's Note. — The 1969 amendment, effective July 1, 1969, substituted "seven and one-half percent (7½%)" for "six percent (6%)" in the first sentence. Session Laws 1969, c. 1075, s. 8, provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

§ **105-228.25. Limitations.**—The taxes levied under this Article shall be in lieu of all other taxes and fees except those imposed by Subchapter I of Chapter 54 of the General Statutes and amendments thereto, and except ad valorem taxes imposed upon real property and tangible personal property, and except sales and /or use taxes levied by this State, and except taxes levied on intangible property under G.S. 105-199, 105-200, 105-204 and 105-205.

Counties, cities and towns shall not, after the effective date of this Article, levy any license tax on the business of any building and loan association subject to taxation under this Article. (1957, c. 1340, s. 9.)

Editor's Note. — The act inserting this Article provides that so much of the Article as applies to the excise tax shall be effective with income years beginning on and after January 1, 1957, and so much as applies to the capital stock tax shall be effective on and after June 1, 1957.

§ **105-228.26. Filing of returns.**—Every association taxed under this Article shall file annually with the Administrator of the Savings and Loan Division a capital stock tax return and an excise tax return upon such forms as the Administrator of the Savings and Loan Division shall from time to time prescribe. The capital stock tax return shall be filed and the tax levied under G.S. 105-228.23 shall be paid to the Administrator of the Savings and Loan Division on or before the fifteenth day of March of each year. The excise tax returns shall be filed and the tax levied under G.S. 105-228.24 shall be paid on or before the fifteenth day of the third month following the close of the income

year. The returns shall contain such information as the Administrator of the Savings and Loan Division shall deem to be necessary for the computation and verification of the amount of the tax. (1957, c. 1340, s. 9; 1971, c. 864, s. 17.)

Editor's Note. — The 1971 amendment substituted "Administrator of the Savings and Loan Division" for "Commissioner of Insurance" throughout the section.

§ 105-228.27. Powers of the Administrator of the Savings and Loan Division.—All provisions of Subchapter I of this Chapter not inconsistent with this Article, relating to administration, auditing and making returns, the imposition and collection of tax and the lien thereof, assessments, refunds, penalties, and appeal and review, shall be applicable to the fees and taxes imposed by this Article; and with respect thereto, the Administrator of the Savings and Loan Division is hereby given the same power and authority as is given to the Commissioner of Revenue under the provisions of this Chapter. The Administrator of the Savings and Loan Division may, from time to time, make, prescribe, and publish such rules and regulations, not inconsistent with law, as may be needful to enforce the provisions of this Article. The Commissioner of Revenue shall render such assistance in the audit of returns and the collection of the taxes levied hereunder as the Administrator of the Savings and Loan Division shall request. (1957, c. 1340, s. 9; 1971, c. 864, s. 17.)

Editor's Note. — The 1971 amendment substituted "Administrator of the Savings and Loan Division" for "Commissioner of Insurance" throughout the section.

Article 8E.

Excise Stamp Tax on Conveyances.

§ 105-228.28. To whom this Article shall apply.—The provisions of this Article shall apply to every person, firm, corporation, association, society or organization conveying an interest in real estate located in North Carolina other than a governmental unit and instrumentalities thereof. (1967, c. 986, s. 1.)

Editor's Note. — For article, "Transferring North Carolina Real Estate, Part I: How the Present System Functions," see 49 N.C.L. Rev. 413 (1971).

§ 105-228.29. Conveyances excluded.—The provisions of this Article shall not apply to transfers of an interest in real estate by operation of law, by lease for a term of years, by or pursuant to the provisions of a will, by intestacy, by gift, by merger or consolidation, or by instruments securing indebtedness, or any other transfer where no consideration in property or money is due or paid by the transferee to transferor. (1967, c. 986, s. 1.)

"Consideration" Includes Exchange of Real Property. — See opinion of Attorney General to Mr. W.G. Massey, 41 N.C.A.G. 480 (1971).

Commissioner's Deed Not by Operation of Law. — See opinion of Attorney General to Patsy Thomas, Caldwell County Register of Deeds, 41 N.C.A.G. 204 (1971).

Husband-Wife Conveyances upon Separation Subject to Excise Stamp Tax. — See opinion of Attorney General to Mr. Mark Stuart, Guilford County Register of Deeds, 41 N.C.A.G. 237 (1971).

§ 105-228.30. Imposition of excise stamp tax.—There is hereby levied an excise tax on each deed, instrument or writing by which any lands, tenements or other realty shall be granted, assigned or otherwise conveyed to, or vested in, the purchaser or purchasers, or any other person or persons. The tax imposed hereby shall be at the rate of fifty cents (50¢) on each five hundred dollars ($500.00) or fractional part thereof of the consideration or value of the interest or property conveyed (exclusive of the value of any lien or encumbrance remaining thereon at the time of sale). The tax hereby imposed and levied shall be paid by the transferor or transferors to the county wherein the real estate is situated prior to recording the instrument of conveyance;

provided that, if the instrument transfers any parcel of real estate lying in two or more counties, the tax shall be paid to the county wherein the greater part of the real estate with respect to value lies. Except as otherwise hereinafter provided, the proceeds of the tax herein levied shall be retained by the county and placed in its general fund. (1967, c. 986, s. 1.)

§ 105-228.31. Issuance of tax stamp.—The Commissioner of Revenue shall furnish to the register of deeds of each county tax stamps to be issued upon payment of the tax herein imposed. Counties shall pay to the Commissioner a reasonable charge therefor to cover the cost of printing and handling same. Such tax stamps shall be uniform as to size and design and shall be in such form as determined by the Commissioner of Revenue and shall be valid until cancelled as hereinafter provided for.

The register of deeds of any county is authorized to affix stamps by meter or other similar device in accordance with procedures established by the Commissioner of Revenue. Stamps affixed by such devices shall be uniform as to size and design and shall be in such form as determined by the Commissioner and cancellation as provided by this Article is not required. (1967, c. 986, s. 1.)

§ 105-228.32. Duties of register of deeds; duty of party presenting instrument for registration.—The register of deeds of each county shall obtain from the Commissioner of Revenue and keep on hand an adequate supply of excise tax stamps. The register of deeds shall keep such records and otherwise account for said stamps in accordance with procedures established by the Commissioner of Revenue for the control, distribution and sale of said stamps and for the accounting for proceeds of their sale consistent with this Article. It is the duty of the party presenting the instrument for registration to see that the correct amount of stamps is affixed to the face thereof prior to recording the same in the office of the register of deeds. The register of deeds shall cancel said stamp or stamps prior to recording by writing the date of filing on the face of said stamp or stamps. (1967, c. 986, s. 1; 1969, c. 599, s. 1.)

Editor's Note. — The 1969 amendment rewrote the third sentence.

Since 1969 Amendment, Register of Deeds May Not Refuse Tender of Deed for Recording if Stamp Tax Not Paid. — See opinion of Attorney General to Mrs. Lois C. LeRay, Register of Deeds, New Hanover County, 40 N.C.A.G. 876 (1970).

§ 105-228.33. Taxes recoverable by action.—Upon the failure to pay the taxes imposed by this Article, they may be recovered in an action in the name of the county brought in the superior court of said county when the same remain unpaid for a period of 30 days after demand has been made by the register of deeds on behalf of the county therefor. In such actions, costs of court shall include a fee to the county of twenty-five dollars ($25.00) for expense of collection. (1967, c. 986, s. 1.)

§ 105-228.34. Willful failure to pay tax.—Any transferor or agent of transferor of real estate willfully and knowingly failing to pay the correct amount of the tax imposed by this Article or any person aiding, abetting, or directing any other person to willfully and knowingly fail to pay the correct amount of such tax shall be guilty of a misdemeanor and fined not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000) for each offense. When the register of deeds relies on the statement of the party presenting the instrument for registration as to the correct amount of stamps to be affixed, he shall not be subject to prosecution as an aider or abettor under this section. (1967, c. 986, s. 1; 1969, c. 599, s. 2.)

Editor's Note. — The 1969 amendment added the second sentence.

§ 105-228.35. Administrative provisions.—The provisions of Subchapter

III, Article 30 of Chapter 105 of the General Statutes of North Carolina to the extent applicable shall apply to the tax imposed herein. (1967, c. 986, s. 1.)

Editor's Note. — Article 30 of Chapter 105, referred to in this section, formerly appeared in Subchapter III of Chapter 105 as §§ 105-399 to 105-407. Sections 105-399 to 105-403 were repealed by Session Laws 1971, c. 806, s. 3; § 105-404 was transferred to § 105-32 by Session Laws 1971, c. 806, s. 2; §§ 105-405.1 and 105-406 were repealed by Session Laws 1971, c. 806, s. 3; and § 105-407 was transferred to § 105-267.1 by Session Laws 1971, c. 806, s. 2.

§ 105-228.36. Reproduction of tax stamps.—No person, firm, or corporation shall print, engrave, or otherwise reproduce excise tax stamps except with the express permission of the Commissioner of Revenue. The unauthorized reproduction of said stamps shall be punishable as a forgery under G.S. 14-119. (1967, c. 986, s. 1.)

Article 9.

Schedule J. General Administration; Penalties and Remedies.

§ 105-229. Failure of person, firm, corporation, public utility and/or public service corporation to file report.—If any person, firm, or corporation required to file a report under any of the provisions of Schedules B and C of this Subchapter fails, refuses, or neglects to make such report as required herein within the time limited in said schedule for making such report he or it shall pay a penalty of ten dollars ($10.00) for each day's omission. (1939, c. 158, s. 900.)

§ 105-230. Charter canceled for failure to report.—If a corporation required by the provisions of this Subchapter to file any report or return or to pay any tax or fee, either as a public utility (not as an agency of interstate commerce) or as a corporation incorporated under the laws of this State, or as a foreign corporation domesticated in or doing business in this State, or owning and using a part or all of its capital or plant in this State, fails or neglects to make any such report or return or to pay any such tax or fee for 90 days after the time prescribed in this Subchapter for making such report or return, or for paying such tax or fee, the Commissioner of Revenue shall certify such fact to the Secretary of State. The Secretary of State shall thereupon suspend the articles of incorporation of any such corporation which is incorporated under the laws of this State by appropriate entry upon the records of his office, or suspend the certificate of authority of any such foreign corporation to do business in this State by proper entry. Thereupon all the powers, privileges, and franchises conferred upon such corporation by such articles of incorporation or by such certificate of authority shall cease and determine. The Secretary of State shall immediately notify by certified mail every such domestic or foreign corporation of the action taken by him, and also shall immediately certify such suspension to the register of deeds of the county in which the principal office or place of business of such corporation is located in this State with instructions to said register of deeds, and it shall be the register's duty to record and index the suspension in the Record of Incorporations; promptly after the recordations, the register shall note the fact of recordation on the said copy and return it to the corporation or its representative. If the corporation or its representative cannot be located, the register may destroy the copy. (1939, c. 158, s. 901; 1957, c. 498; 1967, c. 823, s. 31; 1969, c. 965, s. 2.)

Editor's Note. — The 1969 amendment rewrote the fourth sentence and added the last sentence.

Sections 34 and 35, c. 823, Session Laws 1967, provide: "Sec. 34. It is the intent of this act to establish the office of the register of deeds as the filing office for all of the corporate and related documents now required to be filed with the clerk of the superior court and to transfer all of the duties relating thereto from the clerk

of the superior court to the register of deeds. To this end, all relevant sections of the General Statutes of North Carolina not specifically amended by sections 1 through 33 of this act are hereby amended to the same effect.

"Sec. 35. All of the existing records now in the offices of the clerks of the superior court and kept pursuant to the sections of the General Statutes of North Carolina amended by this act shall be transferred from the offices of the clerks of the superior court to the offices of the registers of deeds."

This section was not intended to deprive a corporation of its properties nor to penalize innocent parties. Page v. Miller, 252 N.C. 23, 113 S.E.2d 52 (1960).

Effect of Suspension of Charter on Corporation's Capacity to Sue. — Allegations in the complaint to the effect that plaintiff corporation's charter was temporarily suspended under this section less than a year prior to the institution of the action do not disclose that the corporation did not have legal capacity to institute the action. Mica Indus., Inc. v. Penland, 249 N.C. 602, 107 S.E.2d 120 (1959).

Cited in Guilford Builders Supply Co. v. Reynolds, 249 N.C. 612, 107 S.E.2d 80 (1959).

§ 105-231. Penalty for exercising corporate functions after cancellation or suspension of charter.—Any person, persons or corporations who shall exercise or by any act attempt to exercise any powers, privileges, or franchises under articles of incorporation or certificate of authority after the same are suspended, as provided in any section of this Subchapter, shall pay a penalty of not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000), to be recovered in an action to be brought by the Commissioner of Revenue in the Superior Court of Wake County. Any corporate act performed or attempted to be performed during the period of such suspension shall be invalid and of no effect. (1939, c. 158, s. 902.)

This section was not intended to deprive a corporation of its properties nor to penalize innocent parties. Page v. Miller, 252 N.C. 23, 113 S.E.2d 52 (1960).

§ 105-232. Corporate rights restored; receivership and liquidation.—Any corporation whose articles of incorporation or certificate of authority to do business in this State has been suspended by the Secretary of State, as provided in G.S. 105-230, or similar provisions of prior Revenue Acts, upon the filing, within five years after such suspension or cancellation under previous acts, with the Secretary of State, of a certificate from the Commissioner of Revenue that it has complied with all the requirements of this Subchapter and paid all State taxes, fees, or penalties due from it (which total amount due may be computed, for years prior and subsequent to said suspension or cancellation, in the same manner as if such suspension or cancellation had not taken place), shall be entitled to exercise again its rights, privileges, and franchises in this State; and the Secretary of State shall cancel the entry made by him under the provisions of G.S. 105-230 or similar provisions of prior Revenue Acts, and shall issue his certificate entitling such corporation to exercise again its rights, privileges, and franchises, and certify such reinstatement to the register of deeds in the county in which the principal office or place of business of such corporation is located with instructions to said register of deeds, and it shall be his duty to cancel from his records the entry showing suspension of corporate privileges.

When the certificate or articles of incorporation in this State have been suspended by the Secretary of State, as provided in G.S. 105-230, or similar provisions of prior or subsequent Revenue Acts, and there remains property held in the name of the corporation, or undisposed of at the time of such suspension, or there remain possibilities of reverters, reversionary interests, rights of reentry or other furture interests that may accrue to the corporation or its successors or stockholders, and the time within which the corporate rights might be restored as provided by this section has expired, any stockholder or any bona fide creditor or other interested party may apply to the superior court for the appointment of a receiver. Application for such receiver may be made in a civil action to which all stockholders or their representatives or next of kin shall be made parties. Stockholders whose

whereabouts are unknown and unknown stockholders and unknown heirs and next of kin of deceased stockholders may be served by publication, as well as creditors, dealers and other interested persons, and a guardian ad litem may be appointed for any stockholders or their representatives who may be an infant or incompetent. The receiver shall enter into such bond with such sureties as may be set by the court and shall give such notice to creditors by publication or otherwise as the court may prescribe. Any creditor who shall fail to file his claim with the receiver within the time set shall be barred of the right to participate in the distribution of the assets. Such receiver shall have authority to sell such property or possibilities of reverters, reversionary interests, rights of reentry, or other future interests, upon such terms and in such manner as shall be ordered by the court, apply the proceeds to the payment of any debts of such corporation, and distribute the remainder among the stockholders or their representatives in proportion to their interests therein. Shares due to any stockholder who is unknown or whose whereabouts are unknown shall be paid into the office of the clerk of the superior court, by him to be disbursed according to law. In the event the stock books of the corporation shall be lost or shall not reflect the latest stock transfers, the court shall determine the respective interests of the stockholders from the best evidence available, and the receiver shall be protected in acting in accordance with such finding. Such proceeding is authorized for the sole purpose of providing a procedure for disposing of the corporate assets by the payment of corporate debts, including franchise taxes which had accrued prior to the suspension of the corporate charter and any other taxes the assessment or collection of which is not barred by a statute of limitations, and by the transfer to the stockholders or their representatives their proportionate shares of the assets owned by the corporation. (1939, c. 158, s. 903; c. 370, s. 1; 1943, c. 400, s. 9; 1947, c. 501, s. 9; 1951, c. 29; 1969, c. 541, s. 10.)

Editor's Note. — The 1969 amendment substituted "register of deeds" for "clerk of superior court" and for "clerk" near the end of the first paragraph.

Cited in Mica Indus., Inc. v. Penland, 249 N.C. 602, 107 S.E.2d 120 (1959); Guilford Builders Supply Co. v. Reynolds, 249 N.C. 612, 107 S.E.2d 80 (1959).

§ 105-233. Officers, agents, and employees; failing to comply with tax law a misdemeanor.—If any officer, agent, and/or employee of any person, firm, or corporation subject to the provisions of this Subchapter shall willfully fail, refuse, or neglect to make out, file, and/or deliver any reports or blanks, as required by such law, or to answer any question therein propounded, or to knowingly and willfully give a false answer to any such question wherein the fact inquired of is within his knowledge, or upon proper demand to exhibit to such Commissioner of Revenue or any of his duly authorized representatives any book, paper, account, record, memorandum of such person, firm, or corporation in his possession and/or under his control, he shall be guilty of a misdemeanor and fined not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000) for each offense. (1939, c. 158, s. 904.)

§ 105-234. Aiding and/or abetting officers, agents, or employees in violation of this Subchapter a misdemeanor.—If any person, firm, or corporation shall aid, abet, direct, or cause or procure any of his or its officers, agents, or employees to violate any of the provisions of this Subchapter, he or it shall be guilty of a misdemeanor, and fined not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000) for each offense. (1939, c. 158, s. 905.)

§ 105-235. Every day's failure a separate offense.—The willful failure, refusal, or neglect to observe and comply with any order, direction, or mandate of the Commissioner of Revenue, or to perform any duty enjoined by this Subchapter, by any person, firm, or corporation subject to the provisions of

this Subchapter, or any officer, agent, or employee thereof, shall, for each day such failure, refusal, or neglect continues, constitute a separate and distinct offense. (1939, c. 158, s. 906.)

§ **105-236. Penalties.**—Except as otherwise provided in this Subchapter, and subject to the provisions of G.S. 105-237, the following penalties shall be applicable:

(1) Penalty for Bad Checks.—When the bank upon which any uncertified check tendered to the Department of Revenue in payment of any obligation due to the Department, shall refuse payment upon such check on account of insufficient funds of the drawer in such bank, and such check shall be returned to the Department of Revenue, an additional tax shall be imposed, which additional tax shall be equal to ten percent (10%) of the obligation for the payment of which such check was tendered: Provided, however, that in no case shall the additional tax so imposed be less than one dollar ($1.00) nor more than two hundred dollars ($200.00). Provided, further, no additional tax shall be imposed if the Commissioner of Revenue shall find that the drawer of such check, at the time it was presented to the drawee, had funds deposited to his credit in any bank of this State sufficient to pay such check, and, by inadvertence, failed to draw the check upon the bank in which he had such funds on deposit. The additional tax hereby imposed shall not be waived or diminished by the Commissioner of Revenue. This section shall apply to all taxes levied or assessed by the State.

(2) Failure to Obtain a License.—For failure to obtain a license before engaging in a business, trade or profession for which a license is required, there shall be assessed an additional tax equal to five percent (5%) of the amount prescribed for such license per month or fraction thereof until paid, which additional tax shall not exceed twenty-five percent (25%) of the amount so prescribed, but in any event shall not be less than five dollars ($5.00).

(3) Failure to File Return.—In case of failure to file any return required under this Subchapter on the date prescribed therefor (determined with regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause, there shall be added to the amount required to be shown as tax on such return, as a penalty, five percent (5%) of the amount of such tax if the failure is for not more than one month, with an additional five percent (5%) for each additional month, or fraction thereof, during which such failure continues, not exceeding twenty-five percent (25%) in the aggregate, or five dollars ($5.00), whichever is the greater.

(4) Failure to Pay Tax When Due.—In the case of failure to pay any tax when due, without intent to evade the tax, there shall be an additional tax, as a penalty, of ten percent (10%) of the tax; provided, that such penalty shall in no event be less than five dollars ($5.00).

(5) Negligence.—For negligent failure to comply with any of the provisions of this Subchapter, or rules and regulations issued pursuant thereto, without intent to defraud, there shall be assessed, as a penalty, an additional tax of ten percent (10%) of the deficiency due to such negligence; provided, that in the case of income tax, if gross income is understated by as much as twenty-five percent (25%), or deductions, exclusive of personal exemptions, are overstated by as much as twenty-five percent (25%) of gross income, or if there is a combination of understatement of gross income and overstatement of deductions, exclusive of personal exemptions, equaling twenty-five percent (25%) of gross income, there shall be assessed, as a penalty,

an additional tax equal to twenty-five percent (25%) of the total deficiency; provided further, that in the case of sales and use taxes, if it is established that the total tax liability is understated by twenty-five percent (25%) or more as a result of any

a. Omission or understatement of gross sales, gross receipts or gross purchases;
b. Overstatement of exemptions or deductions;
c. Incorrect application of a lesser rate of tax; or
d. Any combination of the foregoing; there shall be assessed as a penalty an additional tax equal to twenty-five percent (25%) of the total deficiency. If a penalty is assessed under subdivision (6) of this section, no additional penalty for negligence shall be assessed with respect to the same deficiency.

(6) Fraud.—If there is a deficiency or delinquency in payment of any tax levied by this Subchapter, due to fraud with intent to evade the tax, there shall be assessed, as a penalty, an additional tax equal to fifty percent (50%) of the total deficiency.

(7) Attempt to Evade or Defeat Tax.—Any person who wilfully attempts, or any person who aids or abets any person to attempt in any manner to evade or defeat any tax imposed by this Subchapter, Subchapter V, or Chapter 18 of the General Statutes, or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and shall be punished by a fine not to exceed one thousand dollars ($1,000), or by imprisonment not to exceed six months, or by both such fine and imprisonment. Notwithstanding any other provisions of law or any other statute of limitations, no prosecution for any violation brought hereunder shall be barred before the expiration of three years from the date of such violation.

(8) Wilful Failure to Collect, Withhold, or Pay Over Tax.—Any person required under this Subchapter to collect, withhold, account for, and pay over any tax imposed by this Subchapter who wilfully fails to collect or truthfully account for and pay over such tax shall, in addition to other penalties provided by law, be guilty of a misdemeanor and shall be punished by a fine not to exceed five hundred dollars ($500.00), or by imprisonment not to exceed six months, or by both such fine and imprisonment.

(9) Wilful Failure to File Return, Supply Information, or Pay Tax.—Any person required under this Subchapter to pay any tax, to make a return, to keep any records or to supply any information, who wilfully fails to pay such tax, make such return, keep such records, or supply such information, at the time or times required by law, or regulations issued pursuant thereto, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and shall be punished by a fine not to exceed two hundred dollars ($200.00), or by imprisonment not to exceed 30 days, or by both such fine and imprisonment.

(10) Failure to File Informational Returns.—

a. For failure to file a partnership or a fiduciary informational return when such returns are due to be filed, there shall be assessed as a tax against the delinquent five dollars ($5.00) per month or fraction thereof of such delinquency, such tax, however, in the aggregate not to exceed the sum of twenty-five dollars ($25.00). When assessed against a fiduciary, the tax herein provided shall be paid by the fiduciary and shall not be passed on to the trust estate.
b. For failure to file timely statements of payments to another person or persons with respect to wages, dividends, rents or interest paid to such other person or persons, there shall be

assessed as a tax a penalty of one dollar ($1.00) for each statement not filed on time, the aggregate of such penalties for each tax year not to exceed one hundred dollars ($100.00), and in addition thereto, if the Commissioner shall request the payor to file such statements and shall set a date on or before which such statements shall be filed, and the payor shall fail to file such statements within such time, the amounts claimed on payor's income tax return as deductions for salaries and wages, or rents or interest shall be disallowed to the extent that the payor failed to comply with the Commissioner's request with respect to such statements.

(11) Any violation of the provisions of this Subchapter, Subchapter V of Chapter 105 or Chapter 18 of the General Statutes shall be deemed an act committed in part at the office of the Commissioner of Revenue in Raleigh. The certificate of the Commissioner of Revenue to the effect that a tax has not been paid, that a return has not been filed, or that information has not been supplied, as required by or under the provisions of this Subchapter, or by Subchapter V of Chapter 105 or Chapter 18 of the General Statutes, shall be prima facie evidence that such tax has not been paid, that such return has not been filed or that such information has not been supplied. (1939, c. 158, s. 907; 1953, c. 1302, s. 7; 1959, c. 1259, s. 8; 1963, c. 1169, s. 6; 1967, c. 1110, s. 9.)

Editor's Note. — Chapter 18 of the General Statutes, referred to in subdivisions (7) and (11), was repealed by Session Laws 1971, c. 872, s. 3. For provisions covering the subject matter of the repealed Chapter, see Chapter 18A and §§ 105-113.68 to 105-113.104.

For brief comment on the 1953 amendment which rewrote the section, see 31 N.C.L. Rev. 440 (1953).

Available Only to Commissioner of Revenue and Not Cities or Counties in Enforcing Payment of License Taxes. — See opinion of Attorney General to Mr. Henry W. Underhill, Jr., Charlotte City Attorney, 40 N.C.A.G. 866 (1970).

Applied in State v. Hundley, 272 N.C. 491, 158 S.E.2d 582 (1968).

§ **105-237. Discretion of Commissioner over penalties.**—The Commissioner of Revenue shall have power, upon making a record of his reasons therefor, to reduce or waive any penalties provided for in this Subchapter, except the penalty provided in G.S. 105-236 relating to unpaid checks. (1939, c. 158, s. 908; c. 370, s. 1.)

§ **105-237.1. Compromise of liability.**—(a) The Commissioner of Revenue, with the approval of the Attorney General, is authorized to compromise the amount of liability of any taxpayer for taxes due under Subchapters I or V of this Chapter or under Chapter 18 of the General Statutes and to accept in full settlement of such liability a lesser amount than that asserted to be due when in the opinion of the Commissioner and the Attorney General such compromise settlement is in the best interest of the State. When made other than in the course of litigation in the courts of the State on an appeal from an administrative determination or in a civil action brought to recover from the Commissioner, the basis for such compromise must also conform to the conditions set out in this section. Such compromise settlement may be made only after a final administrative or judicial determination of the liability of the taxpayer.

Such a compromise settlement may be made only upon a finding that:

(1) There is a reasonable doubt as to the amount of the liability of the taxpayer under the law and the facts; or

(2) The taxpayer is insolvent and the Commissioner probably could not otherwise collect an amount equal to or in excess of the amount offered in compromise; or

(3) Collection of a greater amount than that offered in compromise settlement is improbable, and the funds offered in the settlement, or a substantial portion thereof, come from sources from which the Commissioner could not otherwise collect; or

(4) A federal tax assessment arising out of the same facts has been compromised with the federal government on the same or a similar basis as that proposed to the State and the Commissioner could probably not collect an amount equal to or in excess of that offered in compromise.

For the purposes of this section a taxpayer may be considered insolvent only if there is an established status of insolvency by either a judicial declaration of a status necessarily or ordinarily involving insolvency or by a legal proceeding in which the insolvency of the taxpayer would ordinarily be determined or thereby be made evident or if it is plain and indisputable that the taxpayer is clearly insolvent and will remain so in the reasonable future. Whenever a compromise is made by the Commissioner pursuant to this section, there shall be placed on file in the office of the Commissioner a written opinion, signed by the Commissioner and the Attorney General, setting forth the amount of tax or additional tax assessed, the amount actually paid in accordance with the terms of the compromise, and a summary of the facts and reasons upon which acceptance of the compromise is based, provided, however, that such opinion shall not be required with respect to the compromise of any taxpayer's liability where the unpaid amount of tax assessed (including interest, penalty and additional tax) is less than one hundred dollars ($100.00).

(b) Whenever an assessment of taxes or additional taxes is based upon an action of the federal government in making an assessment of taxes and the federal assessment is subsequently settled, compromised or adjusted, the Commissioner may, in his discretion, settle, compromise or adjust the State's tax assessment upon the same basis as the federal settlement, compromise or adjustment. (1957, c. 1340, s. 10; 1959, c. 1259, s. 8.)

Editor's Note. — Chapter 18 of the General Statutes, referred to near the beginning of subsection (a), was repealed by Session Laws 1971, c. 872, s. 3. For provisions covering the subject matter of the repealed Chapter, see Chapter 18A and §§ 105-113.68 to 105-113.104.

§ 105-238. Tax a debt.—Every tax imposed by this Subchapter, and all increases, interest, and penalties thereon, shall become, from the time it is due and payable, a debt from the person, firm, or corporation liable to pay the same to the State of North Carolina. (1939, c. 158, s. 909.)

For prior law see Gatling v. Commissioners of Carteret County, 92 N.C. 536 (1885); Worth v. Wright, 122 N.C. 335, 29 S.E. 361 (1898); Commissioners of Yancey County v. Hall, 177 N.C. 490, 99 S.E. 372 (1919).

§ 105-239. Action for recovery of taxes.—Action may be brought at any time and in any court of competent jurisdiction in this State or other state, in the name of the State and at the instance of the Commissioner of Revenue, to recover the amount of any taxes, penalties, and interest due under this Subchapter. This remedy is in addition to all other remedies for the collection of said taxes and shall not in any respect abridge the same. Any judgment shall be declared to have such preference and priority against the property of the defendant as is provided by law for taxes levied by this Subchapter, and free from any claims for homestead or personal property exemption of the defendant therein. (1939, c. 158, s. 910.)

§ 105-239.1. Transferee liability.—(a) Property transferred for an inadequate consideration to a donee, heir, legatee, devisee, distributee, stockholder of a liquidated corporation, or any other person at a time when the transferor is insolvent or is rendered insolvent by reason of the transfer shall be subject to a lien for any taxes owing by the transferor to the State of North

Carolina at the time of such transfer whether or not the amount of such taxes shall have been ascertained or assessed at the time of such transfer. Such lien shall be subject to the provisions of the first proviso contained in G.S. 105-241. In the event the transferee shall have disposed of such property so that it cannot be subjected to the State's tax lien, the transferee shall be personally liable for the difference between the fair market value of such property at the time of the transfer and the actual consideration, if any, paid to the transferor by the transferee.

Upon a foreclosure of the State's tax lien upon property in the hands of a transferee, the value of any consideration which the transferee shall have established as having been given to the transferor shall be paid to the transferee out of the proceeds of the foreclosure sale before applying such proceeds toward the satisfaction of the State's tax lien.

In order to proceed against the transferee or property in his hands, the Commissioner shall cause to be docketed in the office of the clerk of the superior court of the county wherein the transferee resides or the property is located, as the case may be, a certificate of tax liability as provided in G.S. 105-242 or a lien certificate which shall set forth the amount of the lien as determined by the Commissioner or as finally determined upon appeal and a description of the property subject to the lien. Thereafter, execution may be issued against the transferee as in the case of other money judgments except that no homestead or personal exemption shall be allowable or, upon a lien certificate, an execution may be issued directing the sheriff to seize the property subject to the lien and sell same in the same manner as property is sold under execution. Such procedure and collection shall be subject to the provisions of subsection (c) of this section.

(b) The period of limitations for assessment of any liability against a transferee or enforcing the lien against the transferred property shall expire one year after the expiration of the period of limitations for assessment against the transferor.

(c) The provisions of G.S. 105-241.1, 105-241.2, 105-241.3, 105-241.4, 105-266.1 and 105-267 with respect to assessment procedure, demand for refund, review, and appeal shall apply to the liability of any transferee assessed under this section or of any property subject to the liability imposed by this section and to the assertion of a lien upon property in the hands of the transferee.

(d) In any proceeding before the Tax Review Board or in any court of the State the burden of proof shall be upon the Commissioner of Revenue to show that a person is liable as a transferee of property of a taxpayer under this section. (1957, c. 1340, s. 10.)

§ **105-240. Tax upon settlement of fiduciary's account.**—No final account of a fiduciary shall be allowed by the probate court unless such account shows, and the judge of said court finds, that all taxes imposed by the provisions of this Subchapter upon said fiduciary, which have become payable, have been paid, and that all taxes which may become due are secured by bond, deposit, or otherwise. The certificate of the Commissioner of Revenue and the receipt for the amount of tax herein certified shall be conclusive as to the payment of the tax to the extent of said certificate.

For the purpose of facilitating the settlement and distribution of estates held by fiduciaries, the Commissioner of Revenue, with the approval of the Attorney General, may, on behalf of the State, agree upon the amount of taxes at any time due or to become due from such fiduciaries under the provisions of this Subchapter, and the payment in accordance with such agreement shall be full satisfaction of the taxes to which the agreement relates. (1939, c. 158, s. 911.)

§ **105-240.1. Agreements with respect to domicile.**—Whenever reasonably necessary in order to facilitate the collection of any tax, the Commissioner of

Revenue with the consent and approval of the Attorney General, is authorized to make agreements with the taxing officials of other states of the United States or with taxpayers in cases of disputes as to the domicile of a decedent. (1957, c. 1340, s. 10.)

§ 105-241. Taxes payable in national currency; for what period, and when a lien; priorities.—The taxes herein designated and levied shall be payable in the existing national currency. State, county, and municipal taxes levied for any and all purposes pursuant to this Subchapter shall be for the fiscal year of the State in which they become due, except as otherwise provided, and the lien of such taxes shall attach annually to all real estate of the taxpayer within the State on the date that such taxes are due and payable, and said lien shall continue until such taxes, with any interest, penalty, and costs which shall accrue thereon, shall have been paid; in the settlement of the estate of any decedent where, by any order of court or other proceeding, the real estate of the decedent has been sold to make assets to pay debts, such sale shall not have the effect of extinguishing the lien upon the land so sold for State taxes, nor shall the same be postponed in any manner to the payment of any other claim or debt against the estate, save funeral expenses and cost of administration.

Provided, however, that the lien of State taxes shall not be enforceable as against bona fide purchasers for value, and as against duly recorded mortgages, deeds of trust and other recorded specific liens, as to real estate, except upon docketing of a certificate of tax liability or a judgment in the office of the clerk of the superior court of the county wherein the real estate is situated, and as to personalty, except upon a levy upon such property under an execution or a tax warrant, and the priority of the State's tax lien against property in the hands of bona fide purchasers for value, and as against duly recorded mortgages, deeds of trust and other recorded specific liens, shall be determined by reference to the date and time of docketing of judgment or certificate of tax liability or the levy under execution or tax warrant. Provided further, that in the event any taxpayer shall execute an assignment for the benefit of creditors, or if receivership, a creditor's bill or other insolvency proceedings are instituted against any taxpayer indebted in the State on account of any taxes levied by the State, the lien of State taxes shall attach to any and all property of such taxpayer or of such insolvent's estate as of the date and time of the execution of the assignment for the benefit of creditors or of the institution of proceedings herein mentioned and shall be subject only to prior recorded specific liens and reasonable costs of administration. Notwithstanding the provisions of this paragraph, the provisions contained in G.S. 105-164.38 shall remain in full force and effect with respect to the lien of sales taxes.

The provisions of this section shall not have the effect of releasing any lien for State taxes imposed by other law, nor shall they have the effect of postponing the payment of the said State taxes or depriving the said State taxes of any priority in order of payment provided in any other statute under which payment of the said taxes may be required. (1939, c. 158, s. 912; 1949, c. 392, s. 6; 1957, c. 1340, s. 5.)

Editor's Note. — For brief comment on the 1949 amendment which rewrote the section, see 27 N.C.L. Rev. 485.

Purchase of Warehouse Receipt without Knowledge of Lien Senior in Time. — Under this section a lien for State taxes on personal property is not enforceable against a bona fide purchaser for value, except upon a levy upon such property under an execution or a tax warrant; but when a tax lien is perfected, it is, by § 105-356(b), superior to all other liens or rights prior or subsequent in time. By § 25-7-502(1)(c) a bona fide purchaser of a warehouse receipt acquires good title against a lien senior in time of which the purchaser had no notice. Thus, an enforceable lien on oil stored in North Carolina would not arise until it was executed on; but it could not be attached when a warehouse receipt therefor was in the hands of one who purchased it not knowing of

the lien. Davenport v. Ralph N. Peters & Co., 386 F.2d 199 (4th Cir. 1967).

Fiscal Year and Tax Year. — Welding this and § 153-114 together by established rules of correct interpretation, the fiscal year and the tax year are coterminous and coincident, and the liability of the landowner for taxes for any year arises and begins on July 1 of that year. State v. Champion Fibre Co., 204 N.C. 295, 168 S.E. 207 (1933).

Applied in City of Winston-Salem v. Powell Paving Co., 7 F. Supp. 424 (M.D.N.C. 1934).

§ 105-241.1. Additional taxes; assessment procedure.—(a) If the Commissioner of Revenue discovers from the examination of any return or otherwise that any tax or additional tax is due from any taxpayer, he shall give notice to the taxpayer in writing of the kind and amount of tax which is due and of his intent to assess the same, which notice shall contain advice to the effect that unless application for a hearing is made within the time specified in subsection (c), the proposed assessment will become conclusive and final.

If the Commissioner is unable to obtain from the taxpayer adequate and reliable information upon which to base such assessment, the assessment may be made upon the basis of the best information available and, subject to the provisions hereinafter made, such assessment shall be deemed correct.

(b) The notice required to be given in subsection (a) may be delivered to the taxpayer by an agent of the Commissioner or may be sent by mail to the last known address of the taxpayer and such notice will be deemed to have been received in due course of the mail unless the taxpayer shall make an affidavit to the contrary within 90 days after such notice is mailed, in which event the taxpayer shall be heard by the Commissioner in all respects as if he had made timely application.

(c) Any taxpayer who objects to a proposed assessment of tax or additional tax shall be entitled to a hearing before the Commissioner of Revenue provided application therefor is made in writing within 30 days after the mailing or delivery of the notice required by subsection (a). If application for a hearing is made in due time, the Commissioner of Revenue shall set a time and place for the hearing and after considering the taxpayer's objections shall give written notice of his decision to the taxpayer. The amount of tax or additional tax due from the taxpayer as finally determined by the Commissioner shall thereupon be assessed and upon assessment shall become immediately due and collectible.

Provided, the taxpayer may request the Commissioner at any time within 30 days of notice of such proposed assessment for a written statement, or transcript, of the information and the evidence upon which the proposed assessment is based, and the Commissioner of Revenue shall furnish such statement, or transcript, to the taxpayer. Provided, further, after request by the taxpayer for such written statement, or transcript, the taxpayer shall have 30 days after the receipt of the same from the Commissioner of Revenue to apply in writing for such hearing, explaining in detail his objections to such proposed assessment. If no request for such hearing is so made, such proposed assessment shall be final and conclusive.

Provided, the taxpayer may make a written waiver of any of the limitations of time set out in this section, for either a definite or indefinite time, and if such waiver is accepted by the Commissioner he may institute assessment procedures at any time within the time extended by such waiver. This proviso shall apply to assessments made or undertaken under any provision of all schedules of the Revenue Act, and to assessments under Subchapter V of Chapter 105 and Chapter 18 of the General Statutes.

(d) If no timely application for a hearing is made within 30 days after notice of a proposed assessment of tax or additional tax is given pursuant to subsection (a), such proposed tax or additional tax assessment shall become final without further notice and shall be immediately due and collectible.

(e) Where a proper application for a license or a return has been filed and in the absence of fraud, the Commissioner of Revenue shall assess any tax or additional tax due from a taxpayer within three years after the date upon

which such application or return is filed or within three years after the date upon which such application or return was required by law to be filed, whichever is the later. If no proper application for a license or no return has been filed, and in the absence of fraud, any tax or additional tax due from a taxpayer may be assessed at any time within five years after the date upon which such application or return was required by law to be filed. In the event a false and fraudulent application or return has been filed or there has been an attempt in any manner to fraudulently defeat or evade tax, any tax or additional tax due from the taxpayer may be assessed at any time.

(f) Except as hereinafter provided in subsection (g), the Commissioner of Revenue shall have no authority to assess any tax or additional tax under this section until the notice required by subsection (a) shall have been given and the period within which an application for a hearing may be filed has expired, or if a timely application for a hearing is filed, until written notice of the Commissioner's decision has been given to the taxpayer, provided, however, that if the notice required by subsection (a) shall be mailed or delivered within the limitation prescribed in subsection (e), such limitation shall be deemed to have been complied with and the proceeding may be carried forward to its conclusion.

(g) Notwithstanding any other provision of this section, the Commissioner of Revenue shall have authority at any time within the applicable period of limitations to proceed at once to assess any tax or additional tax which he finds is due from a taxpayer if, in his opinion, the collection of such tax is in jeopardy and immediate assessment is necessary in order to protect the interest of the State, provided, however, that if an assessment is made pursuant to the authority set forth in this subsection before the notice required by subsection (a) is given, such assessment shall not be valid unless the notice required by subsection (a) shall be given within 30 days after the date of such assessment.

(h) The provisions of Article 33A of Chapter 143 of the General Statutes shall not apply to hearings before the Commissioner of Revenue held pursuant to this section, but the provisions of G.S. 105-241.2, 105-241.3 and 105-241.4 with respect to review and appeal shall apply to any tax or additional tax assessed pursuant to this section.

(i) All assessments of taxes or additional taxes (exclusive of penalties assessed thereon) shall bear interest at the rate of one-half percent (1/2%) per month or fraction thereof from the time said taxes or additional taxes were due to have been paid until paid.

(j) This section is in addition to and not in substitution of any other provision of the General Statutes relative to the assessment and collection of taxes and shall not be construed as repealing any other provision of the General Statutes. (1949, c. 392, s. 6; 1951, c. 643, s. 9; 1955, c. 1350, s. 23; 1957, c. 1340, s. 10; 1959, c. 1259, s. 8; 1969, c. 1132, s. 1.)

Cross Reference. — See note to § 105-266.1.

Editor's Note. — The 1969 amendment added the provision as to Article 33A of Chapter 143 at the beginning of subsection (h).

Chapter 18 of the General Statutes, referred to near the end of subsection (c), was repealed by Session Laws 1971, c. 872, s. 3. For provisions covering the subject matter of the repealed Chapter, see Chapter 18A and §§ 105-113.68 to 105-113.104.

The statute of limitations set forth in subsection (e) runs against the sovereign since it is expressly named therein. Colonial Pipeline Co. v. Clayton, 275 N.C. 215, 166 S.E.2d 671 (1969).

Hence, where taxpayer filed timely use tax returns and remitted the amounts covered by the returns, subsection (e) bars an action by the Commissioner of Revenue for underpayment of use taxes which accrued more than three years prior to the date that notice of assessment for underpayment of use taxes was furnished to the taxpayer. Colonial Pipeline Co. v. Clayton, 275 N.C. 215, 166 S.E.2d 671 (1969).

Applied in Brauff v. Commissioner of Revenue, 251 N.C. 452, 111 S.E.2d 620 (1959); Hatteras Yacht Co. v. High, 265 N.C. 653, 144 S.E.2d 821 (1965).

Cited in Gill v. Smith, 233 N.C. 50, 62 S.E.2d 544 (1950); In re Halifax Paper Co., 259 N.C. 589, 131 S.E.2d 441 (1963); In re Carolina Tel. & Tel. Co., 1 N.C. App. 133, 160 S.E.2d 128 (1968); Ward v. Clayton, 5 N.C. App. 53, 167 S.E.2d 808 (1969).

§ 105-241.2. Administrative review.—(a) Without having to pay the tax or additional tax assessed by the Commissioner under this Chapter, any taxpayer may secure from the Tax Review Board an administrative review with respect to his liability for the tax or additional tax assessed by the Commissioner. Such a review may be obtained only if the taxpayer has obtained a hearing before the Commissioner and the Commissioner has rendered a final decision with respect to the taxpayer's liability. To obtain such review the taxpayer shall:

(1) File with the Tax Review Board, with a copy to the Commissioner, notice of intent to file a petition for review, such notice to be filed within 30 days after notice of the Commissioner's final decision is issued; and

(2) File with the Tax Review Board, with a copy to the Commissioner, a petition requesting administrative review and stating in concise terms the grounds upon which review is sought, such petition to be filed within 60 days after the expiration of the period provided in subdivision (1) for filing of notice of intent to petition for review.

(b) Upon receipt by the Commissioner of the taxpayer's petition, the Commissioner shall transmit to the Tax Review Board all of the records, data, evidence and other materials which he has pertaining to the matters which the Tax Review Board is being requested by the taxpayer to review. He shall also transmit to the Board a copy of his decision respecting such matters. The Tax Review Board shall fix a time for reviewing the Commissioner's decision and shall hear the same in the City of Raleigh. The Board shall give notice of the time and place of such hearing to the petitioner and to the Commissioner at least 10 days prior thereto. Officers and employees of the Revenue Department, when so requested by the Board, shall attend hearings on such reviews and shall furnish the Board with all information they have respecting the asserted liability. The Tax Review Board may establish by regulation the procedure to be followed in hearings before it and is authorized to establish by regulations a schedule of costs of the proceedings. At least two members of the Board shall sit at the hearing and all members shall consider and decide the matters on review. The Board shall confirm, modify, reverse, reduce, or increase the assessment or decision of the Commissioner; and it shall furnish a written copy of its order to the Commissioner and shall serve a written copy of its order upon the taxpayer by personal service or by registered mail (return receipt requested). In the event the decision of the Tax Review Board should not result in a reduction of the tax liability asserted by the Commissioner to be due, or if the Tax Review Board should dismiss the petition under the provisions of subsection (c) of this section, the costs of the proceeding shall be added to and shall become a part of the tax liability to be collected by the Commissioner. In the event the decision of the Tax Review Board should result in a reduction of the tax liability asserted by the Commissioner to be due, no costs shall be taxed against the taxpayer.

(c) Upon receipt of a petition requesting administrative review as provided in the preceding subsection, the Tax Review Board shall examine the petition and the records and other data transmitted by the Commissioner pertaining to the matter for which review is sought, and if it should appear from such records and data that the petition is frivolous or filed for purpose of delay, the Tax Review Board shall dismiss the petition for review and, in addition, is authorized, in its discretion, to impose a penalty not to exceed one hundred dollars ($100.00), which penalty shall be in addition to the tax, penalties, interests, and costs, and shall be collected in the same manner as the principal tax liability.

(d) Any taxpayer may also apply to the Tax Review Board under the provisions of this section for administrative review of the decision of the Commissioner of Revenue with respect to an alleged overpayment of tax imposed by this Chapter provided such taxpayer has filed a demand in writing

for refund of such overpayment within the time allowed by law for the filing of such demand and the Commissioner has issued a decision denying the claimed refund. To obtain such review the taxpayer shall file notice of intent to petition for review with the Tax Review Board, with copy to the Commissioner, within 30 days after issuance of the Commissioner's decision. The taxpayer shall also perfect the application for review by filing with the Tax Review Board, with a copy to the Commissioner, a petition requesting administrative review and stating in concise terms the grounds upon which review is sought. Such petition shall be filed within 60 days after expiration of the period provided for filing notice of intent to petition for review. The Tax Review Board shall consider and dispose of the petition for review in the manner provided in subsection (b) for the consideration and disposition of petitions for review of any tax or additional tax assessed by the Commissioner. No costs shall, however, be taxed against the taxpayer if the decision of the Tax Review Board results in a refund to the taxpayer. Any overpayment of tax determined by the decision of the Tax Review Board, together with interest thereon at the rate and for the period provided under G.S. 105-266, shall be refunded by the State.

(e) At any time the Commissioner of Revenue shall have authority, if in his opinion, such action is necessary for the protection of the interest of the State, to proceed at once to levy the assessment for the amount of the tax against the property of the taxpayer seeking the administrative review. In levying said assessment the Commissioner shall make a certificate setting forth the essential parts relating to the tax, including the amount thereof asserted to be due, the date when same is asserted to have become due and payable, the person, firm, or corporation chargeable therewith, and the nature of the tax. Under his hand and seal the Commissioner shall transmit said certificate to the clerk of the superior court of any county in which the taxpayer resides or has property; whereupon, it shall be the duty of the clerk of the superior court of the county to docket the said certificate and to index the same on the cross index of judgments. When so docketed and indexed, said certificate of tax liability shall constitute a lien upon the property of the taxpayer to the same extent as that provided for by G.S. 105-241. No execution shall issue on said certificate before final determination of the administrative review by the Tax Review Board; provided, however, if the Commissioner determines that the collection of the tax would be jeopardized by delay, he may cause execution to be issued, as provided in this Chapter, immediately against the personal property of the taxpayer unless the taxpayer files with the Commissioner a bond in the amount of the asserted liability for tax, penalty and interest. If upon such final administrative determination the tax asserted or any part thereof is sustained, execution may issue on said certificate at the request of the Commissioner of Revenue, and the sheriff shall proceed to advertise and sell the property of the taxpayer.

(f) Taxpayers seeking administrative review of liability decisions of the Commissioner of Insurance under Article 8B of this Subchapter shall follow the procedure prescribed in subsection (a) of this section for taxpayers seeking administrative review of decisions of the Commissioner of Revenue. In such cases all provisions of this section referring to the Commissioner of Revenue shall be considered as applying to the Commissioner of Insurance. (1955, c. 1350, s. 5; 1957, c. 1340, s. 10.)

Cross Reference. — See notes to §§ 105-262, 105-266.1.

This Section and § 105-241.3 Give Taxpayer Benefit of § 143-306 et seq. — The legislature of 1955 took recognition of the fact that the remedy afforded by § 105-267 may at times place an undue burden on the taxpayer, and broadened the provisions by which a taxpayer may have his liability determined. Sections 143-306 to 143-316 permit judicial review of any decision rendered by an administrative agency in a proceeding in which the legal rights of specific parties are determined after an agency hearing. In this section and § 105-241.3 the legislature gave a person charged with tax liability the benefit of § 143-306 et seq. Duke v. State, 247 N.C. 236, 100 S.E.2d 506 (1957).

Procedure. — When the Commissioner has

determined a tax liability exists, the person assessed may, without the payment of the tax so assessed, apply to the Tax Review Board for a determination of his tax liability. The Board, after a review of the factual situation and the application of the statute to that situation, renders its decision. If not satisfied with the decision of the Tax Review Board, the taxpayer may take an appeal by complying with statutory procedure and without the payment of the tax. This appeal is to the superior court under § 105-241.3. The jurisdiction thus conferred on the superior court is not original but appellate. Duke v. State, 247 N.C. 236, 100 S.E.2d 506 (1957).

Board May Not Pass on Constitutionality of Statute. — This section and § 105-241.3 do not give the administrative board authority or jurisdiction to pass on the constitutionality of a statute. Great Am. Ins. Co. v. Gold, 254 N.C. 168, 118 S.E.2d 792 (1961).

Applied in Piedmont Canteen Serv., Inc. v. Johnson, 256 N.C. 155, 123 S.E.2d 582 (1962); In re Sing Oil Co., 263 N.C. 520, 139 S.E.2d 599 (1965); In re Housing Authority, 265 N.C. 719, 144 S.E.2d 904 (1965).

Cited in In re Halifax Paper Co., 259 N.C. 589, 131 S.E.2d 441 (1963); In re Newsom Oil Co., 273 N.C. 383, 160 S.E.2d 98 (1968); Colonial Pipeline Co. v. Clayton, 275 N.C. 215, 166 S.E.2d 671 (1969).

§ 105-241.3. Appeal without payment of tax from Tax Review Board decision.—(a) Any taxpayer aggrieved by the decision of the Tax Review Board may, upon payment of the tax, penalties and interest asserted to be due or upon filing with the Commissioner a bond in such form as the Commissioner may prescribe in the amount of said taxes, penalties and interest conditioned on payment of any liability found to be due on an appeal, appeal said decision to the superior court under the provisions of Article 33 of Chapter 143 of the General Statutes; provided, neither this section nor the provisions of Article 33 of Chapter 143 shall be construed to prohibit a jeopardy assessment and execution made in accordance with the provisions of G.S. 105-241.2.

(b) When an appeal is taken under this section from the Tax Review Board's dismissal of a petition for administrative review under the provisions of G.S. 105-241.2(c), the question of appeal shall be limited to a determination of whether the Tax Review Board erred in its dismissal, and in the event that the court finds error, the case shall be remanded to the Tax Review Board to be heard. (1955, c. 1350, s. 6; 1957, c. 1340, s. 10.)

Cross Reference. — See note to §§ 105-241.2, 105-241.4.

Board May Not Pass on Constitutionality of Statute. — See same catchline under § 105-241.2.

This section and § 143-307 are in pari materia and it is the court's duty to give effect to both if possible. In re Halifax Paper Co., 259 N.C. 589, 131 S.E.2d 441 (1963).

Decisions of Tax Review Board Are Subject to Review Only Pursuant to Chapter 143, Article 33. — The Tax Review Board is an "administrative agency" within the purview of § 143-306. It is an agency of the executive branch of the State government, has no authority or duties with respect to the granting or revocation of licenses, and its decisions are not subject to review under any statute or statutes other than Chapter 143, Article 33. In re Halifax Paper Co., 259 N.C. 589, 131 S.E.2d 441 (1963).

This Section Gives No Right of Appeal to Commissioner of Revenue. — The Commissioner of Revenue has no right to appeal from the decision of the Review Board pursuant to any provision of this section. If he has a right of appeal it is by virtue of Chapter 143, Article 33. In re Halifax Paper Co., 259 N.C. 589, 131 S.E.2d 441 (1963).

But He Is Entitled to Appeal under § 143-307. — The Tax Review Board is an administrative agency of the State within the purview of § 143-306 and the Commissioner of Revenue is entitled to appeal under § 143-307 from a decision of the Board reversing in part an assessment of taxes made by the Commissioner. This section does not impliedly amend the prior statute so as to preclude the right of the Commissioner to appeal, but the two statutes must be construed together and effect given the provisions of both. In re Halifax Paper Co., 259 N.C. 589, 131 S.E.2d 441 (1963).

Applied in In re Sing Oil Co., 263 N.C. 520, 139 S.E.2d 599 (1965); In re Housing Authority, 265 N.C. 719, 144 S.E.2d 904 (1965).

Cited in State ex rel. North Carolina Util. Comm'n v. Old Fort Finishing Plant, 264 N.C. 416, 142 S.E.2d 8 (1965); In re Newsom Oil Co., 273 N.C. 383, 160 S.E.2d 98 (1968).

§ 105-241.4. Action to recover tax paid.—Within 30 days after notification of the Commissioner's decision with respect to liability under this Subchapter or under Article 36 of Subchapter V, any taxpayer aggrieved thereby, in lieu of

petitioning for administrative review thereof by the Tax Review Board under G.S. 105-241.2, may pay the tax and bring a civil action for its recovery as provided in G.S. 105-267.

Any taxpayer who has obtained an administrative review by the Tax Review Board as provided by G.S. 105-241.2 and who is aggrieved by the decision of the said Board may, in lieu of appealing pursuant to the provisions of G.S. 105-241.3, within 30 days after notification of the Board's decision with respect to liability pay the tax and bring a civil action for its recovery as provided in G.S. 105-267.

Either party may appeal to the appellate division from the judgment of the superior court under the rules and regulations prescribed by law for appeals, except that the Commissioner, if he should appeal, shall not be required to give any undertaking or make any deposit to secure the cost of such appeal.

Any taxes, interest or penalties paid and found by the court to be in excess of those which can be properly assessed shall be ordered refunded to the taxpayer with interest from time of payment. (1955, c. 1350, s. 7; 1957, c. 1340, s. 10; 1967, c. 1110, s. 9; 1969, c. 44, s. 65.)

Editor's Note. — The 1969 amendment substituted "appellate division" for "Supreme Court" in the third paragraph.

Taxpayer May Abandon Administrative Review and Seek Relief under Section. — Having taken advantage of the opportunity for a review by the Tax Review Board under § 105-241.2, the person assessed may, if he so elects, abandon the process of administrative review and seek relief from the superior court under its original jurisdiction. Of course, if he asks the superior court to exercise its original jurisdiction he must, as a condition precedent thereto, pay his tax under protest and sue to recover as provided by § 105-267. Duke v. State, 247 N.C. 236, 100 S.E.2d 506 (1957).

Appeal to Supreme Court. — It is immaterial whether the superior court determines the taxpayer's liability in an action originally instituted in that court or as an appellate court. The taxpayer is permitted in either event to review the judgment by appeal to the Supreme Court under this section. Duke v. State, 247 N.C. 236, 100 S.E.2d 506 (1957), decided prior to the 1969 amendment.

Applied in Boylan-Pearce, Inc. v. Johnson, 257 N.C. 582, 126 S.E.2d 492 (1962).

§ 105-242. Warrant for the collection of taxes; certificate or judgment for taxes.—(a) If any tax imposed by this Subchapter, or any other tax levied by the State and payable to the Commissioner of Revenue, or any portion of such tax be not paid within 30 days after the same becomes due and payable, and after the same has been assessed, the Commissioner of Revenue shall issue an order under his hand and official seal, directed to the sheriff of any county of the State, commanding him to levy upon and sell the real and personal property of the taxpayer found within his county for the payment of the amount thereof, with the added penalties, additional taxes, interest, and cost of executing the same, and to return to the Commissioner of Revenue the money collected by virtue thereof within a time to be therein specified, not less than 60 days from the date of the order. The said sheriff shall, thereupon, proceed upon the same in all respects with like effect and in the same manner prescribed by law in respect to executions issued against property upon judgments of a court of record, and shall be entitled to the same fees for his services in executing the order, to be collected in the same manner.

(b) Bank deposits, rents, salaries, wages, and all other choses in action or property incapable of manual levy or delivery, hereinafter called the intangible, belonging, owing, or to become due to any taxpayer subject to any of the provisions of this Subchapter, or which has been transferred by such taxpayer under circumstances which would permit it to be levied upon if it were tangible, shall be subject to attachment or garnishment as herein provided, and the person owing said intangible, matured or unmatured, or having same in his possession or control, hereinafter called the garnishee, shall become liable for all sums due by the taxpayer under this Subchapter to the extent of the amount of the intangible belonging, owing, or to become due to the taxpayer subject to the setoff of any matured or unmatured indebtedness

of the taxpayer to the garnishee; provided, however, the garnishee shall not become liable for any sums represented by or held pursuant to any negotiable instrument issued and delivered by the garnishee to the taxpayer and negotiated by the taxpayer to a bona fide holder in due course, and whenever any sums due by the taxpayer and subject to garnishment are so held or represented, the garnishee shall hold such sums for payment to the Commissioner of Revenue upon the garnishee's receipt of such negotiable instrument, unless such instrument is presented to the garnishee for payment by a bona fide holder in due course in which event such sums may be paid in accordance with such instrument to such holder in due course. To effect such attachment or garnishment the Commissioner of Revenue shall serve or cause to be served upon the taxpayer and the garnishee a notice as hereinafter provided, which notice may be served by any deputy or employee of the Commissioner of Revenue or by any officer having authority to serve summonses. Provided, if the taxpayer no longer resides within North Carolina or cannot be located therein the notice may be served upon the taxpayer by registered or certified mail, return receipt requested, and such service shall be conclusively presumed to have been made upon the exhibition of the return receipt. Said notice shall show:

(1) The name of the taxpayer and his address, if known;

(2) The nature and amount of the tax, and the interest and penalties thereon, and the year or years for which the same were levied or assessed, and

(3) Shall be accompanied by a copy of this subsection, and thereupon the procedure shall be as follows:

If the garnishee has no defense to offer or no setoff against the taxpayer, he shall within 10 days after service of said notice, answer the same by sending to the Commissioner of Revenue by registered mail a statement to that effect, and if the amount due or belonging to the taxpayer is then due or subject to his demand, it shall be remitted to the Commissioner with said statement, but if said amount is to mature in the future, the statement shall set forth that fact and the same shall be paid to the Commissioner upon maturity, and any payment by the garnishee hereunder shall be a complete extinguishment of any liability therefor on his part to the taxpayer. If the garnishee has any defense or setoff, he shall state the same in writing under oath, and, within 10 days after service of said notice, shall send two copies of said statement to the Commissioner by registered mail; if the Commissioner admits such defense or setoff, he shall so advise the garnishee in writing within 10 days after receipt of such statement and the attachment or garnishment shall thereupon be discharged to the amount required by such defense or setoff, and any amount attached or garnished hereunder which is not affected by such defense or setoff shall be remitted to the Commissioner as above provided in cases where the garnishee has no defense or setoff, and with like effect. If the Commissioner shall not admit the defense or setoff, he shall set forth in writing his objections thereto and shall send a copy thereof to the garnishee within 10 days after receipt of the garnishee's statement, or within such further time as may be agreed on by the garnishee, and at the same time he shall file a copy of said notice, a copy of the garnishee's statement, and a copy of his objections thereto in the superior court of the county where the garnishee resides or does business where the issues made shall be tried as in civil actions.

If judgment is entered in favor of the Commissioner of Revenue by default or after hearing, the garnishee shall become liable for the taxes, interest and penalties due by the taxpayer to the extent of the amount over and above any defense or setoff of the garnishee belonging, owing, or to become due to the taxpayer, but payments shall not be required from amounts which are to become due to the taxpayer until the maturity thereof, nor shall more than 10 percent of any taxpayer's salary or wages be required to be paid hereunder in

any one month. The garnishee may satisfy said judgment upon paying said amount, and if he fails to do so, execution may issue as provided by law. From any judgment or order entered upon such hearing either the Commissioner of Revenue or the garnishee may appeal as provided by law. If, before or after judgment, adequate security is filed for the payment of said taxes, interest, penalties, and costs, the attachment or garnishment may be released or execution stayed pending appeal, but the final judgment shall be paid or enforced as above provided. The taxpayer's sole remedies to question his liability for said taxes, interest, and penalties shall be those provided in this Subchapter, as now or hereafter amended or supplemented. If any third person claims any intangible attached or garnished hereunder and his lawful right thereto, or to any part thereof, is shown to the Commissioner, he shall discharge the attachment or garnishment to the extent necessary to protect such right, and if such right is asserted after the filing of said copies as aforesaid, it may be established by interpleader as now or hereafter provided by law in cases of attachment and garnishment. In case such third party has no notice of proceedings hereunder, he shall have the right to file his petition under oath with the Commissioner at any time within 12 months after said intangible is paid to him and if the Commissioner finds that such party is lawfully entitled thereto or to any part thereof, he shall pay the same to such party as provided for refunds by G.S. 105-407, and if such payment is denied, said party may appeal from the determination of the Commissioner under the provisions of G.S. 105-241.4; provided, that in taking an appeal to the superior court, said party may appeal either to the Superior Court of Wake County or to the superior court of the county wherein he resides or does business. The intangibles of a taxpayer shall be paid or collected hereunder only to the extent necessary to satisfy said taxes, interest, penalties, and costs. Except as hereinafter set forth, the remedy provided in this section shall not be resorted to unless a warrant for collection or execution against the taxpayer has been returned unsatisfied: Provided, however, if the Commissioner is of opinion that the only effective remedy is that herein provided, it shall not be necessary that a warrant for collection or execution shall be first returned unsatisfied, and in no case shall it be a defense to the remedy herein provided that a warrant for collection or execution has not been first returned unsatisfied.

This subsection shall be applicable with respect to the wages, salary or other compensation of officials and employees of this State and its agencies and instrumentalities, officials and employees of political subdivisions of this State and their agencies and instrumentalities, and also officials and employees of the United States and its agencies and instrumentalities insofar as the same is permitted by the Constitution and laws of the United States. In the case of State or federal employees, the notice shall be served upon such employee and upon the head or chief officer of the department, agency, instrumentality or institution by which the taxpayer is employed. In case the taxpayer is an employee of a political subdivision of the State, the notice shall be served upon such employee and upon the chief fiscal officer, or any officer or person charged with making up the payrolls, or disbursing funds, of the political subdivision by which the taxpayer is employed. Such head or chief officer or fiscal officer or other person as specified above shall thereafter, subject to the limitations herein provided, make deductions from the salary or wages due or to become due the taxpayer and remit same to the Commissioner until the tax, penalty, interest and costs allowed by law are fully paid. Such deductions and remittances shall, pro tanto, constitute a satisfaction of the salary or wages due the taxpayer.

(c) In addition to the remedy herein provided, the Commissioner of Revenue is authorized and empowered to make a certificate setting forth the essential particulars relating to the said tax, including the amount thereof, the date

when the same was due and payable, the person, firm, or corporation chargeable therewith, and the nature of the tax, and under his hand and seal transmit the same to the clerk of the superior court of any county in which the delinquent taxpayer resides or has property; whereupon, it shall be the duty of the clerk of the superior court of the county to docket the said certificate and index the same on the cross index of judgments, and execution may issue thereon with the same force and effect as an execution upon any other judgment of the superior court (said tax shall become a lien on realty only from the date of the docketing of such certificate in the office of the clerk of the superior court and on personalty only from the date of the levy on such personalty and upon the execution thereon no homestead or personal property exemption shall be allowed).

Except as provided in subsection (e) of G.S. 105-241.2, no sale of real or personal property shall be made under any execution issued on a certificate docketed pursuant to the provisions of this subsection before the administrative action of the Commissioner of Revenue or the Tax Review Board is completed when a hearing has been requested of the Commissioner or a petition for review has been filed with the Tax Review Board, nor shall such sale be made before the assessment on which the certificate is based becomes final when there is no request for a hearing before the Commissioner or petition for review by the Tax Review Board. Neither the title to real estate nor to personal property sold under execution issued upon a certificate docketed under this subsection shall be drawn in question upon the ground that the administrative action contemplated by this paragraph was not completed prior to the sale of such property under execution. Nothing in this paragraph shall prevent the sheriff to whom an execution is issued from levying upon either real or personal property pending an administrative determination of tax liability and, in the case of personal property, the sheriff may hold such property in his custody or may restore the execution defendant to the possession thereof upon the giving of a sufficient forthcoming bond. Upon a final administrative determination of the tax liability being had, if the assessment or any part thereof is sustained, the sheriff shall, upon request of the Commissioner of Revenue, proceed to advertise and sell the property under the original execution notwithstanding the original return date of the execution may have expired.

A certificate or judgment in favor of the State or the Commissioner of Revenue for taxes payable to the Department of Revenue, whether docketed before or after the effective date of this paragraph, shall be valid and enforceable for a period of 10 years from the date of docketing. When any such certificate or judgment, whether docketed before or after the effective date of this paragraph, remains unsatisfied for 10 years from the date of its docketing, the same shall be unenforceable and the tax represented thereby shall abate. Upon the expiration of said 10-year period, the Commissioner of Revenue or his duly authorized deputy shall cancel of record said certificate or judgment. Any such certificate or judgment now on record which has been docketed for more than 10 years shall, upon the request of any interested party, be canceled of record by the Commissioner of Revenue or his duly authorized deputy; provided, in the event of the death of the judgment debtor or his absence from the State before the expiration of the 10-year period herein provided, the running of said 10-year period shall be stopped for the period of his absence from the State or during the pendency of the settlement of the estate and for one year thereafter, and the time elapsed during the pendency of any action or actions to set aside the judgment debtor's conveyance or conveyances as fraudulent, or the time during the pendency of any insolvency proceeding, or the time during the existence of any statutory or judicial bar to the enforcement of the judgment shall not be counted in computing the running of said 10-year period. And, provided further, that any execution sale which has

been instituted upon any such judgment before the expiration of the 10-year period may be completed after the expiration of the 10-year period, notwithstanding the fact that resales may be required because of the posting of increased bids. Provided further, that, notwithstanding the expiration of the 10-year period provided and notwithstanding the fact that no proceedings to collect the judgment by execution or otherwise has been commenced within the 10-year period, the Commissioner of Revenue may accept any payments tendered upon said judgments after the expiration of said 10-year period.

If the Commissioner of Revenue shall find that it will be for the best interest of the State in that it will probably facilitate, expedite or enhance the State's chances for ultimately collecting a tax due the State, he may authorize a deputy or agent to release the lien of a State tax judgment or certificate of tax liability upon a specified parcel or parcels of real estate by noting such release upon the judgment docket where such certificate of tax liability is recorded. Such release shall be signed by the deputy or agent and witnessed by the clerk of court or his deputy or assistant and shall be in substantially the following form: "The lien of this judgment upon (insert here a short description of the property to be released sufficient to identify it, such as a reference to a particular tract described in a recorded instrument) is hereby released, but this judgment shall continue in full force and effect as to other real property to which it has heretofore attached or may hereafter attach. This .... day of ...., 19....

.....

Deputy Collector N.C. Department of Revenue

WITNESS:

.....C.S.C."

The release shall be noted on the judgment docket only upon conditions prescribed by the Commissioner and shall have effect only as to the real estate described therein and shall not affect any other rights of the State under said judgment.

(d) The remedies herein given are cumulative and in addition to all other remedies provided by law for the collection of said taxes. (1939, c. 158, s. 913; 1941, c. 50, s. 10; 1949, c. 392, s. 6; 1951, c. 643, s. 9; 1955, c. 1285; c. 1350, s. 23; 1957, c. 1340, s. 10; 1959, c. 368; 1963, c. 1169, s. 6; 1969, c. 1071, s. 1.)

Cross Reference. — As to interpleader in cases of attachment and garnishment, see § 1-440.43.

Editor's Note. — The 1969 amendment added the proviso at the end of the first sentence of subsection (b). Section 2 of the amendatory act provides that the act does not apply to pending litigation.

Section 105-407, referred to in the third paragraph of subsection (b), was transferred to § 105-267.1 by Session Laws 1971, c. 806, s. 2.

Session Laws 1949, c. 392, s. 9, provides: "That except as otherwise expressly provided herein, this act shall take effect on and after July 1, 1949."

For comment on the 1941 amendment which inserted subsection (b), see 19 N.C.L. Rev. 541; on the 1949 amendment which added the third paragraph to subsection (c), see 27 N.C.L. Rev. 485.

Federal Tax Lien Entitled to Priority Where Taxpayer Insolvent. — A tax lien filed by the State of North Carolina under subsection (c) of this section is no more than a general lien, and thus, under 31 U.S.C.A. § 191, where taxpayer was insolvent within the meaning of that statute, the federal government's lien for unpaid income tax was entitled to priority though State lien for unpaid taxes was filed prior to date of federal tax lien. United States v. Williams, 139 F. Supp. 94 (M.D.N.C. 1956).

Remedies of Taxpayer. — Where the Commissioner of Revenue assesses additional income tax against a taxpayer in accordance with provisions of § 105-160, and has the certificate filed in the county in which the taxpayer has property for the purpose of creating a lien under subsection (c) of this section, the taxpayer may not move in such county to vacate and set aside the certificate on the ground of irregularity or invalidity, no execution having been issued thereon nor any effort made to enforce the lien, but the taxpayer is remitted to the statutory remedies given him to contest the assessment or attack its validity. Gill v. Smith, 233 N.C. 50, 62 S.E.2d 544 (1950).

Execution on Judgment under Subsection (c) Must Be Issued by Clerk. — Where the

Commissioner of Revenue has the clerk of a superior court to docket his certificate setting forth the tax due by a resident of the county pursuant to subsection (c) of this section, execution on such judgment directed to the sheriff of the county must be issued by the clerk of the superior court of the county, or in his name by a deputy or assistant clerk, and it cannot be issued by the Commissioner of Revenue. A sale under execution issued by the Commissioner is a nullity. Daniels v. Yelverton, 239 N.C. 54, 79 S.E.2d 311 (1953).

Garnishee Held Liable for Costs. — Where the Commissioner of Revenue has garnisheed a bank deposit for taxes due by the depositor, and the garnishee bank, in refusing to comply with the order, asserts no defense or setoff against the taxpayer, the bank, in the Commissioner's action to compel compliance, will be held liable also for the costs. Gill v. Bank of French Board, 230 N.C. 118, 52 S.E.2d 4 (1949).

§ 105-243. Taxes recoverable by action.—Upon the failure of any corporation to pay the taxes, fees, and penalties prescribed by this Subchapter, the Commissioner of Revenue may certify same to the sheriff of the county in which such company may own property, for collection as provided in this Subchapter; and if collection is not made, such taxes or fees and penalties thereon may be recovered in an action in the name of the State, which may be brought in the Superior Court of Wake County, or in any county in which such corporation is doing business, or any county in which such corporation owns property. The Attorney General, on request of the Commissioner of Revenue, shall institute such action in the Superior Court of Wake County, or of any such county as the Commissioner of Revenue may direct. In any such action it shall be sufficient to allege that the tax, fee, or penalty sought to be recovered is delinquent, and that the same has been unpaid for the period of 30 days after due date. (1939, c. 158, s. 914.)

§ 105-244. Additional remedies.—In addition to all other remedies for the collection of any taxes or fees due under the provisions of this Subchapter, the Attorney General shall, upon the request of the Commissioner of Revenue, whenever any taxes, fees, or penalties due under this Subchapter from any public utility (not an agency of interstate commerce) or corporation shall have remained unpaid for a period of 90 days, or whenever any corporation or public utility (not an agency of interstate commerce) has failed or neglected for 90 days to make or file any report or return required by this Subchapter, or to pay any penalty for failure to make or file such report or return, apply to the Superior Court of Wake County, or of any county in the State in which such public utility (not an agency of interstate commerce) or corporation is located or has an office or place of business, for an injunction to restrain such public utility (not an agency of interstate commerce) or corporation from the transaction of any business within the State until the payment of such taxes or fees and penalties thereon, or the making and filing of such report or return and payment of penalties for failure to make or file such report or return, and the cost of such application, which shall be fixed by the court. Such petition shall be in the name of the State; and if it is made to appear to the court, upon hearing, that such public utility (not an agency of interstate commerce) or corporation has failed or neglected, for 90 days, to pay such taxes, fees, or penalties thereon, or to make and file such reports, or to pay such penalties, for failure to make or file such reports or returns, such court shall grant and issue such injunction. (1939, c. 158, s. 915.)

§ 105-244.1. Cancellation of certain assessments.—The Commissioner of Revenue is hereby authorized, empowered and directed to cancel and abate all assessments made after October 16, 1940, for or on account of any tax owing to the State of North Carolina and which is payable to the Department of Revenue against any person who was killed while a member of the armed forces or who has a service connected disability as a result of which the United States is paying him disability compensation. This provision shall apply only to

assessments made after October 16, 1940, for taxes which were due prior to the time the taxpayer was inducted into the armed forces. If any such assessment is or has been paid, the Commissioner of Revenue may refund the amount paid but shall not add thereto any interest. (1949, c. 392, s. 6.)

§ **105-245. Failure of sheriff to execute order.**—If any sheriff of this State shall willfully fail, refuse, or neglect to execute any order directed to him by the Commissioner of Revenue and within the time provided in this Subchapter, the official bond of such sheriff shall be liable for the tax, penalty, interest, and cost due by the taxpayer. (1939, c. 158, s. 916.)

§ **105-246. Actions, when tried.** — All actions or processes brought in any of the superior courts of this State, under provisions of this Subchapter, shall have precedence over any other civil causes pending in such courts, and the courts shall always be deemed open for trial of any such action or proceeding brought therein. (1939, c. 158, s. 917.)

§ **105-247. Municipalities not to levy income and inheritance tax.** — No city, town, township, or county shall levy any tax on income or inheritance. (1939, c. 158, s. 918.)

§ **105-248. State taxes; purposes.**—The taxes levied in this Subchapter are for the expenses of the State government, the appropriations to its educational, charitable, and penal institutions, pensions for Confederate soldiers and widows, the interest on the debt of the State, for public schools, and other specific appropriations made by law, and shall be collected and paid into the general fund of the State Treasurer.

The taxes levied under authority of § 492 of Chapter 427 of the Public Laws of 1931, and remaining unpaid, shall be collected in the same manner as other county taxes and accounted for in the same manner as other taxes under the Daily Deposit Act. The county treasurer or other officer receiving such taxes in each county shall remit to the Treasurer of the State on the first and fifteenth days of each month all taxes collected up to the time of such remittance under the levy therein provided for, and such remittance to the State Treasurer shall also include the proportion of all poll taxes collected required by the Constitution of the State to be used for educational purposes.

The tax levy therein provided for shall be subject to the same discounts and penalties as provided by law for other county taxes, and there shall be allowed the same percentage for collecting such taxes as for other county taxes. The obligation to the State under the levy therein provided for shall run against all taxes that become delinquent; and with respect to any property that may be sold for taxes, any public officer receiving such delinquent taxes, when and if such property may be redeemed or such tax obligations in any manner satisfied, shall remit such proportionate part of such tax levy to the State Treasurer within 15 days after receipt of same. At the end of each fiscal year the county accountant shall furnish the State Treasurer a statement of the total amount of taxes levied in accordance with the provisions of this section, that are uncollected at the end of the fiscal year.

Whenever in any law or act of incorporation, granted either under the general law or by special act, there is any limitation or exemption of taxation, the same is hereby repealed, and all the property and effects of all such corporations, other than the bonds of this State and of the United States government, shall be liable to taxation, except property belonging to the United States and to municipal corporations, and property of churches, religious societies, charitable, educational, literary, or benevolent institutions or orders, and also cemeteries: Provided, that no property whatever, held or used for investment, speculation, or rent, shall be exempt, other than bonds of this State and of the United States government, unless said rent or the interest on or income from such investment shall be used exclusively for religious,

charitable, educational, or benevolent purposes, or the interest upon the bonded indebtedness of said religious, charitable, or benevolent institutions. (1939, c. 158, s. 919.)

Editor's Note.—See 12 N.C.L. Rev. 23.

§ 105-249. Free privilege licenses for blind people.—(a) Notwithstanding any other provisions of law, any blind person, of the age of 18 years or more, desiring to operate as sole proprietor a legitimate business, trade, employment or profession of any kind to provide a livelihood for himself and dependents, if any, shall be exempt from procuring any license, and from liability for paying any license tax or fee, required or levied by the State, or any department, licensing board, or commission thereof, or by any county or municipality in the State, for or in connection with the privilege of engaging in or carrying on such business, trade, employment or profession.

(b) The term "blind persons," as used herein, is defined to mean any person who is totally blind or whose central visual acuity does not exceed 20/200 in the better eye with correcting lenses, or where the widest diameter of visual field subtends an angle no greater than 20 degrees.

(c) The provisions of this section shall not extend to any such sole proprietor who shall permit more than one person other than himself to work regularly in connection with such business, trade, employment or profession for remuneration or recompense of any kind whatsoever, unless such other person in excess of one so remunerated shall be a blind person as defined in subsection (b), above.

(d) Every blind person operating said business, trade, employment or profession under the provisions of this section shall be required to keep at his place of business the statement of a qualified physician or optometrist that he is totally blind or that his central visual acuity does not exceed 20/200 in the better eye with correcting lenses, or that the widest diameter of the visual field does not subtend an angle greater than 20 degrees.

(e) This section shall not apply to N.C. sales tax or to licenses, taxes, and fees required or levied in connection with the manufacture, processing, handling or selling of intoxicating beverages, and shall not apply to any license issued only upon satisfactory completion of a qualification examination conducted by the State or any board or commission thereof.

(f) Any person violating the provisions of subsection (d) of this section shall be guilty of a misdemeanor and fined not to exceed twenty-five dollars ($25.00) for each offense. (1933, c. 53; 1935, c. 162; 1939, c. 306; 1943, c. 122; 1953, c. 1039, s. 1; 1971, c. 1231, s. 1.)

Editor's Note.—The 1971 amendment substituted "18" for "twenty-one" in subsection (a).

For comment on 1953 amendment which rewrote the section, see 31 N.C.L. Rev. 434 (1953).

§ 105-249.1. Members of armed forces and merchant marine exempt from license taxes and fees.—(a) License Taxes.—Any person serving in any branch of the armed forces of the United States or in the merchant marine during the period of such service shall be exempt from liability for any and all license taxes levied by the State or by any county or city in the State for the privilege of engaging in or carrying on any trade or profession in the State, which trade or profession such a person immediately prior to being called into such service was engaged in: Provided, that nothing herein contained shall relieve such person of any license tax for carrying on any trade or profession conducted through agents or employees or which is conducted in the name of and under the license of such person so entering into the service of the United States.

(b) License Fees.—Any person entering into the armed forces of the United States or in the merchant marine shall be during the period of such service exempt from paying any license fees to any licensing board or commission or to

the State of North Carolina in which the payment of such license fees is by law required as a condition to the continuance of the privilege to engage in any trade or profession. Such a person upon being discharged from such service shall have all the rights and privileges to engage in such profession upon payment of such fees as may thereafter become due, to the same extent as though such activity had not been suspended during the period of such service. (1943, c. 438, ss. 1, 2.)

§ 105-249.2. State taxes owed by members of armed forces; no interest or penalty to accrue while in combat zone.—Whenever any tax imposed by the State under the provisions of this Chapter is owed by any member of the armed forces of the United States who is serving in a combat zone, as the same is hereinafter defined, or who is hospitalized as a result of wounds, disease or injury incurred by serving in a combat zone during a period of induction, there shall be no interest or penalty assessed for taxes due during the period in which such member of the armed forces is in such combat zone, or is hospitalized as a result of wounds, disease or injury incurred while serving in such combat zone.

Combat zone is hereby defined as an area which the President of the United States by executive order has designated as an area in which the armed forces of the United States are, or have been, engaged in combat. The provisions of this section shall apply to any month or months during any part of which such member of the armed services served in a combat zone during an induction period; except that this section shall not apply for any month during any part of which there was no combat activities in the combat zone. (1967, c. 706, s. 1.)

§ 105-249.3. Exemption of pensions or compensations from taxation.—Every person receiving a pension or compensation from the State, or United States, or any foreign country or government, for and on account of wounds or physical disabilities contracted or sustained during the late war between the United States and Germany, and any of the allied countries cooperating with the United States, shall not be required to pay any tax of any kind upon such pension or compensation, but the same shall be exempted from any and all taxes. This section shall apply to all such taxes for the year 1923, and thereafter. The benefits of this section are hereby extended to and include those coming within the provisions of said section serving at any time between December 7, 1941 and the termination of World War II. (1923, c. 259; C. S., s. 5168(aa); 1945, c. 968, s. 2; 1971, c. 806, s. 2.)

Editor's Note. — This section was formerly § 105-344. It was transferred to its present position by Session Laws 1971, c. 806, s. 2, effective July 1, 1971.

§ 105-250. Law applicable to foreign corporations.—All foreign corporations, and the officers and agents thereof, doing business in this State, shall be subject to all the liabilities and restrictions that are or may be imposed upon corporations of like character, organized under the laws of this State, and shall have no other or greater powers. (1939, c. 158, s. 920.)

§ 105-250.1. Distributors of coin-operated machines required to make semiannual reports.—Every person, firm or corporation who or which owns and places on location other than on his or its own premises, under any lease or rental agreement, loan or otherwise, or which sells coin-operated machines or vending machines of any type whatsoever upon which a tax is levied under G.S. 105-65 and 105-65.1 of the General Statutes (or upon which a tax shall hereafter be levied), hereinafter referred to as a distributor, shall file a semiannual informational report with the Commissioner of Revenue, in duplicate, as of the first day of January and July of each year, setting out the following information:

(1) The name and address of the distributor making the report.

(2) A description of the principal business of such distributor.

(3) A list giving the location of each machine placed or remaining on

location under any lease or rental agreement, loan or other arrangement whatsoever, other than by sale, together with the type of each such machine and its serial or other identifying number: Provided that this subdivision (3) shall not be applicable to distributors or operators of soft drink dispensers who have complied with the provisions of G.S. 105-65.1(b)(1).

(4) A list giving the location of each machine theretofore sold by the distributor, (whether such sale was for cash, on open account, or under a conditional sale or other title retention contract), together with the type of each such machine and its serial or other identifying number. Provided, that machines sold by the distributor but known by him to be no longer in service need not be reported.

(5) A list giving the location of each machine, other than those described in subdivisions (3) and (4) above, for the sale or use by, for or in which the distributor sells, leases, services or in any manner furnishes any goods, wares, merchandise, records, equipment, accessories, supplies, parts or any services whatsoever, together with the type of each such machine and its serial or other identifying number.

Provided, that the report required to be made as of June 1, 1949, (or the first report made by any distributor) shall contain a complete and true list of all of the machines described in subdivisions (3), (4) and (5) above, together with the information required by said subdivisions, but the semiannual reports required to be made as of the first day of January and July thereafter need show only those machines placed on location or sold by the distributor or for which the distributor has begun furnishing supplies, equipment and other services since the date as of which the next preceding semiannual report was made.

As used herein, "location" shall include the name and address of the owner or operator of the place of business where the machine is located, or the address of the premises on which the machine is located and the name of the person principally responsible for the operation of the machine.

Each semiannual report required by this section shall be made to the license tax division of the Department of Revenue not later than 20 days after the date as of which each report is required to be made.

The Commissioner of Revenue is hereby authorized and empowered to prescribe forms to be used in making the reports required by this section.

Any distributor who shall fail to comply with the provisions of this section and who shall fail, without showing good cause therefor, to make timely, full and accurate reports shall be liable to a penalty equal to the amount of the tax on all the machines described in subdivisions (3) and (4), whether or not the distributor would otherwise be liable for the tax on such machines: Provided, that this shall not be construed as relieving the owner and/or operator of such machines of liability for any tax which may be due thereon. Provided further, if any person, firm or corporation required to make semiannual informational reports under this section shall fail to do so within the time herein specified, he or it shall be guilty of a misdemeanor and upon conviction, shall be fined or imprisoned in the discretion of the court, and in addition to such fine or imprisonment shall be required to pay the taxes and penalties herein set out. (1949, c. 392, s. 6; 1951, c. 643, s. 9; 1963, c. 294, s. 8; 1965, c. 1078, s. 2.)

The purpose of this section apparently is to enable the Commissioner of Revenue to be advised as to the number of machines placed on location by a distributor on whom would be imposed a tax for each dispensing machine as otherwise there would be no necessity for such a report from one who pays a single annual occupation license tax. Charlotte Coca-Cola Bottling Co. v. Shaw, 232 N.C. 307, 59 S.E.2d 819 (1950).

§ **105-251. Information must be furnished.**—Each company, firm, corporation, person, association, copartnership, or public utility shall furnish the Commissioner of Revenue in the form of returns prescribed by him, all information required by law and all other facts and information in addition to

the facts and information in this act specifically required to be given, which the Commissioner of Revenue may require to enable him to carry into effect the provisions of the laws which the said Commissioner is required to administer, and shall make specific answers to all questions submitted by the Commissioner of Revenue. (1939, c. 158, s. 921.)

§ **105-252. Returns required.**—Any company, firm, corporation, person, association, copartnership, or public utility receiving from the Commissioner of Revenue any blanks, requiring information, shall cause them to be properly filled out so as to answer fully and correctly each question therein propounded, and in case it is unable to answer any question, it shall, in writing, give a good and sufficient reason for such failure.

The answers to such questions shall be verified under oath by such persons, or by the president, secretary, superintendent, general manager, principal accounting officer, partner, or agent, and returned to the Commissioner of Revenue at his office within the period fixed by the Commissioner of Revenue. (1939, c. 158, s. 922.)

§ **105-253. Personal liability of officers, trustees, or receivers.** — Any officer, trustee, or receiver of any corporation required to file report with the Commissioner of Revenue, having in his custody funds of the corporation, who allows said funds to be paid out or distributed to the stockholders of said corporation without having satisfied the Commissioner of Revenue for any State taxes which are due and have accrued, shall be personally responsible for the payment of said tax, and in addition thereto shall be subject to a penalty of not more than the amount of the tax, nor less than twenty-five percent (25%) of such tax found to be due or accrued.

The Secretary of State shall withhold the issuance of any certificate of dissolution to, or withdrawal of, any corporation, domestic or foreign, until the receipt by him of a notice from the Commissioner of Revenue to the effect that any such corporation has met the requirements with respect to reports and taxes required by this Subchapter. (1939, c. 158, s. 923; 1941, c. 50, s. 10; 1955, c. 1350, s. 23.)

§ **105-254. Blanks furnished by Commissioner of Revenue.** — The Commissioner of Revenue shall cause to be prepared suitable blanks for carrying out the purposes of the laws which he is required to administer, and, on application, furnish such blanks to each company, firm, corporation, person, association, copartnership, or public utility subject thereto. (1939, c. 158, s. 924.)

§ **105-255. Commissioner of Revenue to keep records.** — The Commissioner of Revenue shall keep books of account and records of collections of taxes as may be prescribed by the Director of the Budget; shall keep an assessment roll for the taxes levied, assessed, and collected under this Subchapter, showing in same the name of each taxpayer, the amount of tax assessed against each, when assessed, the increase or decrease in such assessment; the penalties imposed and collected, and the total tax paid; and shall make monthly reports to the Director of the Budget and to the Auditor and/or State Treasurer of all collections of taxes on such forms as prescribed by the Director of the Budget. (1939, c. 158, s. 925.)

Cross Reference. — As to photographic reproductions of records of Department of Revenue, see § 8-45.3.

§ **105-256. Preparation and publication of statistics.**—The Commissioner of Revenue shall biennially, or more frequently if he so desires, prepare and publish reasonably available statistics dealing with the operation of this Subchapter and Subchapter V, including amounts collected, classifications of

taxpayers, income and exemptions, and such other facts as are deemed pertinent and valuable. (1939, c. 158, s. 926; 1955, c. 1350, s. 8.)

§ **105-257. Report to General Assembly on tax system.** — The Commissioner of Revenue shall biennially make report to the General Assembly, making such recommendations as he may consider useful in improving the tax laws and systems of this State. (1933, c. 88, s. 2; 1955, c. 1350, s. 9.)

Editor's Note.—See 11 N.C.L. Rev. 250.

§ **105-258. Powers of Commissioner of Revenue; who may sign and verify pleadings, legal documents, etc.**—The Commissioner of Revenue, for the purpose of ascertaining the correctness of any return, making a return where none has been made, or determining the liability of any person for any tax imposed by this Subchapter, or collecting any such tax, shall have the power to examine, personally, or by an agent designated by him, any books, papers, records, or other data which may be relevant or material to such inquiry, and the Commissioner may summon the person liable for the tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, care or control of books of account containing entries relevant or material to the income and expenditures of the person liable for the tax or required to perform the act, or any other person having knowledge in the premises, to appear before the Commissioner, or his agent, at a time and place named in the summons, and to produce such books, papers, records or other data, and to give such testimony under oath as may be relevant or material to such inquiry, and the Commissioner or his agent may administer oaths to such person or persons. If any person so summoned refuses to obey such summons or to give testimony when summoned, the Commissioner may apply to the Superior Court of Wake County for an order requiring such person or persons to comply with the summons of the Commissioner, and the failure to comply with such court order shall be punished as for contempt.

In any action, proceeding, or matter of any kind, to which the Commissioner of Revenue is a party or in which he may have an interest, all pleadings, legal notices, proofs of claim, warrants for collection, certificates of tax liability, executions, and other legal documents may be signed and verified on behalf of the Commissioner by the assistant commissioner or by any director or assistant director of any division of the Department of Revenue or by any other agent or employee of the Department so authorized by the Commissioner of Revenue. (1939, c. 158, s. 927; 1943, c. 400, s. 9; 1955, c. 435; 1959, c. 1259, s. 8A.)

§ **105-259. Secrecy required of officials; penalty for violation.** — Except in accordance with proper judicial order, or as otherwise provided by law, it shall be unlawful for the Commissioner of Revenue, any deputy, agent, clerk, other officer, employee, or former officer or employee, to divulge and make known in any manner the amount of income, income tax or other taxes, set forth or disclosed in any report or return required under this Subchapter.

Nothing in this section shall be construed to prohibit the publication of statistics, so classified as to prevent the identification of particular reports or returns, and the items thereof; the inspection of such reports or returns by the Governor, Attorney General, or their duly authorized representative; or the inspection by a legal representative of the State of the report or return of any taxpayer who shall bring an action to set aside or review the tax based thereon, or against whom an action or proceeding has been instituted to recover any tax or penalty imposed by this Subchapter; nor shall the provisions of this section prohibit the Department of Revenue furnishing information to other governmental agencies, of persons and firms properly licensed under Schedule B, G.S. 105-33 to 105-113. The Department of Revenue may exchange information with the officers of organized associations of taxpayers under

Schedule B, G.S. 105-33 to 105-113, with respect to parties liable for such taxes and as to parties who have paid such license taxes.

Reports and returns shall be preserved for three years, and thereafter until the Commissioner of Revenue shall order the same to be destroyed.

Any person, officer, agent, clerk, employee, or former officer or employee violating the provisions of this section shall be guilty of a misdemeanor, and fined not less than two hundred dollars ($200.00) nor more than one thousand dollars ($1,000) and/or imprisoned, in the discretion of the court; and if such offending person be an officer or employee of the State, he shall be dismissed from such office or employment, and shall not hold any public office or employment in this State for a period of five years thereafter.

Notwithstanding the provisions of this section, the Commissioner of Revenue may permit the Commissioner of Internal Revenue of the United States, or the revenue officer of any other state imposing any of the taxes imposed in this Subchapter, or the duly authorized representative of either, to inspect the report or return of any taxpayer; or may furnish such officer or his authorized agent an abstract of the report or return of any taxpayer; or supply such officer with information concerning any item contained in any report or return, or disclosed by the report of any investigation of such report or return of any taxpayer. Such permission, however, shall be granted or such information furnished to such officer, or his duly authorized representatives, only if the statutes of the United States or of such other state grants substantially similar privilege to the Commissioner of Revenue of this State or his duly authorized representative. Nothing in this section or any other law shall prevent the exchange of information between the Department of Revenue and the Department of Motor Vehicles when such information is needed by either or both of said departments for the purpose of properly enforcing the laws with the administration of which either or both of said departments is charged. (1939, c. 158, s. 928; 1951, c. 190, s. 2.)

§ **105-260. Deputies and clerks.** — The Commissioner of Revenue may appoint such deputies, clerks and assistants under his direction as may be necessary to administer the laws relating to the assessment and collection of all taxes provided for in this Subchapter; may remove and discharge same at his discretion, and shall fix their compensation within the rules and regulations prescribed by law. (1939, c. 158, s. 929.)

§ **105-261. Commissioner and deputies to administer oaths.** — The Commissioner of Revenue and such deputies as he may designate shall have the power to administer an oath to any person or to take the acknowledgment of any person in respect to any return or report required by this Subchapter or under the rules and regulations of the Commissioner of Revenue, and shall have access to all the books and records of any person, firm, corporation, county, or municipality in this State. (1939, c. 158, s. 930.)

§ **105-262. Rules and regulations.** — The Commissioner of Revenue shall, from time to time, initiate and prepare such regulations, not inconsistent with law, as may be useful and necessary to implement the provisions of all the Articles of Subchapter I (except Article 8B) and Article 36 of Subchapter V, such regulations to become effective when approved by the Tax Review Board. All regulations and amendments thereto shall be published and made available by the Commissioner of Revenue.

The Commissioner of Revenue may, from time to time, make and prescribe such administrative rules, not inconsistent with law and the regulations approved by the Tax Review Board, as may be useful for the administration of his department and the discharge of his responsibilities.

References to rules and regulations of the Commissioner of Revenue in this Chapter and in any subsequent amendments or additions thereto (unless expressly provided to the contrary therein) shall be construed to mean those

rules and regulations promulgated under the provisions of this section. (1939, c. 158, s. 931; 1955, c. 1350, s. 2.)

Remedies of Taxpayer.—Any interested citizen may procure a copy of the regulations promulgated pursuant to this section and apply the administrator's interpretation of the law to the citizen's tax situation. If, under the regulations, tax liability seems likely, he may present the matter to the Commissioner of Revenue for examination and determination. If the Commissioner assesses a tax, the party who deems himself aggrieved may, as provided by statute, protect himself against an illegal assessment. Duke v. State, 247 N.C. 236, 100 S.E.2d 506 (1957).

Petition will not lie directly to the superior court to have an administrative interpretation promulgated by the Commissioner under this section declared to be erroneous, unlawful or improper. Duke v. State, 247 N.C. 236, 100 S.E.2d 506 (1957).

Interpretation of Commissioner Prima Facie Correct.—While a decision or regulation of the Commissioner of Revenue interpreting a taxing statute is not controlling, the Commissioner of Revenue is authorized by this section to implement taxing statutes, with certain specific exceptions, and his interpretation is made prima facie correct, and such interpretive regulation will ordinarily be upheld when it is not in conflict with the statute and is within the authority of the Commissioner to promulgate. Campbell v. Currie, 251 N.C. 329, 111 S.E.2d 319 (1959).

Cited in Sale v. Johnson, 258 N.C. 749, 129 S.E.2d 465 (1963).

§ **105-263. Time for filing reports extended.** — The Commissioner of Revenue, when he deems the same necessary or advisable, may extend to any person, firm, or corporation or public utility a further specified time within which to file any report required by law to be filed with the Commissioner of Revenue, in which event the attaching or taking effect of any penalty for failure to file such report or to pay any tax or fee shall be extended or postponed accordingly. Interest at the rate of six percent (6%) per annum from the time the report or return was originally required to be filed to the time of payment shall be added to and paid with any tax that might be due on returns so extended. (1939, c. 158, s. 932.)

§ **105-264. Construction of the Subchapter; population.** — It shall be the duty of the Commissioner of Revenue to construe all sections of this Subchapter (except Article 8B) and all sections of Article 36 of Subchapter V; provided, such construction shall not be inconsistent with applicable regulations duly promulgated under the provisions of G.S. 105-262; provided further, nothing in this section shall be construed to prohibit the Commissioner of Revenue from initiating and proposing regulations, as provided in G.S. 105-262, modifying, changing, altering or repealing existing regulations. Such decisions by the Commissioner of Revenue shall be prima facie correct, and a protection to the officers and taxpayers affected thereby. Where the license tax is graduated in this Subchapter according to the population, the population shall be the number of inhabitants as determined by the last census of the United States government: Provided, that if any city or town in this State has extended its limits since the last census period, and hereafter has taken a census of its population in these increased limits by an official enumeration, either through the aid of the United States government or otherwise, the population thus ascertained shall be that upon which the license tax is to be graduated.

Whenever the Commissioner of Revenue shall construe any provisions of the revenue laws administered by him and shall issue or publish to taxpayers in writing any regulation or ruling so construing the effect or operation of any such laws, such ruling or regulation shall be a protection to the officers and taxpayers affected thereby and taxpayers shall be entitled to rely upon such regulation or ruling. In the event the Commissioner of Revenue shall change, modify, repeal, abrogate, or alter any such regulation or ruling any taxpayer who has relied upon the construction or interpretation contained in the Commissioner's previous ruling or regulation shall not be liable for any additional assessment on account of any tax not paid by reason of reliance upon such ruling or regulation and which

might have accrued prior to the date of the change, modification, repeal, abrogation, or alteration by the Commissioner, and during the effective period of such prior ruling or regulation. Provided, that nothing herein contained shall prevent any such change in construction or interpretation of the provisions of this Chapter by the Commissioner of Revenue from being effective from and after the date of its issuance or promulgation, or the assessment of any tax thereunder. (1939, c. 158, s. 933; 1955, c. 1350, s. 4; 1957, c. 1340, s. 14.)

Authority of Commissioner to Construe. — This section gives the Commissioner of Revenue the power to construe the Revenue Act of 1939, codified as this Subchapter, and such construction will be given due consideration by the courts, although it is not controlling. Valentine v. Gill, 223 N.C. 396, 27 S.E.2d 2 (1943). See Powell v. Maxwell, 210 N.C. 211, 186 S.E. 326 (1936); Dayton Rubber Co. v. Shaw, 244 N.C. 170, 92 S.E.2d 799 (1956.)

The construction given a taxing statute by the Commissioner of Revenue will be given consideration by the courts though not controlling. Charlotte Coca-Cola Bottling Co. v. Shaw, 232 N.C. 307, 59 S.E.2d 819 (1950); Campbell v. Currie, 251 N.C. 329, 111 S.E.2d 319 (1959).

The responsibility for interpreting a tax statute is placed on the Commissioner of Revenue by this section, and an Attorney General's opinion in regard thereto was advisory only. In re Virginia-Carolina Chem. Corp., 248 N.C. 531, 103 S.E.2d 823 (1958).

Court Interpretation Prevails.—If there should be a conflict between the interpretation placed upon any of the provisions of the Revenue Act by the Commissioner of Revenue and the interpretation of the courts, the interpretation or construction by the latter will prevail. Campbell v. Currie, 251 N.C. 329, 111 S.E.2d 319 (1959).

Quoted in Duke Power Co. v. Clayton, 274 N.C. 505, 164 S.E.2d 289 (1968).

Stated in Clark v. City of Greenville, 221 N.C. 255, 20 S.E.2d 56 (1942).

Cited in Sale v. Johnson, 258 N.C. 749, 129 S.E.2d 465 (1963).

§ 105-265. Authority for imposition of tax.—This Subchapter shall constitute authority for the imposition of taxes upon the subject herein revised, and all laws in conflict with it are hereby repealed, but such repeal shall not affect taxes listed or which ought or should have been listed, or which may have been due, or penalties or fines incurred from failure to make the proper reports, or to pay the taxes at the proper time under any of the schedules of existing law, but such taxes and penalties may be collected, and criminal offenses prosecuted under such law existing on March 24, 1939, notwithstanding this repeal. (1939, c. 158, s. 935.)

§ 105-266. Overpayment of taxes to be refunded with interest.—If the Commissioner of Revenue discovers from the examination of any return, or otherwise, that any taxpayer has overpaid the correct amount of tax (including penalties, interest and costs if any), such overpayment if the amount of three dollars ($3.00) or more, shall be refunded to the taxpayer within 60 days after it is ascertained together with interest thereon at the rate of four percent (4%) per annum; provided, that interest on any such refund shall be computed from a date 90 days after the date the tax was originally paid by the taxpayer. If said overpayment is less than three dollars ($3.00) said overpayment shall be refunded as aforesaid but only upon receipt by the Commissioner of Revenue of a written demand for such refund from the taxpayer. Provided, however, that no overpayment shall be refunded irrespective of whether upon discovery or receipt of written demand if such discovery is not made or such demand is not received within three years from the date set by the statute for the filing of the return or within six months of the payment of the tax alleged to be an overpayment, whichever date is the later. The provisions of this paragraph shall not apply to interest required under G.S. 105-267. (1939, c. 158, s. 937; 1941, c. 50, s. 10; 1947, c. 501, s. 9; 1949, c. 392, s. 6; 1951, c. 643, s. 9; 1957, c. 1340, s. 14.)

Deductions for 1957 Disallowed.—To allow as deductions for the tax year 1957 items which could have been the basis of claims for refunds in prior years, would render every return inconclusive far beyond the time intended by the legislature. In re Fleishman, 264 N.C. 204, 141 S.E.2d 256 (1965).

§ **105-266.1. Refunds of overpayment of taxes.**—(a) Any taxpayer may apply to the Commissioner of Revenue for refund of tax or additional tax paid by him at any time within three years after the date set by the statute for the filing of the return or application for a license or within six months from the date of payment of such tax or additional tax, whichever is later. The Commissioner shall grant a hearing thereon, and if upon such hearing he shall determine that the tax is excessive or incorrect, he shall resettle the same according to the law and the facts, and adjust the computation of tax accordingly. The Commissioner shall notify the taxpayer of his determination, and shall refund to the taxpayer the amount, if any, paid in excess of the tax found by him to be due.

(b) The provisions of Article 33A of Chapter 143 of the General Statutes shall not apply to hearings before the Commissioner of Revenue held pursuant to this section, but the provisions of G.S. 105-241.2, 105-241.3 and 105-241.4 with respect to review and appeal shall apply to any tax or additional tax assessed pursuant to this section.

(c) Within 90 days after notification of the Commissioner's decision with respect to a demand for refund of any tax or additional tax under this section any taxpayer aggrieved thereby, in lieu of petitioning for administrative review by the Tax Review Board under G.S. 105-241.1, may bring a civil action against the Commissioner of Revenue for recovery of the alleged overpayment in the Superior Court of Wake County, or in the superior court of the county in which the taxpayer resides, if the alleged overpayment exceeds two hundred dollars ($200.00), and if two hundred dollars ($200.00) or less, in any State court of competent jurisdiction in Wake County. If upon trial it shall be determined that there has been any overpayment of tax or additional tax, judgment shall be rendered therefor, with interest, and the same shall be refunded by the State.

(d) Either party may appeal to the appellate division from the judgment of the superior court under the rules and regulations prescribed by law for appeals, except that the Commissioner, if he should appeal, shall not be required to give any undertaking or make any deposit to secure the cost of such appeal.

(e) Nothing in this section shall be construed to conflict with or supersede the provisions of G.S. 105-241.2, and, with respect to tax paid to the Commissioner of Revenue, the rights granted by this section are in addition to the rights provided by G.S. 105-267. (1957, c. 1340, s. 10; 1969, c. 44, s. 66; c. 1132, s. 2.)

Cross Reference.—See note to § 105-266.

Editor's Note.—The first 1969 amendment substituted "appellate division" for "Supreme Court" in subsection (d).

The second 1969 amendment rewrote subsection (b).

This section, by express language, relates to proceedings begun by request for administrative review. It is an extension and enlargement of the policy declared by the legislature in § 105-241.1. This policy is predicated on the theory that an administrative hearing may be preferred by the taxpayer to an action at law to determine liability for the tax. In 1955 this idea was expanded to permit an appeal from the Commissioner's decision to a Tax Review Board under § 105-241.2. Proceedings so initiated may ultimately find their way to the courts. Kirkpatrick v. Currie, 250 N.C. 213, 108 S.E.2d 209 (1959).

Rights granted by section are in addition to rights provided by § 105-267. Housing Authority v. Johnson, 261 N.C. 76, 134 S.E.2d 121 (1964).

Applied in Hatteras Yacht Co. v. High, 265 N.C. 653, 144 S.E.2d 821 (1965); In re Housing Authority, 265 N.C. 719, 144 S.E.2d 904 (1965); Southern Bell Tel. & Tel. Co. v. Clayton, 266 N.C. 687, 147 S.E.2d 195 (1966); Northcutt v. Clayton, 269 N.C. 428, 152 S.E.2d 471 (1967); Ervin v. Clayton, 278 N.C. 219, 179 S.E.2d 353 (1971).

Cited in Colonial Pipeline Co. v. Clayton, 275 N.C. 215, 166 S.E.2d 671 (1969).

§ **105-267. Taxes to be paid; suits for recovery of taxes.**—No court of this State shall entertain a suit of any kind brought for the purpose of preventing the collection of any tax imposed in this Subchapter. Whenever a person shall

have a valid defense to the enforcement of the collection of a tax assessed or charged against him or his property, such person shall pay such tax to the proper officer, and such payment shall be without prejudice to any defense of rights he may have in the premises. At any time within 30 days after payment, the taxpayer may demand a refund of the tax paid in writing from the Commissioner of Revenue of the State, if a State tax, or if a county, city or town tax, from the treasurer thereof for the benefit or under the authority or by request of which the same was levied; and if the same shall not be refunded within 90 days thereafter, may sue the Commissioner of Revenue or the county, city or town, as the case may be, in the courts of the State for the amount so demanded. Such suit, if against the State Commissioner of Revenue, must be brought in the Superior Court of Wake County, or in the county in which the taxpayer resides, if the sum demanded is upwards of two hundred dollars ($200.00), and if for two hundred dollars ($200.00) or less, before any State court of competent jurisdiction in Wake County. If for a county, city or town tax, suit must be brought in a State court of competent jurisdiction in the county where the tax is collectible, and the defendant official has his official residence. If upon the trial it shall be determined that such tax or any part thereof was levied or assessed for an illegal or unauthorized purpose, or was for any reason invalid or excessive, judgment shall be rendered therefor, with interest, and the same shall be collected as in other cases. The amount of State taxes for which judgment shall be rendered in such action shall be refunded by the State: Provided, nothing in this section shall be construed to conflict with or supersede the provisions of G.S. 105-241.2. (1939, c. 158, s. 936; 1955, c. 1350, s. 15; 1957, c. 1340, s. 10.)

Cross References.—See notes to §§ 105-241.4, 105-262.

As to refund of taxes illegally collected, see § 105-267.1.

Editor's Note.—See 12 N.C.L. Rev. 23.

Section Is Constitutional.—This section, permitting payment to be made under protest with a right to bring an action to recover the moneys so paid, is constitutional and accords the taxpayer due process. Kirkpatrick v. Currie, 250 N.C. 213, 108 S.E.2d 209 (1959).

Section Requires Taxpayer Disputing Assessment to Pay Tax and Sue for Recovery. — This section requires the taxpayer disputing an allegedly illegal assessment to pay the amount of the disputed tax and sue the State for its recovery. Gulf Oil Corp. v. Clayton, 267 N.C. 15, 147 S.E.2d 522 (1966).

Method Has Been Available Since 1887. — The method of disputing an assessment by requiring the taxpayer to pay the disputed tax and sue the State for its recovery has, in effect, been available to taxpayers since 1887. Gulf Oil Corp. v. Clayton, 267 N.C. 15, 147 S.E.2d 522 (1966).

And Is Appropriate for Testing Constitutionality of Statute.—Requiring a taxpayer to pay the amount of a disputed tax and sue the State for its recovery is an appropriate procedure for a taxpayer who seeks to test the constitutionality of a statute or its application to him. Gulf Oil Corp. v. Clayton, 267 N.C. 15, 147 S.E.2d 522 (1966).

Adequate Remedy at Law. — A suit to enjoin the collection of the photographer's tax imposed by § 105-42 was held not maintainable as there is an adequate remedy at law under the provision of this section. Lucas v. City of Charlotte, 14 F. Supp. 163 (W.D.N.C. 1936).

No Injunction Lies in Federal Courts.—A suit in equity to enjoin the collection of State tax, alleged to be violative of the Fourteenth Amendment on the ground of an arbitrary and excessive assessment, will not lie in the federal court, since the plaintiff has a plain, adequate, and complete remedy at law by first paying the tax and then suing to recover it. Catholic Soc'y of Religious & Literary Educ. v. Madison County, 74 F.2d 848 (4th Cir. 1935).

Class Suit. — The remedy provided by this section cannot, in case of a class suit instituted in behalf of a large number of taxpayers, be deemed an adequate remedy as compared with the suit in equity which eliminates so much useless and cumbersome litigation. Gramling v. Maxwell, 52 F.2d 256 (W.D.N.C. 1931).

Compliance with Section Necessary. — Strict compliance with the provisions of this section is necessary, and where payments were not made under protest, nor the mandatory provisions of this section otherwise complied with, the taxpayer is not entitled to recover for the excess fees paid. Victory Cab Co. v. City of Charlotte, 234 N.C. 572, 68 S.E.2d 433 (1951).

In order for a taxpayer to avoid the payment of a tax claimed by him to have been illegally assessed by the State, he must comply with procedure provided in the statute and where the statute specifies that he must pay the tax to the proper officer and notify him in writing that he pays under protest, and at any time within 30 days demand its refund from the

State Commissioner in writing, and if not refunded in 90 days, bring action to recover the amount, the remedy given must be followed in order for the taxpayer to recover the amount, and the failure of the taxpayer to make the demand required until nearly two years after the payment of the tax is fatal; § 105-267.1, requiring the State Auditor to issue his warrant in certain instances, has no application. Bunn v. Maxwell, 199 N.C. 557, 155 S.E. 250 (1930).

Burden Is on Taxpayer to Show Exemption.—A taxpayer who challenges a sales tax coverage by virtue of an exemption or exclusion has the burden of showing that he comes within the exemption upon which he relies. Olin Mathieson Chem. Corp. v. Johnson, 257 N.C. 666, 127 S.E.2d 262 (1962).

The proper procedure for a taxpayer to determine his liability for a tax is to pay the tax under protest and sue to recover such payment. ET & WNC Transp. Co. v. Currie, 248 N.C. 560, 104 S.E.2d 403 (1958).

Rights granted in § 105-266.1 are in addition to rights provided by this section. Housing Authority v. Johnson, 261 N.C. 76, 134 S.E.2d 121 (1964).

As Are Provisions of § 105-130.4(s).—The purpose of § 105-130.4(s) was not to provide either a substitute for, or an alternative to this section, but to afford relief from the apportionment formula of § 105-130.4 when it operates to tax a greater portion of a corporation's income than is reasonably attributable to business in this State. Gulf Oil Corp. v. Clayton, 267 N.C. 15, 147 S.E.2d 522 (1966) (decided under § 105-134 prior to the amendment thereof by Session Laws 1967, c. 1110).

Section Is Available to Corporation Taxed on Income Not Attributable to This State.—Had the General Assembly meant to deprive a corporation of the right to proceed under this section when it contends that it has been illegally taxed upon income not attributable to business within the State, it would undoubtedly have said so. Gulf Oil Corp. v. Clayton, 267 N.C. 15, 147 S.E.2d 522 (1966).

A taxpayer contending that an additional assessment of income tax is invalid is not required to proceed under § 105-130.4(s), but may pay the tax under protest, make proper demand for refund, and, upon refusal, bring suit under this section. Sayles Biltmore Bleacheries, Inc. v. Johnson, 266 N.C. 692, 147 S.E.2d 177 (1966) (decided under § 105-134 prior to the amendment thereof by Session Laws 1967, c. 1110).

A taxpayer may not maintain an action under the Declaratory Judgment Act to determine his liability therefor, since the State has not waived its immunity against suit by one of its citizens under the Declaratory Judgment Act to adjudicate his tax liability under the sales tax statute. Buchan v. Shaw, 238 N.C. 522, 78 S.E.2d 317 (1953).

The State has not waived its immunity against suit by one of its citizens under the Declaratory Judgment Act to adjudicate his tax liability under the sales tax statute. Housing Authority v. Johnson, 261 N.C. 76, 134 S.E.2d 121 (1964).

Commissioner of Revenue cannot be sued pursuant to provisions of Declaratory Judgment Act. Housing Authority v. Johnson, 261 N.C. 76, 134 S.E.2d 121 (1964).

Alternate Remedy under §§ 105-241.2 and 105-241.3. — The remedy afforded by this section may at times place an undue burden on the taxpayer. The legislature of 1955 took recognition of that fact and broadened the provisions by which the taxpayer might have his liability determined, in the enactment of §§ 105-241.2 and 105-241.3. Duke v. State, 247 N.C. 236, 100 S.E.2d 506 (1957).

Where the plaintiffs complied with the provisions of this section in respect to the fees paid for a particular year, they are entitled to recover back the excess portion of the fees paid for that year. Victory Cab Co. v. City of Charlotte, 234 N.C. 572, 68 S.E.2d 433 (1951).

Recovery of Entire Amount Paid under Protest.—Since a debtor may direct application of payment, and if neither debtor nor creditor makes application before institution of suit, the law will apply a payment to the unsecured or most precariously secured debt, when a taxpayer makes anticipatory payment not under protest, and thereafter pays under protest the balance of the taxes levied against his property, in his action under this section, to recover the taxes the entire amount paid under protest may be recovered when unlawful levies equal such amount, and the recovery will not be limited to the proportionate part which the unlawful levies bear to the entire tax levy, since it will not be presumed that the county intended to make an unlawful levy or that the taxpayer intended to pay tax illegally levied. Nantahala Power & Light Co. v. Clay County, 213 N.C. 698, 197 S.E. 603 (1938).

Demand Where Tax Collector Is Also Treasurer.—Where the tax collector is also treasurer of the county, a written demand for the return of taxes paid to him under protest addressed to him in his capacity as tax collector without the appellation "treasurer" is a reasonable compliance with this section, and will support an action for the recovery of the taxes. Southern Ry. v. Polk County, 227 N.C. 697, 44 S.E.2d 76 (1947).

Commissioners who were directed by a consent judgment to sell land and pay the taxes lawfully due thereon and distribute the remaining proceeds as provided in the judgment could not tender only the taxes which were in fact lawfully due, but were compelled

by this section to pay the entire amount demanded by the county, and then sue for the recovery of so much of the tax paid as was not lawfully due. Rand v. Wilson County, 243 N.C. 43, 89 S.E.2d 779 (1955).

Allegation That Tax Paid under Compulsion.—In an action under the Revenue Act of 1933 it was held that an allegation that the tax was paid under compulsion was a mere conclusion of the pleader, and a demurrer of the Commissioner of Revenue was sustained. Metro-Goldwyn-Mayer Distrib. Corp. v. Maxwell, 209 N.C. 47, 182 S.E. 724 (1935).

Applied in Piedmont Memorial Hosp. v. Guilford County, 221 N.C. 308, 20 S.E.2d 332 (1942); Sabine v. Gill, 229 N.C. 599, 51 S.E.2d 1 (1948); Gill v. Smith, 233 N.C. 50, 62 S.E.2d 544 (1950); Good Will Distrib., Inc. v. Currie, 251 N.C. 120, 110 S.E.2d 880 (1959); Great Am. Ins. Co. v. Gold, 254 N.C. 168, 118 S.E.2d 792 (1961); Piedmont Canteen Serv., Inc. v. Johnson, 256 N.C. 155, 123 S.E.2d 582 (1962); Boylan-Pearce, Inc. v. Johnson, 257 N.C. 582, 126 S.E.2d 492 (1962); Sale v. Johnson, 258 N.C. 749, 129 S.E.2d 465 (1963); Southern Bell Tel. & Tel. Co. v. Clayton, 266 N.C. 687, 147 S.E.2d 195 (1966); Excel, Inc. v. Clayton, 269 N.C. 127, 152 S.E.2d 171 (1967); Overlook Cemetery v. Rockingham County, 273 N.C. 467, 160 S.E.2d 293 (1968); Myrtle Desk Co. v. Clayton, 8 N.C. App. 452, 174 S.E.2d 619 (1970).

Quoted in Virginia Elec. & Power Co. v. Currie, 254 N.C. 17, 118 S.E.2d 155 (1961).

Cited in Duke Power Co. v. Clayton, 274 N.C. 505, 164 S.E.2d 289 (1968); Colonial Pipeline Co. v. Clayton, 275 N.C. 215, 166 S.E.2d 671 (1969); Telerent Leasing Corp. v. High, 8 N.C. App. 179, 174 S.E.2d 11 (1970).

§ 105-267.1. Refund of taxes illegally collected and paid into State treasury.—Whenever taxes of any kind are or have been through clerical error, or misinterpretation of the law, or otherwise, collected and paid into the State treasury in excess of the amount legally due the State, the State Auditor shall issue his warrant for the amount so illegally collected, to the person entitled thereto, upon certificate of the head of the department through which said taxes were collected or his successor in the performance of the functions of that department, with the approval of the Attorney General, and the Treasurer shall pay the same out of any funds in the treasury not otherwise appropriated: Provided, demand is made for the correction of such error or errors within two years from the time of such payment. (Ex. Sess. 1921, c. 96; C. S., s. 7979(a); 1971, c. 806, s. 2.)

Cross References.—As to refund of overpayment with interest, see § 105-266. As to suits for recovery of taxes paid under protest, see § 105-267.

Editor's Note. — This section was formerly § 105-407. It was transferred to its present position by Session Laws 1971, c. 806, s. 2, effective July 1, 1971.

This section is specifically limited to State taxes. It has no application to local taxing units. Victory Cab Co. v. City of Charlotte, 234 N.C. 572, 68 S.E.2d 433 (1951).

The difference between this section and § 105-267 is this: When a refund is ordered under this section, simply upon demand and notice by the taxpayer, no interest is allowed, but when the demand for a refund is denied, and the taxpayer is required to bring suit, and recovers, it is provided that "judgment shall be rendered therefor, with interest." This is a reasonable difference between the two statutes. Cannon v. Maxwell, 205 N.C. 420, 171 S.E. 624 (1933).

Where the Commissioner of Revenue, with the approval of the Attorney General, orders a refund of taxes paid under protest in accordance with this section, merely upon demand and notice of the taxpayer, no suit having been brought to recover the taxes, the taxpayer is not entitled to interest on the amount refunded. Cannon v. Maxwell, 205 N.C. 420, 171 S.E. 624 (1933). See § 105-266, providing for refund of overpayment with interest.

§ 105-268. Reciprocal comity.—The courts of this State shall recognize and enforce liabilities for taxes lawfully imposed by other states which extend a like comity to this State. (1939, c. 158, s. 938.)

Editor's Note.—See 13 N.C.L. Rev. 405.

§ 105-268.1. Agreements to coordinate the administration and collection of taxes. — The Commissioner of Revenue is hereby authorized, with the approval of the Governor and Council of State, to enter into agreements with the United States government or any department or agency thereof, or with a state or any political subdivision thereof, for the purpose of coordinating the administration and collection of taxes imposed by this State and administered

and collected by said Commissioner with taxes imposed by the United States or by any other state or political subdivision thereof. (1943, c. 747, s. 1; 1971, c. 806, s. 2.)

Editor's Note. — This section was formerly § 105-417.1. It was transferred to its present position by Session Laws 1971, c. 806, s. 2, effective July 1, 1971.

For comment on this enactment, see 21 N.C.L. Rev. 363.

Cited in United States v. Williams, 139 F. Supp. 94 (M.D.N.C. 1956).

§ 105-268.2. Expenditures and commitments authorized to effectuate agreements. — The Commissioner of Revenue with the approval of the Governor and Council of State is authorized and empowered to undertake such commitments and make such expenditures, within the appropriations provided by law, as may be necessary to effectuate such agreements. (1943, c. 747, s. 2; 1971, c. 806, s. 2.)

Editor's Note. — This section was formerly § 105-417.2. It was transferred to its present position by Session Laws 1971, c. 806, s. 2, effective July 1, 1971.

§ 105-268.3. Returns to be filed and taxes paid pursuant to agreements.—Notwithstanding any other provision of law, returns shall be filed and taxes paid in accordance with the provisions of any agreement entered into pursuant to this Article. (1943, c. 747, s. 3; 1971, c. 806, s. 2.)

Editor's Note. — This section was formerly § 105-417.3. It was transferred to its present position by Session Laws 1971, c. 806, s. 2, effective July 1, 1971.

§ 105-269. Extraterritorial authority to enforce payment. — The Commissioner of Revenue, with the assistance of the Attorney General, is hereby empowered to bring suits in the courts of other states to collect taxes legally due this State. The officials of other states which extend a like comity to this State are empowered to sue for the collection of such taxes in the courts of this State. A certificate by the Secretary of State, under the Great Seal of the State, that such officers have authority to collect the tax shall be conclusive evidence of such authority. Whenever it shall be deemed expedient by the Commissioner of Revenue to employ local counsel to assist in bringing suit in an out-of-state court, the Commissioner, with the concurrence of the Attorney General, may employ such local counsel on the basis of a negotiated retainer or in accordance with prevailing commercial law league rates. (1939, c. 158, s. 939; 1963, c. 1169, s. 6.)

§ 105-269.1. Local authorities authorized to furnish office space.—Boards of county commissioners and governing boards of cities and towns are hereby fully authorized and empowered to furnish adequate and suitable office space for field representatives of the Department of Revenue upon request of the Commissioner of Revenue, and are hereby authorized and empowered to make necessary expenditures therefor. (1951, c. 643, s. 9.)

§ 105-269.2. Tax Review Board.—The Director of the Department of Tax Research, ex officio, the State Treasurer, ex officio, and the chairman of the Utilities Commission, ex officio, are hereby constituted the Tax Review Board. Provided, that for the purposes stated in G.S. 105-122 and G.S. 105-130.4, and for those purposes only, the Commissioner of Revenue, ex officio, shall also be a member of said Board. The State Treasurer, ex officio, shall be chairman of the Board.

The chairman or any two members, upon five days' notice, may call a meeting of the Board; provided, any member of the Board may waive notice of a meeting and the presence of a member of the Board at any meeting shall constitute a waiver of the notice of said meeting. A majority of the members of the Board shall constitute a quorum, and any act or decision of a majority of the members shall constitute an act or decision of the Board, except for the purposes and under the conditions of the provisions of G.S. 105-122 and G.S. 105-130.4.

The Tax Review Board may employ a secretary and such clerical assistance as it deems necessary for the proper performance of its duties. All expenses of the Board shall be paid from sums appropriated from the Contingency and Emergency Fund to the use of said Board. If the full time of such secretary and clerical staff should not be needed in connection with the duties of such Board, such secretary and staff can be assigned by the Board to other duties related to the tax program of the State.

The regular sessions of the Tax Review Board shall be held in the City of Raleigh at the offices provided for the Board by the Superintendent of Public Buildings and Grounds. The Board may in its discretion, hold other meetings at any place in the State. (1953, c. 1302, s. 7; 1955, c. 1350, s. 1; 1971, c. 1093, s. 11.)

Editor's Note.—The 1971 amendment substituted "105-130.4" for "105-134" in the second sentence of the first paragraph, and substituted "105-130.4" for "105-134" in the second sentence of the second paragraph.

For brief comment on this section, see 31 N.C.L. Rev. 441 (1953).

State Government Reorganization.—The Tax Review Board was transferred to the Department of State Treasurer by § 143A-38, enacted by Session Laws 1971, c. 864.

§ 105-269.3. Article applicable to gasoline and fuel taxes and gasoline and oil inspection fees.—The provisions of this Article shall be applicable to taxes levied under Subchapter V of Chapter 105 of the General Statutes and to inspection fees levied under Chapter 119 of the General Statutes. (1963, c. 1169, s. 6.)

Article 10.

Liability for Failure to Levy Taxes.

§ 105-270. Repeal of laws imposing liability upon governing bodies of local units. — All laws and clauses of laws, statutes and parts of statutes, imposing civil or criminal liability upon the governing bodies of local units, or the members of such governing bodies, for failure to levy or to vote for the levy of any particular tax or rate of tax for any particular purpose, are hereby repealed, and said governing bodies and any and all members thereof are hereby freed and released from any civil or criminal liability heretofore imposed by any law or statute for failure to levy or to vote for the levy of any particular tax or tax rate for any particular purpose. (1933, c. 418.)

SUBCHAPTER II. LISTING, APPRAISAL, AND ASSESSMENT OF PROPERTY AND COLLECTION OF TAXES ON PROPERTY.

Article 11.

Short Title, Purpose, and Definitions.

§ 105-271. Official title. — This Subchapter may be cited as the Machinery Act. (1939, c. 310, s. 1; 1971, c. 806, s. 1.)

Revision of Subchapter. — Session Laws 1971, c. 806, effective July 1, 1971, revised and rewrote Subchapter II of this Chapter, substituting the present Subchapter, consisting of §§ 105-271 to 105-395, for the former Subchapter, consisting of §§ 105-271 to 105-398. In addition, the 1971 act transferred and renumbered a number of sections in this Chapter and repealed many others, mainly in Subchapter III. In many instances, the provisions of the repealed sections were revised and incorporated in new Subchapter II. No attempt has been made to point out the changes effected, but, where appropriate, the historical citations to the former sections have been added to corresponding sections in the revised Subchapter.

Session Laws 1971, c. 806, s. 5, provides: "All laws and clauses of laws in conflict with this act are repealed as of the effective date of this act except that §§ 105-341, 105-342, and 105-343 of the General Statutes in effect on June 30, 1971, shall continue in effect until July 1, 1972, on which date they shall be repealed."

Editor's Note. — The case cited in the follow-

ing note were decided under former similar provisions.

The subject of taxation is regulated entirely by statutes, and the revenues of this State are collected under the operation of what is known as the Machinery Act. Wade v. Commissioners of Craven County, 74 N.C. 81 (1876).

The assessment, listing, and collection of taxes is regulated by this Subchapter which prescribes the time and manner for listing and valuing property for ad valorem tax purposes. In re Appeal of Reeves Broadcasting Corp., 273 N.C. 571, 160 S.E.2d 728 (1968).

What Machinery Act Prescribes. — The Machinery Act prescribes the time and manner for listing and valuing property for ad valorem tax purposes; it also fixes the time for payment. Spiers v. Davenport, 263 N.C. 56, 138 S.E.2d 762 (1964).

§ 105-272. Purpose of Subchapter. — The purpose of this Subchapter (being G.S. 105-271 through 105-395, inclusive) is to provide the machinery for the listing, appraisal, and assessment of property and the levy and collection of taxes on property by counties and municipalities. It is the intent of the General Assembly to make the provisions of this Subchapter uniformly applicable throughout the State, and to assure this objective no local act to become effective on or after July 1, 1971, shall be construed to repeal or amend any section of this Subchapter in whole or in part unless it shall expressly so provide by specific reference to the section to be repealed or amended. As used in this section, the term "local act" means any act of the General Assembly that applies to one or more counties by name, to one or more municipalities by name, or to all municipalities within one or more named counties. (1939, c. 310, s. 1802; 1971, c. 806, s. 1.)

§ 105-273. Definitions. — When used in this Subchapter (unless the context requires a different meaning):

(1) "Abstract" means the document on which the property of a taxpayer is listed for ad valorem taxation and on which the appraised and assessed values of the property are recorded.
(2) "Appraisal" means both the true value of property and the process by which true value is ascertained.
(3) "Assessment" means both the tax value of property ascertained by applying the assessment ratio to the appraised value of property and the process by which the assessment is determined.
(4) "Assessment ratio" means that percentage of the appraised value of property adopted for use in taxing property.
(5) "Collector" or "tax collector" means any person charged with the duty of collecting taxes for a county or municipality.
(6) "Corporation" includes nonprofit corporation and every type of organization having capital stock represented by shares.
(7) "Document" includes book, paper, record, statement, account, map, plat, film, picture, tape, object, instrument, and any other thing conveying information.
(8) "Intangible personal property" means patents, copyrights, secret processes, formulae, good will, trademarks, trade brands, franchises, stocks, bonds, cash, bank deposits, notes, evidences of debt, leasehold interests in exempted real property, bills and accounts receivable, and other like property.
(9) "List" or "listing," when used as a noun, means abstract.
(10) "List taker" means list taker and assessor.
(11) "Municipal corporation" and "municipality" mean city, town, incorporated village, sanitary district, rural fire protection district, rural recreation district, mosquito control district, hospital district, metropolitan sewerage district, watershed improvement district, or other district or unit of local government by or for which ad valorem taxes are levied.
(12) "Person" and "he" include any individual, trustee, executor, administrator, other fiduciary, corporation, unincorporated

association, partnership, sole proprietorship, company, firm, or other legal entity.

(13) "Real property," "real estate," and "land" mean not only the land itself, but also buildings, structures, improvements, and permanent fixtures thereon, and all rights and privileges belonging or in any wise appertaining thereto.

(14) "Tangible personal property" means all personal property that is not intangible and that is not permanently affixed to real property.

(15) "Tax" and "taxes" include the principal amount of any tax, costs, penalties, and interest imposed upon property tax or dog license tax.

(16) "Taxing unit" means a county or municipality authorized to levy ad valorem property taxes.

(17) "Taxpayer" means any person whose property is subject to ad valorem property taxation by any county or municipality and any person who, under the terms of this Subchapter, has a duty to list property for taxation.

(18) "Valuation" means appraisal and assessment. (1939, c. 310, s. 2; 1971, c. 806, s. 1.)

Leasehold Estate. — A lease is a chattel real, and as such is a species of intangible personal property. However, the value of a leasehold estate is subject to ad valorem tax and not to the State intangible tax. Bragg Inv. Co. v. Cumberland County, 245 N.C. 492, 96 S.E.2d 341 (1957) (decided under former similar provisions).

Husband and Wife Are Separate "Taxpayers" as to Land Held by Entirety. — A husband and wife are "taxpayers" with reference to taxes levied on account of property owned by each alone, but they are, in contemplation of law, a separate person from either with reference to land owned by them as tenants by the entirety. Consequently, no lien attaches to such land on account of a tax levied upon either on account of separately owned property. Duplin County v. Jones, 267 N.C. 68, 147 S.E.2d 603 (1966) (decided under former similar provisions).

Article 12.

Property Subject to Taxation.

§ **105-274. Property subject to taxation.**—(a) All property, real and personal, within the jurisdiction of the State shall be subject to taxation unless it is:

(1) Excluded from the tax base by a statute of statewide application enacted under the classification power accorded the General Assembly by Article V, Sec. 2(2), of the North Carolina Constitution, or

(2) Exempted from taxation by the Constitution or by a statute of statewide application enacted under the authority granted the General Assembly by Article V, Sec. 2(3), of the North Carolina Constitution.

(b) No provision of this Subchapter shall be construed to exempt from taxation any property situated in this State belonging to any foreign corporation unless the context of the provision clearly indicates a legislative intent to grant such an exemption. (1939, c. 310, ss. 303, 1800; 1961, c. 1169, s. 8; 1967, c. 1185; 1971, c. 806, s. 1.)

Editor's Note.—The cases and opinions of the Attorney General cited in the following note were decided or issued under former similar provisions.

Opinions of Attorney General. — Mr. James R. Hood, Jones County Attorney, 40 N.C.A.G. 786 (1969).

All property privately owned within this State is subject to taxation unless exempt by strict construction of the pertinent statute. Bragg Inv. Co. v. Cumberland County, 245 N.C. 492, 96 S.E.2d 341 (1957).

All personal property whatsoever within the jurisdiction of the State and not specifically exempted from taxation by law is subject to taxation in North Carolina. Davenport v. Ralph N. Peters & Co., 274 F. Supp. 99 (W.D.N.C. 1966), rev'd on other grounds, 386 F.2d 199 (4th Cir. 1967).

No state may tax anything not within her

jurisdiction without violating the Fourteenth Amendment of the Constitution of the United States. Billings Transf. Corp. v. County of Davidson, 276 N.C. 19, 170 S.E.2d 873 (1969).

But interstate commerce can be required to pay its nondiscriminatory share of taxes which each state may impose on property within its borders. Billings Transf. Corp. v. County of Davidson, 276 N.C. 19, 170 S.E.2d 873 (1969).

The ad valorem property tax may be levied by the proper taxing authority upon personal property of an individual or corporation engaged in interstate commerce the same as upon any other property so long as the effect of such taxation does not place interstate commerce at a competitive disadvantage with intrastate commerce. Billings Transf. Corp. v. County of Davidson, 276 N.C. 19, 170 S.E.2d 873 (1969).

The test of whether a tax law violates due process is whether the taxing power exerted by the State bears fiscal relation to protection, opportunities and benefits given by the State. The simple but controlling question is whether the State has given anything for which it can ask return. Billings Transf. Corp. v. County of Davidson, 276 N.C. 19, 170 S.E.2d 873 (1969).

Taxation of Personal Property of Nonresidents Is Constitutional. — The taxation of personal property of nonresidents by this State when such personal property has acquired a taxable situs here does not violate the provisions of the 14th Amendment of the federal Constitution, the rule that personal property follows the domicile of the owner being subject to an exception when such personalty is held in such a manner as to create a "business situs" for the purpose of taxation. County of Mecklenburg v. Sterchi Bros. Stores, 210 N.C. 79, 185 S.E. 454 (1936).

When Personal Property of a Nonresident Stored in a Warehouse in North Carolina Not Subject to Ad Valorem Taxes. — See opinion of Attorney General to Mr. T.R. Holbrook, Administrative Officer, State Board of Assessment, 41 N.C.A.G. 27 (1970).

Taxable Situs of Cottonseed Oil Stored at Refinery.—See Davenport v. Ralph N. Peters & Co., 274 F. Supp. 99 (W.D.N.C. 1966), rev'd on other grounds, 386 F.2d 199 (4th Cir. 1967).

Structures and improvements, together with stoves and refrigerators, placed by lessee on lands within a military reservation leased from the federal government, are subject to taxation by the county in which the property is situate, the improvements as realty, and the stoves and refrigerators as tangible personal property. Bragg Inv. Co. v. Cumberland County, 245 N.C. 492, 96 S.E.2d 341 (1957).

As to right of State to tax foreign corporations, see Commissioners of Beaufort County v. Old Dominion S.S. Co., 128 N.C. 558, 39 S.E. 18 (1901).

§ **105-275. Property classified and excluded from the tax base.**—The following classes of property are hereby designated special classes under authority of Article V, Sec. 2(2), of the North Carolina Constitution and shall not be listed, appraised, or assessed for taxation:

(1) Cotton, tobacco, other farm products, goods, wares, and merchandise held or stored for shipment to any foreign country, except any such products, goods, wares, and merchandise that have been so stored for more than 12 months on the date as of which property is listed for taxation. (The purpose of this classification is to encourage the development of the ports of North Carolina.)

(2) Cotton, tobacco, other farm products, goods, wares, and merchandise held or stored at a seaport terminal awaiting further shipment after being imported from a foreign country through any seaport terminal in North Carolina, except such products, goods, wares, and merchandise that have been so stored for more than 12 months on the date as of which property is listed for taxation. (The purpose of this classification is to encourage the development of the ports of North Carolina.)

(3) Personal property of nonresidents of the State in its original package or fungible goods in bulk, belonging to a nonresident of the State, shipped into this State and placed in a public warehouse for the purpose of transshipment to an out-of-state or within-the-state destination, and so designated on the original bill of lading, so long as such personal property remains in its original package or, if fungible, in bulk, and in such a public warehouse. No portion of a premises owned or leased by a consignor or consignee, or subsidiary of a consignor or consignee, shall be deemed to be a public warehouse within the meaning of this subdivision despite any

licensing as such. (The purpose of this classification is to encourage the development of the State of North Carolina as a distribution center.)

(4) Personal property of residents of the State in its original package and fungible goods in bulk, belonging to a resident of the State, placed in a public warehouse for the purpose of transshipment to an out-of-state destination, and so designated on the original bill of lading, so long as such personal property remains in its original package or, if fungible, in bulk, and in such a public warehouse. No portion of a premises owned or leased by a consignor or consignee, or subsidiary of a consignor or consignee, shall be deemed to be a public warehouse within the meaning of this subdivision despite any licensing as such. (The purpose of this classification is to encourage the development of the State of North Carolina as a distribution center.)

(5) Real and personal property owned by nonprofit water or nonprofit sewer associations or corporations. (1939, c. 310, s. 303; 1961, c. 1169, s. 8; 1967, c. 1185; 1971, c. 806, s. 1; c. 1121, s. 3.)

Cross Reference.—See note to § 105-274.

Editor's Note. — Session Laws 1971, c. 1121, s. 3, added subdivision (5).

§ **105-276. Taxation of intangible personal property.**—The classes of intangible personal property that, under the authority of Article V, Sec. 2(2), of the North Carolina Constitution, have been classified for taxation under the provisions of Schedule H, G.S. 105-198 through 105-217, are excluded from the tax base of counties and municipal corporations. Thus, the provisions of this Subchapter concerning listing, appraisal, assessment, and taxation of real and personal property shall not be construed to apply to the classes of intangible personal property taxed under Schedule H, G.S. 105-198 through 105-217. The listing, appraisal, assessment, and taxation of intangible personal property not specifically excluded from the local tax base by Schedule H, G.S. 105-198 through 105-217, shall be governed by the provisions of this Subchapter. (1939, c. 310, s. 601; 1971, c. 806, s. 1.)

§ **105-277. Property classified for taxation at reduced rate.** — (a) Agricultural Products in Storage.—Any agricultural product held in North Carolina by any manufacturer or processor for manufacturing or processing, which agricultural product is of such nature as customarily to require storage and processing for periods of more than one year in order to age or condition such product for manufacture, is hereby classified as a special class of property under authority of Sec. 2(2), Article V of the Constitution. Such agricultural products so classified shall be taxed uniformly as a class in each local taxing unit at sixty percent (60%) of the rate levied for all purposes upon real estate and other tangible personal property by said taxing unit in which such agricultural product is listed for taxation.

(b) Peanuts; Year Following Year in Which Grown.—Peanuts held in North Carolina in the year following the year in which such peanuts are grown are hereby classified as a special class of property under authority of Sec. 2(2), Article V of the Constitution. Such peanuts so classified shall be taxed uniformly as a class in each local taxing unit at twenty percent (20%) of the rate levied for all purposes upon real estate and other tangible personal property by said taxing unit in which such peanuts are listed for taxation.

(c) Baled Cotton for Manufacture or Processing in State.—Cotton in bales held for manufacture or processing in North Carolina is hereby classified as a special class of property under authority of Sec. 2(2), Article V of the Constitution. Such cotton so classified shall be taxed uniformly as a class in each local taxing unit at fifty percent (50%) of the rate levied for all purposes

upon real estate and other tangible personal property by said taxing unit in which such cotton is listed for taxation. This classification shall not be held to repeal any other classification or exemption granted to cotton under any existing law of statewide application.

(d) Individual Family Fallout Shelters.—Individual family fallout shelters meeting the criteria and standards of the Office of Civil Defense, United States Department of Defense, when constructed to protect an individual family from radioactive fallout, are hereby classified as a special class of property under authority of Sec. 2(2), Article V of the Constitution. Such fallout shelters shall be subject to taxation in each local taxing unit only to the extent that the appraised value of such shelter, separate and apart from any structure to which the shelter is attached or within which the shelter is constructed, exceeds two thousand dollars ($2,000). Where two or more families join in the construction of such a shelter for their common use, an exclusion of two thousand dollars ($2,000) shall be allowed from the total appraised value for each such family. (1947, c. 1026; 1955, c. 697, s. 1; 1961, c. 1169, ss. 6, 7, 7½; 1963, c. 940; 1971, c. 806, s. 1.)

§ **105-277.1. Property classified for taxation at reduced valuation.** — The following class of property is hereby designated a special class under authority of Article V, Sec. 3, of the North Carolina Constitution and shall not be assessed for taxation: The first five thousand dollars ($5,000) in appraised value of real property held and used as the principal place of residence of the owner and spouse if living; provided the owner is retired and the combined disposable income of the owner and his spouse, if living, is not more than three thousand five hundred dollars ($3,500); provided further that in no event shall the disposable income of the owner or of any person contributing one half or more of the owner's support exceed three thousand five hundred dollars ($3,500). For the purposes of this section, the following definitions shall apply:

(1) A person is retired when he is (i) 65 years of age or more, and (ii) is not regularly engaged in income-producing activity.

(2) Disposable income means gross income as defined in G.S. 105-141, increased by amounts excluded from gross income pursuant to G.S. 105-141(b)(1), (2), (4), (7), (8), (10), (12), (13), (14), (15), and (16).

(3) A person is an owner of property when he holds, individually or as a tenant by the entirety, the entire legal or equitable title, subject to easements, removable liens and other similar encumbrances, if any.

(4) The principal place of residence of a person is the place at which he resides for six months or more out of the year.

The exclusion offered by this paragraph may be claimed by any person entitled thereto at the time he lists his property for taxation, and shall be supported by proof of disposable income in the preceding calendar year filed with the tax supervisor of the county or counties in which the property lies not later than April 15. Claim of the exemption and proof of eligibility must be made for each year within the time prescribed herein. (1971, c. 932, s. 1.)

Editor's Note. — Session Laws 1971, c. 932, s. 3, makes the act effective on Jan. 1, 1972.

§ **105-278. Real property exempt.**—The following real property, and no other, shall be exempted from taxation:

(1) Real property owned by the United States or this State, and real property owned by the State for the benefit of any general or special fund of the State, and real property lawfully owned and held by counties, municipalities, or school districts, used wholly and exclusively for public or school purposes. The repeal of the exemption of real property indirectly owned by federal, State, or local governments shall be effective for the tax year 1943, and such

property indirectly owned shall be placed upon the tax books for 1943 and subject to the tax rates levied on real estate in the year 1943.

(2) Real property, tombs, vaults and mausoleums set apart for burial purposes, except such as are owned and held for purposes of sale or rental.

(3) Buildings, with the land upon which they are situated, lawfully owned and held by churches or religious bodies, wholly and exclusively used for religious worship or for the residence of the minister of any such church or religious body or occupied gratuitously by one other than the owner which if it were the owner, would qualify for the exemption under this section, together with the additional adjacent land reasonably necessary for the convenient use of any such building.

(4) Buildings, with the land occupied, wholly devoted to educational purposes, belonging to and exclusively occupied and used by public libraries, museums, colleges, academies, industrial schools, seminaries, and any other institutions of learning, together with such additional land owned by such libraries and educational institutions as may be reasonably necessary for the convenient use of such buildings, and also such other buildings and facilities located on the premises of such institutions as may be reasonably necessary and useful in the functional operation of such institutions: Provided, however, that the exemption of this subdivision shall not apply to any institution organized or operated for profit, or if any officer, shareholder, member, or employee thereof or other individual shall be entitled to receive any pecuniary profit from the operations thereof, except reasonable compensation for services.

(4a) Real property owned by religious educational assemblies, retreats and similar organizations, associations and corporations, including (without limitation) assembly grounds, buildings used for meetings, conferences, religious bookstores, study or worship, facilities used for lodging or eating, recreational facilities and areas, and adjacent lands and facilities reasonably necessary for the convenient use of such buildings and facilities, exclusively maintained and used for the religious education, housing, feeding and recreation of the officers, employees, instructors, students, conferees and other participants in the religious educational schools, institutes, seminars, conferences, and activities sponsored or conducted by any such religious educational organization, association or corporation for the purpose of providing religious education and development of the students, conferees and other participants: Provided, however, that the exemption of this subdivision shall not apply to any assembly or other similar organization organized or operated for profit, or if any officer, shareholder, member, or employee thereof or other individual shall be entitled to receive any pecuniary profit from the operations thereof, except reasonable compensation for services. Any such building or facility shall be deemed to be exclusively maintained and used for the exempt purposes herein defined, whether operated through the employees of the exempt assembly or similar organization or through a contractual arrangement, notwithstanding the fact that the building or facility is incidentally available to and patronized by the general public so long as there is no material amount of business or patronage with the general public.

(5) Real property belonging to, actually and exclusively occupied by Young Men's Christian Associations and other similar religious associations, homes for the aged, sick or infirm, orphanages, or other similar homes, Societies for the Prevention of Cruelty to.

Animals which are not conducted for profit and are charitable in nature where such property is used in the furtherance of humane activities, hospitals and nunneries not conducted for profit, but entirely and completely as charitable.

(6) Buildings, with the land actually occupied, belonging to the American Legion or Post of the American Legion, or any other veterans' organization chartered by Congress or organized and operated on a statewide or nationwide basis, or any post or other local organization thereof, or any benevolent, patriotic, historical, or charitable association used exclusively for lodge purposes by said societies or associations, together with such additional adjacent land as may be necessary for the convenient use of the buildings thereon.

(7) The exemptions granted in subdivisions (3), (4), (4a), (5), (6) and (10) of this section shall apply to real property of foreign religious, charitable, educational, literary, benevolent, patriotic or historical corporations, institutions or orders when such property is exclusively used for religious, charitable, educational or benevolent purposes within this State.

(8) The real property of Indians who are not citizens, except lands held by them by purchase.

(9) Real property falling within the provisions of G.S. 55A-16, appropriated exclusively for public parks and drives.

(10) Real property actually used for hospital purposes, including homes for nurses employed by or in training in such hospitals, held for or owned by hospitals organized and operated as nonstock, nonprofit, charitable institutions, without profit to the members or their successors, notwithstanding that patients able to pay are charged for services rendered: Provided, all revenues or receipts of such hospitals shall be used, invested, or held for the purposes for which they are organized; and provided, further, that where hospital property is used partly for such hospital purposes and partly rented out for commercial and business purposes, then only such proportion of the value of such building and the land on which it is located shall be exempt from taxation as is actually used for such hospital purposes. The provisions of this section shall be effective as to taxes for the year 1936 and subsequent years.

(11) Real property, or so much thereof, which is used exclusively for air cleaning or waste disposal or air or water pollution abatement facilities, including waste lagoons, designed to abate, reduce, or prevent pollution of air or water. This exemption is allowed only upon the condition that a certificate is furnished to the tax supervisor of the county, wherein such property is located, by the Board of Water and Air Resources, certifying that said Board has found as a fact that the air cleaning device or the waste treatment plant, including waste lagoons, or pollution abatement equipment above described has been constructed or installed thereon and that such plant, device or equipment complies with the requirements of said Board with respect to such plants, devices or equipment, that such plant, device or equipment is being effectively operated in accordance with the terms and conditions set forth in the permit, certificate of approval, or other document of approval issued by the Board of Water and Air Resources, and that the primary purpose thereof is to reduce air or water pollution resulting from the emission of air contaminants or the discharge of sewage and waste and not merely incidental to other purposes and functions. The exemption provided in this section shall apply to the facilities or equipment of private or public utilities built and installed

primarily for the purpose of providing sewer service to residential and outlying areas. The exemption herein provided for shall be applicable only with respect to taxes levied in 1955 and subsequent years.

(12) Buildings with the land upon which they are situated, together with the additional adjacent land reasonably necessary for the convenient use of such buildings, lawfully owned and held by churches or other religious bodies or organizations, and used for the general or promotional offices or headquarters of such churches or religious bodies or organizations.

(13) Real property owned by any airport authority, airport board or airport commission created as a separate and independent body corporate and politic by an act of the General Assembly or by counties or municipalities pursuant to an act of the General Assembly.

(14) Notwithstanding any of the other provisions of this section, when any building and additional adjacent land necessary for the convenient use of said building belongs to an organization enumerated in subdivisions (3) through (7) or (10) or (12) of this section and a part thereof is devoted to the purposes for which an exemption from ad valorem taxes would be allowed by said subdivisions if the entire building and grounds were exclusively used for such purposes, then such property shall be exempt from ad valorem taxes to the extent of that pro rata part so used. (1939, c. 310, s. 600; 1941, c. 125, ss. 1, 2; 1943, c. 634, s. 2; 1945, c. 995, s. 2; 1955, c. 230, s. 1; c. 1100, s. 2; 1959, cc. 511, 521; 1961, c. 953; 1965, c. 741, ss. 1, 2; 1967, c. 892, s. 8; c. 1160, s. 1; 1969, c. 541, s. 12; 1971, c. 806, s. 1; c. 1162, s. 1.1.)

Editor's Note. — Session Laws 1971, c. 1162, applicable to taxable years beginning on or after Jan. 1, 1971, inserted "Societies for the Prevention of Cruelty to Animals which are not conducted for profit and are charitable in nature where such property is used in the furtherance of humane activities" in subdivision (5).

The cases and opinions of the Attorney General cited in the following note were decided or issued under former similar provisions.

Opinions of Attorney General. — Mr. James R. Hood, Jones County Attorney, 40 N.C.A.G. 786 (1969); Mr. Robert C. Black, Iredell County Tax Supervisor, 40 N.C.A.G. 799 (1969).

Construction of Section. — Statutes exempting specific property from taxation because of the purposes for which such property is held and used, are and should be construed strictly, when there is room for construction, against exemption and in favor of taxation. However, it is not meant that the statute shall be stintingly or even narrowly construed, but it does mean that everything shall be excluded from its operation which does not clearly come within the scope of the language used. Southern Baptist Theological Sem. v. Wake County, 251 N.C. 775, 112 S.E.2d 528 (1960); Wake County v. Ingle, 273 N.C. 343, 160 S.E.2d 62 (1968).

Statutes exempting specific property from taxation because of the purposes for which such property is held and used, are and should be construed strictly, when there is room for construction, against exemption and in favor of taxation. However, the rule of strict construction does not require that the statute be stintingly or even narrowly construed. Overlook Cemetery v. Rockingham County, 273 N.C. 467, 160 S.E.2d 293 (1968).

Exemptions from taxation are to be strictly construed. Redevelopment Comm'n v. Guilford County, 1 N.C. App. 512, 162 S.E.2d 108 (1968).

The words used in subdivision (2), when given their ordinary meaning, are clear and require no construction. Overlook Cemetery v. Rockingham County, 273 N.C. 467, 160 S.E.2d 293 (1968).

The words used in subdivision (3) are clear and unambiguous and require no construction. Wake County v. Ingle, 273 N.C. 343, 160 S.E.2d 62 (1968).

The words used in subdivision (4) must be given their natural or ordinary meaning. Overlook Cemetery v. Rockingham County, 273 N.C. 467, 160 S.E.2d 293 (1968).

And Are Clear.—The words of subdivision (4) of this section, given their ordinary meaning, are clear and require no construction. Southeastern Baptist Theological Sem. v. Wake County, 251 N.C. 775, 112 S.E.2d 528 (1960).

The word "gratuitously," used in subdivision (3), is defined as "without valuable or legal consideration." Wake County v. Ingle, 273 N.C. 343, 160 S.E.2d 62 (1968).

A redevelopment commission is a

municipal corporation and exempt from ad valorem taxation. Redevelopment Comm'n v. Guilford County, 1 N.C. App. 512, 162 S.E.2d 108 (1968).

But even a municipality does not have an absolute exemption. Redevelopment Comm'n v. Guilford County, 1 N.C. App. 512, 162 S.E.2d 108 (1968).

Hence, Property Held for Purposes Other Than Governmental Is Taxable.—A redevelopment commission, just as any other municipal corporation, is to be taxed for property held by it for purposes other than governmental. Redevelopment Comm'n v. Guilford County, 1 N.C. App. 512, 162 S.E.2d 108 (1968).

Properties owned by a redevelopment commission, both improved and unimproved, from which income is being derived are subject to ad valorem taxes. It is only the nonincome producing properties, both improved and unimproved, which are to be exempt from taxation. Redevelopment Comm'n v. Guilford County, 1 N.C. App. 512, 162 S.E.2d 108 (1968).

Exemption Contemplated by Subdivision (2).—When the words, "set apart for burial purposes," and the words, "owned and held for purposes of sale or rental," are considered contextually, the exemption contemplated by subdivision (2) of this section refers only to real property presently in use for burial purposes and property owned and held by persons for their use for burial purposes. Overlook Cemetery v. Rockingham County, 273 N.C. 467, 160 S.E.2d 293 (1968).

Subdivision (2) distinguishes between real property "set apart for burial purposes," which is exempt, and that "owned and held for purposes of sale or rental," which is not exempt. Overlook Cemetery v. Rockingham County, 273 N.C. 467, 160 S.E.2d 293 (1968).

The property of a cemetery association is exempt from ad valorem taxes by virtue of subdivision (2). Raleigh Cemetery Ass'n v. City of Raleigh, 235 N.C. 509, 70 S.E.2d 506 (1952).

But this section does not authorize the exemption of such property from a local improvement assessment made pursuant to and in conformity with the law authorizing such assessment. No land in a municipality is exempt from assessment for local improvements. Raleigh Cemetery Ass'n v. City of Raleigh, 235 N.C. 509, 70 S.E.2d 506 (1952). See § 160A-220. See also annotation under N.C. Const., Art. V, § 2.

Property Used for Religious, Charitable, etc., Purposes.—It is fundamental that the property of religious or charitable institutions, to be exempt, must be used exclusively for the purposes enumerated, and the rents arising from such property must be so applied. Southern Assembly v. Palmer, 166 N.C. 75, 82 S.E. 18 (1914). See United Brethren v. Commissioners of Forsyth County, 115 N.C. 489, 20 S.E. 626 (1894).

Plaintiff association was empowered by its charter inter alia to hold real estate provided the profits therefrom, if any, were used for the benefit of widows and orphans of deceased members or for such charitable and benevolent purposes as it deemed necessary or expedient to the successful prosecution of its charter provisions. During the years 1934 through 1939 it owned a building in which it maintained its lodge rooms and rented the remainder of the building for use as offices and stores on the basis of a commercial enterprise and used the entire rents therefrom for repairs and the payment of the mortgage indebtedness on the building. It was held that since the building was held for business or commercial purposes it was subject to the assessment of ad valorem taxes of the city and county in which it was situate for the years in question. Odd Fellows v. Swain, 217 N.C. 632, 9 S.E.2d 365 (1940).

Former Exemption Held Unconstitutional.—Though former exemptions were broad enough in their terms to exempt business property owned by an educational institution and rented for offices and business purposes to private enterprises, the net profit derived therefrom being devoted exclusively to educational purposes, they were, when applied to the facts, beyond the scope of the constitutional grant of permissive power of exemption contained in N.C. Const., Art. V, § 2, and therefore the property was subject to ad valorem assessment and taxation. County of Rockingham v. Board of Trustees, 219 N.C. 342, 13 S.E.2d 618 (1941).

Land Adjacent to Church. — A lot purchased by trustees of a church for the purpose of erecting a new church, and, pending the accumulation of sufficient funds to erect the new church, used exclusively for religious purposes, is property adjacent to the church property and reasonably necessary for the convenient use of the church property within the meaning of subdivision (3) exempting such property from taxation, even though the lot purchased, because of unavailability of adjoining land, is four or five blocks distant from the church, the word "adjacent" meaning lying close together but not necessarily in contact. Harrison v. Guilford County, 218 N.C. 718, 12 S.E.2d 269 (1940).

Property leased by a church for religious worship without the payment of rent to the owner is property occupied gratuitously within the meaning of subdivision (3) and is exempt from ad valorem taxation, notwithstanding the fact that the church maintains the property and pays the expenses connected with its use. Wake County v. Ingle, 273 N.C. 343, 160 S.E.2d 62 (1968).

Exemption Status of YMCA Property.—See opinion of Attorney General to Mr.

Bernard B. Hollowell, Pamlico County Attorney, 40 N.C.A.G. 802 (1970).

Foreign Eleemosynary Corporations. — By an interpretation of a former statute which some thought to be unnecessarily literal, the court had held foreign eleemosynary corporations deprived of the exemptions otherwise granted to such organizations on property used in their work in the State. Catholic Soc'y of Religious & Literary Educ. v. Gentry, 210 N.C. 579, 187 S.E. 795 (1936). The exemptions are now granted in specific terms by subdivision (7) of this section and § 105-280. 15 N.C.L. Rev. 391.

Subdivision (10) Is Retroactive in Terms. — See Piedmont Mem. Hosp. v. Guilford County, 221 N.C. 308, 20 S.E.2d 332 (1942).

But Did Not Authorize Refund. — The 1941 act adding subdivision (10) to the predecessor of this section and amending what is now § 105-280 contained no provision authorizing refund of taxes theretofore paid by nonprofit hospitals nor machinery for the recovery of such taxes, and therefore a hospital which paid real property taxes for 1940 under protest and unsuccessfully sued for their recovery under § 105-267 was not empowered by the act of 1941 to maintain another suit for the recovery of the same taxes. Piedmont Mem. Hosp. v. Guilford County, 221 N.C. 308, 20 S.E.2d 332 (1942).

Plaintiff hospital instituted suit to recover ad valorem taxes for the year 1940, paid by it under protest. On appeal it was held that the hospital was liable for taxes for that year, and final judgment was entered in accordance therewith. Thereafter the hospital, upon the same agreed facts, instituted suit to recover the same taxes, upon its contention that the 1941 amendment exempted its property from taxation retroactively. It was held that the act of 1941, insofar as the status of plaintiff hospital for taxes for the year 1940 was concerned, was an attempt to annul the effect of a final judgment, and was unconstitutional and void. Piedmont Mem. Hosp. v. Guilford County, 221 N.C. 308, 20 S.E.2d 332 (1942).

Property of Hospital Held Not Exempt. — The property of a hospital organized as a business corporation and charging all patients according to a fixed schedule is not exempt from taxation, under this section or those immediately following, although patients unable to pay were relieved of payment and classified as charity patients, and although its stockholders, though not waiving their right to dividends, did not expect to receive dividends when they subscribed for stock, and no dividends were paid thereon for the years for which taxes were assessed, the hospital not being a charitable corporation, nor its property used entirely for charitable purposes. Salisbury Hosp. v. Rowan County, 205 N.C. 8, 169 S.E. 805 (1933).

Elks Club Swimming Pool as Exempt Property.—See opinion of Attorney General to Mr. D.R. Holbrook, State Board of Assessment, 41 N.C.A.G. 248 (1971).

Institution Does Not Become Agency of State by Reason of Exemption.—It cannot be said that a purely local church, school or hospital becomes an instrumentality of the State, and subject to its control, by simply having its property exempt from ad valorem taxes. Simkins v. Moses H. Cone Mem. Hosp., 211 F. Supp. 628 (M.D.N.C. 1962).

§ 105-279. Timberland owned by State.—(a) Any State department or agency owning timberland or leasing, controlling or administering timberland owned by the State, shall pay to each county in which said timberland is situated an amount equal to fifteen percent (15%) of proceeds of the gross sales of trees, timber, pulpwood, and any forest products from said timberland, and said funds shall, when received, be placed in the account of the county general fund. Where the said timberland consists of a tract situated in more than one county and the timber, trees, pulpwood, or forest products are sold, or cut, removed and sold from the entire tract, then the percentage of gross sales as herein prescribed shall be divided and paid to said county boards on the basis of the acreage located in the respective counties.

(b) Any other organization (corporation, trust, foundation, association or other entity) owning timberland which is organized and operated exclusively to receive, hold, invest and administer property and to make expenditures to or for the sole benefit of an educational institution shall in lieu of paying the county taxes otherwise assessed against such timberland, make the payments prescribed in subsection (a) above or ten cents (10¢) per acre per year, whichever is greater.

(c) This section shall not apply to the proceeds of sale of trees, timber, pulpwood, or forest products directly paid to or received by the State Board of Education, or any other State educational institution, or the North Carolina Department of Agriculture from its research stations and experimental

farmlands: Provided, that where State forests are held, leased, or administered by the Department of Correction, or as held, leased or administered by the Department of Conservation and Development as provided by G.S. 113-34, or by the Wildlife Resources Commission, said departments, instead of payment as above prescribed, may elect permanently to subject such State forests to county taxes assessed on the same basis as are private lands, and pay said taxes from the proceeds of revenue received and collected by said departments to the board of county commissioners of the county in which said forest is situated, but all fire towers, buildings and all other permanent improvements shall be exempt from assessment. Provided that the provisions of this section shall not apply to lands under the control of the Hospitals Board of Control [Department of Mental Health]. (1957, c. 988, s. 1; 1963, c. 1120; 1967, c. 996, s. 13; 1969, c. 1185; 1971, c. 806, s. 1.)

Opinions of Attorney General. — Mr. James R. Hood, Jones County Attorney, 40 N.C.A.G. 786 (1969) (issued under prior similar provisions).

§ **105-280. Personal property exempt.**—The following personal property, and no other, shall be exempt from taxation:

(1) Personal property, directly or indirectly owned by this State and by the United States, and that lawfully owned and held by the counties, municipalities, and school districts of the State, used wholly and exclusively for county, municipal, or public school purposes.

(2) The furniture and furnishings of buildings lawfully owned and held by churches or religious bodies, wholly and exclusively used for religious worship or for the residence of the minister of any church or religious body, and private libraries of such ministers and the teachers of the public schools of this State.

(3) Tangible personal property exclusively used for educational purposes and owned by churches, public libraries, colleges, academies, industrial schools, seminaries, or other educational institutions. However, the exemption granted by this subdivision shall not apply to the tangible personal property of any institution organized or operated for profit or if any officer, shareholder, member, employee thereof, or other person shall be entitled to receive any pecuniary profit from the operations thereof except reasonable compensation for services.

(3a) Personal property owned by religious educational assemblies, retreats and similar organizations, associations and corporations exclusively maintained and used in connection with buildings, facilities and areas exempt from taxation under the provisions of G.S. 105-278(4a).

(4) The endowment and invested funds of churches and other religious associations, charitable, educational, literary, benevolent, patriotic or historical institutions, associations or orders, when the interest or income from said funds shall be used wholly and exclusively for religious, charitable, educational or benevolent purposes, or to pay the principal or interest of the indebtedness of said associations.

(5) Personal property belonging to Young Men's Christian Associations and other similar religious associations, homes for the aged, sick or infirm, orphan and other similar homes, Societies for the Prevention of Cruelty to Animals which are not conducted for profit and are charitable in nature where such property is used in the furtherance of humane activities, reformatories, hospitals, and nunneries which are not conducted for profit and entirely and completely used for charitable and benevolent purposes.

(6) The furniture, furnishings, and other personal property belonging to the American Legion, or any post thereof, or any other vet-

erans' organization chartered by Congress or organized and operating on a nationwide or statewide basis, or any post or other local organization thereof, or any patriotic, historical, or any benevolent or charitable association, when used wholly for lodge or post purposes and meeting rooms by said association or when such personal property is used for charitable or benevolent purposes.

(7) The exemptions granted in subdivisions (2), (3), (4), (5), (6) and (11) of this section shall apply to personal property of foreign religious, charitable, educational, literary, benevolent, patriotic or historical corporations, institutions or orders when such property is exclusively used or the income therefrom is exclusively used for religious, charitable, educational or benevolent purposes within this State.

(8) Wearing apparel, household and kitchen furniture, the mechanical and agricultural instruments of farmers and mechanics, libraries and scientific instruments, provisions and livestock, not exceeding the total value of three hundred dollars ($300.00), and all growing crops: Provided, that said three hundred dollars ($300.00) exemptions shall be limited to:

a. Each household, consisting of the head of the household and all the dependents, one three hundred dollars ($300.00) exemption to be distributed among the members of the household as they see fit; and

b. Each single person, not residing with persons on whom he is dependent, as to eligible property actually owned by him.

(9) The intangible personal property referred to in Schedule H, G.S. 105-198 to 105-217, which said intangible personal property shall be taxed or exempt in accordance with the provisions of said Schedule H, G.S. 105-198 to 105-217: Provided, that the provisions of this subdivision shall not be construed to modify the provisions of Article 23 of this Subchapter.

(10) Repealed by Session Laws 1961, c. 1169, s. 8.

(11) The furniture, furnishings, books, instruments, and all other tangible or intangible personal property held for or owned by hospitals organized and operated as nonstock, nonprofit, charitable institutions, notwithstanding that patients of such hospitals able to pay are charged for services rendered: Provided, all revenues or receipts of such hospitals shall be used, invested, or held for the purposes for which they are organized. The provisions of this section shall be effective as to any assessment for taxes for the year 1936 and subsequent years.

(12) All cotton, tobacco or other farm products owned by the original producer, or held by the original producer in any public warehouse and represented by warehouse receipts, or held by the original producer for any cooperative marketing or grower's association, shall be exempt from taxation for the year following the year in which grown, but not for any year thereafter.

(13) Any vehicle given by the federal government to any veteran on account of any disability suffered during World War II, so long as such vehicle is owned by the original donee or other veteran entitled to receive such gift under Title 38, section 252, United States Code Annotated.

(14) Personal property owned by any airport authority, airport board or airport commission created as a separate and independent body corporate and politic by act of the General Assembly or by counties and/or municipalities pursuant to an act of the General Assembly.

(15) All cotton while subject to transit privileges under Interstate Commerce Commission tariffs.

(16) Air cleaning devices, sewage and waste treatment facilities, and air or water pollution abatement equipment designated to abate, reduce, or eliminate air or water pollution. This exemption shall be allowed only upon the condition that a certificate is furnished to the tax supervisor of the county, wherein such property is located, by the Board of Water and Air Resources, certifying that said Board has found as a fact that the air cleaning device or waste treatment plant or pollution abatement equipment purchased or constructed or installed as above described has actually been constructed and installed and that such plant or equipment complies with the requirements of said Board with respect to such devices, plants, or equipment, that such device, plant or equipment is being effectively operated in accordance with the terms and conditions set forth in the permit, certificate of approval, or other document of approval issued by the Board of Water and Air Resources, and that the primary purpose thereof is to reduce air or water pollution resulting from the emission of air contaminants or the discharge of sewage and waste and not merely incidental to other purposes and functions. The exemption herein provided shall apply to facilities or equipment of private or public utilities built and installed primarily for the purpose of providing sewer service to residential and outlying areas. The exemption herein provided for shall be applicable only with respect to taxes levied in 1955 and subsequent years.

(17) Repealed by Session Laws 1961, c. 1169, s. 8.

(18) Wheat grown in North Carolina and stored in an unmanufactured state, owned or held by one other than a processor of wheat, upon which there is money borrowed and said money borrowed being secured by a mortgage on said wheat, shall be exempt for the year following the year in which grown. (1939, c. 310, s. 601; 1941, c. 125, ss. 3, 4; c. 221, s. 2; 1945, c. 995, s. 3; 1949, cc. 132, 1268; 1955, c. 230, s. 2; c. 1069, s. 1; c. 1100, s. 2; c. 1356; 1961, c. 1169, ss. 8, 8½; 1965, c. 741, s. 3; 1967, c. 892, s. 9; c. 1160, s. 2; 1971, c. 806, s. 1; c. 1163, s. 1.1.)

Editor's Note. — Session Laws 1971, c. 1163, applicable to taxable years beginning on or after Jan. 1, 1971, inserted "Societies for the Prevention of Cruelty to Animals which are not conducted for profit and are charitable in nature where such property is used in the furtherance of humane activities" in subdivision (5).

The cases and opinions of the Attorney General cited in the following note were decided or issued under former similar provisions.

Opinions of Attorney General. — Mr. W.M. Styles, Buncombe County Attorney, 40 N.C.A.G. 785 (1969).

School bonds of a city in this State in the hands of an investor residing in a county in this State were held not subject to be locally assessed for taxation. County of Mecklenburg v. Piedmont Fire Ins. Co., 210 N.C. 171, 185 S.E. 654 (1936).

Church Property Exempt from Ad Valorem Taxes. — See opinion of Attorney General to Mr. Fred P. Parker, Jr., Wayne County Attorney, 40 N.C.A.G. 789 (1970).

Solvent credits held by a religious society, the income from which is devoted and applied exclusively to educational, religious and charitable purposes, are exempt from taxation. United Brethren v. Commissioners of Forsyth County, 115 N.C. 489, 20 S.E. 626 (1894).

Hospital Property. — See Piedmont Mem. Hosp. v. Guilford County, 218 N.C. 673, 12 S.E.2d 265 (1940).

Seed Company Inventory Not Exempt from Ad Valorem Taxes. — See opinion of Attorney General to Mr. Walter J. Cashwell, Jr., Scotland County Attorney, 41 N.C.A.G. 56 (1970).

§ 105-281. Deductions and credits.—(a) Private hospitals shall not be exempt from property taxes and other taxes lawfully imposed, but in consideration of the large amount of charity work done by them, the boards of commissioners of the several counties are authorized and directed to accept, as valid claims against the county, the bills of such hospitals for attention and

services voluntarily rendered to afflicted or injured residents of the county who are indigent and likely to become public charges, when such bills are duly itemized and sworn to and are approved by the county physician or health officer as necessary or proper; and the same shall be allowed as payments on and credits against all taxes which may be or become due by such hospital on properties strictly used for hospital purposes, but to that extent only will the county be liable for such hospital bills: Provided, that the board of aldermen or other governing boards of cities and towns shall allow similar bills against the municipal taxes for attention and services voluntarily rendered by such hospitals to paupers or other indigent persons resident in any such city or town: Provided further, that the governing boards of cities and towns shall require a sworn statement to the effect that such bills have not and will not be presented to any board of county commissioners as a debt against that county, or as a credit on taxes due that county. The provisions of this subsection shall not apply to public hospitals or to hospitals organized and operated as nonstock, nonprofit, charitable institutions, which, for the purposes of this Subchapter, shall be deemed public hospitals: Provided, however, that nothing in this subsection shall affect the liability of counties, cities, and towns to public hospitals, as herein defined, for services heretofore or hereafter rendered indigent patients or public charges and for which such counties, cities, or towns are or may be otherwise liable.

(b) All bona fide indebtedness incurred in the purchase of fertilizer and fertilizer materials owing by a taxpayer as principal debtor may be deducted from the total value of all fertilizer and fertilizer materials as are held by such taxpayer for his own use in agriculture during the current year: Provided, further, that from the total value of cotton stored in this State there may be deducted by the owner thereof all bona fide indebtedness incurred directly for the purchase of said cotton and for the payment of which the cotton so purchased is pledged as collateral.

(c) For the purpose of ascertaining and fixing the tax value of any cotton, tobacco, or other farm products, held by or for any cooperative stabilization or marketing association or corporation, to whom the products have been delivered or conveyed or assigned by the original producer for the purpose of sale, there shall be deducted (by any person or corporation liable for the tax thereon) from the determined value of the commodity the amount of any unpaid loan or loans and/or advance or advances of any nature whatsoever made or granted thereon by the United States government or by any agency of the United States government or by any cooperative stabilization or marketing association or corporation. (1939, c. 310, s. 602; 1941, c. 125, s. 5; c. 221, s. 3; 1949, c. 723; 1971, c. 806, s. 1.)

Real Property of Private Hospitals Controlled by Section.—The real property of private hospitals is made a separate and distinct classification under subsection (a) of this section and it was the legislative intent that the provisions of this section should control rather than the former provisions exempting from taxation property of churches, religious societies and charitable institutions and orders, the language of the former provisions, strictly construed, not being sufficiently broad to include property of private hospitals in view of the fact that subsection (a) of this section specifically deals with property of such institutions. Piedmont Mem. Hosp. v. Guilford County, 218 N.C. 673, 12 S.E.2d 265 (1940).

Distinction between Private and Public Hospitals.—Before the 1941 amendment to the predecessor to this section it was held that, in determining the question of exemption from taxation, a nonprofit hospital established solely for charitable purposes through individual donations, and which was governed by a self-perpetuating board of trustees named by the incorporators, was a private hospital as contradistinguished from a public hospital, which was one supported, maintained and controlled by public authority, and the distinction observed between charitable hospitals and those operated for gain or profit in determining liability for negligence, had no bearing in determining the question of tax exemption. Piedmont Mem. Hosp. v. Guilford County, 218 N.C. 673, 12 S.E.2d 265 (1940).

Use of Building Owned by Hospital. — Where the first floor of plaintiff's building was rented out for stores and shops, the second floor

was rented for offices for physicians and surgeons, and the third and fourth floors were used for a hospital, as to the first two floors, it was held that the General Assembly was without authority to grant any exemption from taxation, and as to the third and fourth floors, subsection (a) of the predecessor to this section as it stood before the 1941 amendment was held applicable, and bills for services rendered indigent patients could be allowed as a credit on taxes levied against this part of the property, but it was not exempt from taxation. Piedmont Mem. Hosp. v. Guilford County, 218 N.C. 673, 12 S.E.2d 265 (1940).

§ **105-282. Records of tax exempt property.**—The person making up the tax records shall enter, in regular order, the name of the owner, a clear description of all real and personal property exempt from taxation, together with a statement of its value, for what purpose used, and the rent, if any, obtained therefrom. Each list taker shall secure the necessary information with respect to such property in his township. The county supervisor of taxation, when the list of exempt property is completed, shall make duplicate copies thereof and transmit a duplicate copy to the State Board of Assessment on or before November 1 of each year and shall file the original list in his office. (1939, c. 310, s. 906; 1963, c. 515; 1971, c. 806, s. 1.)

Article 13.

Standards for Appraisal and Assessment.

§ **105-283. Uniform appraisal standard.**—All property, real and personal, shall as far as practicable be appraised or valued at its true value in money. (The intent of this section is to have all property appraised at its true and actual value in money, in such manner as such property is usually sold, but not by forced sale). Thus, when used in this Subchapter, the words "true value" shall be interpreted as meaning market value, that is, the price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of all the uses to which the property is adapted and for which it is capable of being used. (1939, c. 310, s. 500; 1953, c. 970, s. 5; 1955, c. 1100, s. 2; 1959, c. 682; 1967, c. 892, s. 7; 1969, c. 945, s. 1; 1971, c. 806, s. 1.)

§ **105-284. Uniform assessment standard; selection of assessment ratio.**—(a) Each year prior to the first meeting of the board of equalization and review, the board of county commissioners shall adopt by resolution some uniform percentage of the amount at which property in the county has been appraised as the value to be used in taxing property. This percentage shall be known as the assessment ratio.

(b) Before adopting the resolution required by subsection (a), the board of county commissioners shall give representatives of municipalities required to use the assessments determined by the county an opportunity to make recommendations as to that assessment ratio that would provide a reasonable and adequate tax base in each such municipality. The board of county commissioners shall give due consideration to the recommendations of such representatives, but final action selecting and adopting the assessment ratio shall be taken by the board alone.

(c) Within 10 days after adopting an assessment ratio, the board of county commissioners shall forward a certified copy of the adoption resolution to the State Board of Assessment and shall notify each municipality in the county of the assessment ratio adopted.

(d) The assessment ratio selected by the board of county commissioners shall be applied to the appraised value of all real and personal property subject to taxation in the county, and the abstracts or tax records of the county shall show for all properties both the appraisal value and the assessed value for tax purposes.

(e) Taxes levied by all counties and municipalities shall be levied uniformly on assessments determined as provided in this section. (1939, c. 310, s. 500; 1953, c. 970, s. 5; 1955, c. 1100, s. 2; 1959, c. 682; 1967, c. 892, s. 7; 1969, c. 945, s. 1; 1971, c. 806, s. 1.)

Article 14.

Time for Listing and Appraising Property for Taxation.

§ 105-285. Date as of which property is to be listed and appraised.—(a) All property subject to ad valorem taxation shall be listed annually.

(b) Except as otherwise provided in this subsection (b), the values and ownership of personal property, both tangible and intangible, shall be determined annually as of January 1. The value of inventories and other goods and materials held and used in connection with the mercantile, manufacturing, processing, producing, or other business enterprise of a taxpayer whose fiscal year closes at a date other than December 31 shall be determined as of the ending date of the taxpayer's latest completed fiscal year. If a taxpayer has begun an additional business enterprise in a county between the close of the taxpayer's fiscal year and January 1 or if a taxpayer has not completed a fiscal year as of January 1, the value of the taxpayer's inventory and other goods and materials shall be determined as of January 1. For purposes of this subsection, the word "inventories" means goods held for resale, raw materials, and goods in process of manufacture.

(c) The value of real property shall be determined as of January 1 of the years prescribed by G.S. 105-286 and 105-287. The ownership of real property shall be determined annually as of January 1, except in the following situation: When any real property is acquired after January 1, but prior to July 1, and the property was not subject to taxation on January 1 on account of its exempt status, it shall be listed for taxation by the transferee as of the date of acquisition and shall be appraised in accordance with its true value as of January 1 preceding the date of acquisition; and the property shall be taxed for the fiscal year of the taxing unit beginning on July 1 of the year in which it is acquired. The person in whose name such property is listed shall have the right to appeal the listing, appraisal, and assessment of the property in the same manner as that provided for listings made as of January 1.

In the event real property exempt as of January 1 is, prior to July 1, acquired from a governmental unit that by contract is making payments in lieu of taxes to the taxing unit for the fiscal period beginning on July 1 of the year in which the property is acquired, the tax on such property for the fiscal period beginning on July 1 immediately following acquisition shall be one half of the amount of the tax that would have been imposed if the property had been listed for taxation as of January 1. (1939, c. 310, s. 302; 1945, c. 973; 1971, c. 806, s. 1.)

When Lien Attaches.—Under the former law the lien for taxes attached to realty on the first day of April of each year, the date on which land was required to be listed in the name of the owner. Bemis Hardwood Lumber Co. v. Graham County, 214 N.C. 167, 198 S.E. 843 (1938).

§ 105-286. Time for general reappraisal of real property. — (a) Octennial Plan.—Unless the date shall be advanced as provided in subdivision (a)(2), below, each county of the State, as of January 1 of the year prescribed in the schedule set out in subdivision (a)(1), below, and every eighth year thereafter, shall reappraise all real property in accordance with the provisions of G.S. 105-283 and 105-317.

(1) Schedule of Initial Reappraisals.—

Division One—1972: Avery, Camden, Cherokee, Cleveland,

Cumberland, Guilford, Harnett, Haywood, Lee, Montgomery, Northampton, and Robeson.

Division Two—1973: Caldwell, Carteret, Columbus, Currituck, Davidson, Gaston, Greene, Hyde, Lenoir, Madison, Orange, Pamlico, Pitt, Richmond, Swain, Transylvania, and Washington.

Division Three—1974: Ashe, Buncombe, Chowan, Franklin, Henderson, Hoke, Jones, Pasquotank, Rowan, and Stokes.

Division Four—1975: Alleghany, Bladen, Brunswick, Cabarrus, Catawba, Dare, Halifax, Macon, New Hanover, Surry, Tyrrell, and Yadkin.

Division Five—1976: Bertie, Caswell, Forsyth, Iredell, Jackson, Lincoln, Onslow, Person, Perquimans, Rutherford, Union, Vance, Wake, Wilson, and Yancey.

Division Six—1977: Alamance, Durham, Edgecombe, Gates, Martin, Mitchell, Nash, Polk, Randolph, Stanly, Warren, and Wilkes.

Division Seven—1978: Alexander, Anson, Beaufort, Clay, Craven, Davie, Duplin, and Granville.

Division Eight—1979: Burke, Chatham, Graham, Hertford, Johnston, McDowell, Mecklenburg, Moore, Pender, Rockingham, Sampson, Scotland, Watauga, and Wayne.

(2) Advancing Scheduled Octennial Reappraisal.—Any county desiring to conduct a reappraisal of real property earlier than required by this subsection (a) may do so upon adoption by the board of county commissioners of a resolution so providing. A copy of any such resolution shall be forwarded promptly to the State Board of assessment. If the scheduled date for reappraisal for any county is advanced as provided herein, real property in that county shall thereafter be reappraised every eighth year following the advanced date unless, in accordance with the provisions of this subdivision (a)(2), an earlier date shall be adopted by resolution of the board of county commissioners, in which event a new schedule of octennial reappraisals shall thereby be established for that county.

(b) Fourth-Year Horizontal Adjustments.—As of January 1 of the fourth year following a reappraisal of real property conducted under the provisions of subsection (a), above, each county shall review the appraised values of all real property and determine whether changes should be made to bring those values into line with then current true value. If it is determined that the appraised value of all real property or of defined types or categories of real property require such adjustment, the tax supervisor shall revise the values accordingly by horizontal adjustments rather than by actual appraisal of individual properties: That is, by uniform application of percentages of increase or reduction to the appraised values of properties within defined types or categories or within defined geographic areas of the county.

(c) Value to Be Assigned Real Property When Not Subject to Appraisal.—In years in which real property within a county is not subject to appraisal or reappraisal under subsections (a) or (b), above, or under G.S. 105-287, it shall be listed at the value assigned when last appraised under this section or under G.S. 105-287. (1939, c. 310, s. 300; 1941, c. 282, ss. 1, 1½; 1943, c. 634, s. 1; 1945, c. 5; 1947, c. 50; 1949, c. 109; 1951, c. 847; 1953, c. 395; 1955, c. 1273; 1957, c. 1453, s. 1; 1959, c. 704, s. 1; 1971, c. 806, s. 1.)

Editor's Note. — Session Laws 1971, c. 806, s. 4, provides: "In G.S. 153-9, subsection (51), in G.S. 153-64.1, and in all other sections of the General Statutes, each reference to G.S. 105-278 shall be deemed to be a reference to G.S. 105-296 as that section appears in Section 1 of this Act. In G.S. 153-64.1 and in all other sections of the General Statutes, each reference to G.S. 105-295 shall be deemed to be a reference to G.S. 105-317 as that section appears in Section 1 of this Act."

The reference to § 105-296 in the above-quoted section should have been to § 105-286.

§ 105-287. Real property to be appraised in years in which general reappraisal is not conducted.—(a) Real property described in subsection (b), below, and no other shall be reappraised for taxation in years in which no general appraisal or reappraisal is being conducted in the county under the provisions of G.S. 105-286(a). However, nothing in this section shall modify or restrict the provisions of G.S. 105-312 governing the appraisal of discovered property. Reappraisals required by this section shall not be retroactive but shall take effect as of January 1 of the year in which made. The appeal provisions of G.S. 105-322 and 105-324 shall apply to reappraisals made under the requirements of this section.

(b) All real property that meets the following requirements shall be reappraised in years in which no general appraisal or reappraisal is being conducted in the county, that is, real property which:

(1) Was not appraised at the last general appraisal or reappraisal conducted in accordance with the provisions of G.S. 105-286.

(2) Has increased in value to the extent of more than one hundred dollars ($100.00) by virtue of improvements or appurtenances added since the last appraisal or reappraisal of such property. (In no case, however, shall the valuation of a property be increased under the provisions of this section as the result of the owner's enterprise in adopting any one or more of the following progressive policies:

a. Planting and care of lawns, shade trees, shrubs, and flowers for noncommercial purposes.

b. Repainting buildings.

c. Terracing or other methods of soil conservation, to the extent that they preserve values already existing.

d. Protection of forests against fire.

e. Planting of forest trees on vacant land for reforestation purposes (for 10 years after such planting).

f. The impoundment of water upon marshlands for the purpose of preserving or enhancing the natural habitat of wildlife indigenous to such marshlands, but only when the marshlands are used for noncommercial purposes.

g. Installing or constructing air cleaning devices or waste disposal or water pollution abatement plants (including waste lagoons) or equipment, upon the condition that a certificate is furnished to the tax supervisor of the county in which such property is located by the Board of Water and Air Resources certifying that the Board has found as a fact:

1. That the waste treatment plant, air cleaning device, or air or water pollution abatement equipment as above described has actually been constructed and installed, and

2. That the plant, device, or equipment complies with the requirements of the Board with respect to such plants, devices, or equipment, and

3. That the plant, device, or equipment is being effectively operated in accordance with the terms and conditions set forth in the permit, certificate of approval, or other document of approval issued by the Board, and

4. That the primary rather than incidental purpose of the plant, device, or equipment is to reduce air or water pollution resulting from the emission of air contaminants or the discharge of sewage and waste.

The provisions of this subdivision (b)(2)g shall also apply to the facilities or equipment of private or public utilities built and installed primarily for the purpose of providing sewer service to residential and outlying areas.)

(3) Has decreased in value to the extent of more than one hundred dollars ($100.00) by virtue of damage, destruction, or removal of improvements or appurtenances (other than those listed in subdivision (b)(2), above) since the last appraisal or reappraisal of such property.

(4) Has been divided into lots that are located on streets laid out and open for travel and that have been sold or offered for sale as lots since the last appraisal of such property. (However, if a tract has been divided into lots and more than five acres of the tract remain unsold by the owner thereof, the unsold portion may be appraised as land acreage rather than as lots in the discretion of the tax supervisor.)

(5) Was last appraised at an improper figure as the result of a clerical error.

(6) Has increased or decreased in value to the extent of more than one hundred dollars ($100.00) by virtue of circumstances external to the property other than increases or decreases in the general economy of the county since the last appraisal of such property. (In each such case the facts in connection with the increase or decrease in value of the specific tract, parcel, or lot shall be found by the board of equalization and review and entered upon the proceedings of the board.)

(7) Has increased or decreased in value by virtue of a change in the acreage or poundage allotment for any farm commodity, when any such allotment was assigned a fixed value per acre or other unit of measurement in the last appraisal of such property. (In such event the board of equalization and review shall adjust uniformly the appraised and assessed valuations of all real property affected by such a change in allotments.)

(8) Was last appraised at an improper figure as the result of an error in the number of acres in the tract or parcel or in the dimensions of the lot, or as the result of an error in the area or other measurement of a building or other improvement.

(9) Was last appraised at a figure that, when measured by the schedules of values, standards, and rules adopted under the provisions of G.S. 105-317 for the county's last preceding general reappraisal, was manifestly unjust at the time so appraised.

(c) In appraising real property under the provisions of this section, the schedules, standards, and rules that were adopted for use in the last preceding reappraisal of real property in the county conducted under G.S. 105-286 shall be applied. (1939, c. 310, ss. 301, 500; 1953, c. 970, s. 5; 1955, c. 901; c. 1100, s. 2; 1959, c. 682; c. 704, s. 2; 1963, c. 414; 1967, c. 892, s. 7; 1969, c. 945, s. 1; 1971, c. 806, s. 1.)

Correction of Unjust and Inequitable Assessment. — It is apparent that the legislature intended to authorize a county board of equalization and review, when requested so to do, to correct any unjust and inequitable assessment. In re Property of Pine Raleigh Corp., 258 N.C. 398, 128 S.E.2d 855 (1963) (decided under former similar provisions).

If the county board of equalization and review refuses to act, the taxpayer may appeal to the State Board of Assessment. In re Property of Pine Raleigh Corp., 258 N.C. 398, 128 S.E.2d 855 (1963).

The legislature never contemplated that an injustice done a taxpayer must continue for a period of years merely because he failed at the first opportunity to bring the injustice to the attention of the authority having the power to correct. In re Property of Pine Raleigh Corp., 258 N.C. 398, 128 S.E.2d 855 (1963).

Article 15.

State Board of Assessment.

§ 105-288. Creation; functions; members and officers; oaths.—(a) There is hereby created a State Board of Assessment.

(1) The Board shall exercise general and specific supervision over the valuation and taxation of property by counties and municipalities throughout the State.

(2) The Board is constituted a board of appraisers and assessors for the property of public service companies as defined in G.S. 105-333.

(3) The Board is constituted a State board of equalization and review of valuation and taxation of property in this State.

(b) The State Board of Assessment shall be composed of five members chosen as provided in subdivisions (b)(1) through (b)(6), below.

(1) Members of the Board serving on July 1, 1971, shall serve until their current terms expire and their successors are appointed and qualified.

(2) On July 1, 1971, and quadrennially thereafter, the Governor, the Lieutenant Governor, and the Speaker of the North Carolina House of Representatives shall each appoint one member to serve for four years and until his successor is appointed and qualified.

(3) On July 1, 1973, and quadrennially thereafter, the Governor shall appoint a member to fill the single term expiring on that date to serve for four years and until his successor is appointed and qualified.

(4) The Director of the Department of Tax Research shall serve ex officio as a member of the Board.

(5) In the case of a vacancy, the unexpired term shall be filled by appointment by the holder of the office making the original appointment.

(6) Pursuant to Article VI, Sec. 9, of the North Carolina Constitution, the office of member of the State Board of Assessment is hereby declared to be an office that may not be held concurrently with any other elective or appointive office other than Director of the Department of Tax Research.

(c) The Board shall select its chairman from the membership of the Board. The chairman shall serve for a term of four years unless his membership on the Board shall expire earlier.

(d) On July 1, 1971, and quadrennially thereafter, the Board shall appoint an administrative officer whose entire time shall be given to the work of the Board and who shall have the powers and duties assigned to him by the Board. The administrative officer shall serve at the pleasure of the Board. Pursuant to Article VI, Sec. 9, of the North Carolina Constitution, the office of administrative officer is hereby declared to be an office that may not be held concurrently with any other elective or appointive office.

(e) Each member of the Board and the administrative officer shall take and subscribe the oath set out below and file it with the Secretary of State:

I, ..., do solemnly swear (or affirm) that I will support and maintain the Constitution and laws of the United States, and the Constitution and laws of North Carolina not inconsistent therewith, and that I will faithfully discharge the duties of my office as a member of the State Board of Assessment (or Administrative Officer of the State Board of Assessment) and that I will not allow my actions as a member (or Administrative Officer) of said Board to be influenced by personal or political friendships or obligations, so help me God.

.....
(Signature)

(f) Upon authorization of the Board, the administrative officer may employ valuation and appraisal specialists and other assistants needed for the performance of the Board's duties.

(g) The members of the Board shall receive fifteen dollars ($15.00) per day when engaged in the performance of the duties of the Board plus subsistence and travel expenses. The administrative officer of the Board shall be paid a

salary to be fixed by the Governor and the Advisory Budget Commission. All expenses of the Board, the administrative officer, and other employees of the Board shall be paid from funds appropriated out of revenues derived from the tax on intangible personal property as provided by G.S. 105-213. (1939, c. 310, ss. 200, 201; 1941, c. 327, s. 6; 1947, c. 184; 1961, c. 547, s. 1; 1967, c. 1196, ss. 1, 2; 1971, c. 806, s. 1.)

State Government Reorganization. — The State Board of Assessment was transferred to the Department of Revenue by § 143A-190, enacted by Session Laws 1971, c. 864.

Present Members of State Board of Assessment Continue Although Statute Revised and Renumbered. — See opinion of Attorney General to Mr. Thomas W. Alexander, State Board of Assessment, 41 N.C.A.G. 458 (1971).

Suits against Former State Tax Commission. — The former State Tax Commission (under the prior law corresponding to the State Board of Assessment) acted as a body and in a corporate capacity, and an action or proceeding to compel that body to perform its ministerial duties must be brought against it in that capacity and not against its members, for its functions were not individual or personal, but corporate. Hence, mandamus to compel the refund of taxes alleged to have been paid under an excessive valuation of property would not lie against two of the commissioners as individuals. Jenkins Bros. Shoe Co. v. Travis, 168 N.C. 599, 84 S.E. 1036 (1915).

§ 105-289. Duties of the Board.—(a) It shall be the duty of the State Board of Assessment:

(1) To discharge the duties prescribed by law and to take such action and to do such things as may be needful and proper to enforce the provisions of this Subchapter.

(2) To report in reasonably durable form to the General Assembly at each regular session or at such other times as the General Assembly may direct:

a. The proceedings of the Board during the preceding biennium.

b. Recommendations concerning revision of this Subchapter and information concerning the public revenues that may be required by the General Assembly or that the Board deems expedient and wise.

(3) To report to the Governor on or before the first day of January each year:

a. The proceedings of the Board during the preceding year.

b. Any recommendations the Board desires to submit with respect to any matter relating to this Subchapter.

(4) To keep full and accurate records of its official proceedings.

(b) In its capacity as a board of appraisers and assessors, it shall be the duty of the Board to administer the provisions of Article 23 of this Subchapter.

(c) In its capacity as a State board of equalization and review, it shall be the duty of the Board to administer the provisions of G.S. 105-290.

(d) In exercising general and specific supervision over the valuation and taxation of property, the Board shall provide for the instruction of county, city, and town tax authorities in the listing, appraisal, and assessment of property for taxation and in the levying and collection of property taxes. On and after July 1, 1973, boards of county commissioners and municipal governing bodies shall not appoint any person to the office of county or municipal tax supervisor unless and until the State Board of Assessment shall have certified that he has been instructed in the duties of the office and that he is qualified to appraise the kinds of real and personal property commonly found in this State.

(e) In accordance with regulations that may be adopted by the Board, the State Board of Assessment shall make available to county tax supervisors, boards of equalization and review, and boards of county commissioners any information contained in any report to the Board, information to which the Board may have access in any report to the Department of Revenue or other State department, or any other information that the Board may have in its

possession that may assist the county authorities in securing a complete listing of property for taxation and in appraising taxable property.

(1) Information transmitted or made available to county tax authorities under this subsection (e) shall not be divulged or published by the county tax authorities and shall be used only for the purposes of securing complete tax listings, appraising taxable property, and presenting information in administrative and judicial proceedings involving listings and appraisals.

(2) Except as provided in this subsection (e), and except to the Governor or his authorized agent, and except to a solicitor or the authorized agent of a solicitor of a district in which such information would affect the listing or appraisal of property for taxation, the Board shall not divulge or make public the reports made to it or to other State departments. (The provisions of this subsection shall not interfere with the publication of appraisals, assessments, and decisions made by the Board or with publication of statistics by the Board, nor shall the provisions of this subsection prevent presentation of such information in any administrative or judicial proceeding involving appraisals, assessments, or decisions of the Board.)

(f) To confer with and advise county and municipal tax authorities as to their duties under this Subchapter and other laws with respect to the listing, appraisal, and assessment of property and the levying and collection of property taxes.

(g) To see that proper proceedings are brought to enforce the statutes pertaining to taxation and the collection of penalties and liabilities imposed by law upon public officers, officers of corporations, and individuals who fail, refuse, or neglect to comply with the provisions of this Subchapter and other laws with respect to the taxation of property, and to call upon the Attorney General of this State or any prosecuting attorney of this State to assist in the execution of the powers conferred by the laws of this State with respect to the taxation of property.

(h) To make continuing studies of the ratio of appraised value of real and personal property to its true value in each county and to publish the results of the studies at least every two years.

(i) To maintain the register of experts provided for in G.S. 105-299, to review the qualifications and work of registrants, and to advise county authorities with respect to the professional and financial capacity of registrants to comply with the terms of their employment to aid and assist counties in determining the true value of property subject to taxation. (1939, c. 310, s. 202; 1955, c. 1350, s. 10; 1967, c. 1196, s. 3; 1969, c. 7, s. 1; 1971, c. 806, s. 1.)

Statutory Method of Assessment and Appeal Must Be Followed. — A particular board, such as the State Board of Assessment, given authority to assess or fix the value of property for taxation, is exercising a quasi-judicial function, and when a method is provided by the State for appeals from the exercise of this function, and the taxpayer fails to avail himself of it, he cannot bring an action to recover back that portion of the taxes so assessed which he claims to be illegal. The method provided by statute for assessment and appeal from the assessment must be followed. The facts of the instant case did not permit a variation of this rule. Garysburg Mfg. Co. v. Commissioners of Pender, 196 N.C. 744, 147 S.E. 284 (1929) (decided under former similar provisions).

Review of Assessment. — Under the prior law original proceedings before the State Board of Assessment to have the value of property reduced for taxation would be disregarded and considered as a nullity when the question involved was solely whether such value theretofore fixed and agreed upon be reduced. Caldwell County v. Doughton, 195 N.C. 62, 141 S.E. 289 (1928).

§ 105-290. Appeals to the State Board of Assessment.—(a) Duty to Hear Appeals.—In its capacity as the State board of equalization and review, the State Board of Assessment shall hear and adjudicate appeals from boards of

county commissioners and from county boards of equalization and review as provided in this section.

(b) Appeals from Appraisal and Listing Decisions.—It shall be the duty of the State Board of Assessment to hear and to adjudicate appeals from decisions made by county boards of equalization and review and boards of county commissioners under the provisions of G.S. 105-286, 105-287, 105-322, 105-325, and 105-312, whether the decisions be made by such a board upon appeal from the tax supervisor or upon such a board's own motion.

(1) In such cases, taxpayers and persons having ownership interests in the property subject to taxation may file separate appeals or joint appeals at the election of one or more of the taxpayers. It is the intent of this provision that all owners of a single item of personal property or tract or parcel of real property be allowed to join in one appeal and also that any taxpayer be allowed to include in one appeal all objections timely presented regardless of the fact that the listing or valuation of more than one item of personal property or tract or parcel of real property is the subject of the appeal.

(2) When an appeal has been filed as provided in G.S. 105-286, 105-287, 105-324, 105-325, or 105-312, the State Board of Assessment shall elect whether to deal with the appeal under the procedure specified in subdivision (b)(2)a, below, or that specified in subdivision (b)(2)b, below.

a. Hearing by Board Representatives.—The Board is empowered to direct any member or members of the Board or authorized deputy to hear an appeal, to make examinations and investigations, to have made from stenographic notes a full and complete record of the evidence offered at the hearing, and to make recommended findings of fact and conclusions of law. Should the Board elect to follow this procedure, it shall fix the time and place at which its representative or representatives will hear the appeal and, at least 10 days before the hearing, give written notice thereof to the appellant and to the clerk of the board of commissioners of the county from which the appeal is taken. At the hearing the Board's representative or representatives shall hear all evidence and affidavits offered by the appellant and appellee county and may exercise the authority granted by subsection (d), below, to obtain information pertinent to decision of the appeal. The representative or representatives conducting the hearing shall submit to the Board and to the appellant and appellee a full record of the proceeding and his or their recommended findings of fact and conclusions of law. The Board shall review the record, the recommended findings of fact and conclusions of law, and any written arguments that may be submitted to the Board by the appellant or appellee within 15 days following the date on which the findings and conclusions were submitted to the parties and shall take one of the following actions:

1. Accept the recommended findings of fact and conclusions of law and issue an appropriate order as provided in subdivision (b)(3), below.
2. Make new findings of fact or conclusions of law based upon the record submitted by the Board's representative or representatives and issue an appropriate order as provided in subdivision (b)(3), below.
3. Rehear the appeal under the procedure provided in subdivision (b)(2)b, below, with respect to any portion of the record or recommended findings of fact or conclusions of law.

b. Hearing by Full Board.—Should the Board elect not to employ the

procedure provided in subdivision (b)(2)a, above, it shall fix a time and place at which the Board shall hear the appeal and, at least 10 days before the hearing, give written notice thereof to the appellant and to the clerk of the board of commissioners of the county from which the appeal is taken. At the hearing the Board shall hear all evidence and affidavits offered by the appellant and appellee county and may exercise the authority granted by subsection (d), below, to obtain information pertinent to decision of the appeal. The Board shall make findings of fact and conclusions of law and issue an appropriate order as provided in subdivision (b)(3), below.

(3) On the basis of the findings of fact and conclusions of law made after any hearing provided for by this subsection (b), the State Board of Assessment shall enter an order (incorporating the findings and conclusions) reducing, increasing, or confirming the valuation or valuations appealed or listing or removing from the tax lists the property whose listing has been appealed. A certified copy of the order shall be delivered to the appellant and to the clerk of the board of commissioners of the county from which the appeal was taken, and the abstracts and tax records of the county shall be corrected to reflect the Board's order.

(c) Appeals from Adoption of Schedules, Standards, and Rules.—It shall be the duty of the State Board of Assessment to hear and to adjudicate appeals from orders of boards of county commissioners adopting schedules of values, standards, and rules under the provisions of G.S. 105-317 as prescribed in this subsection (c), and the adoption of such schedules, standards, and rules shall not be subject to appeal under any other provision of this Subchapter.

(1) Any property owner of the county (separately or in conjunction with other property owners of the county) asserting that schedules of values, standards, and rules adopted by order of the board of county commissioners under the provisions of G.S. 105-317 fail to meet the appraisal standard established by G.S. 105-283 may appeal to the State Board of Assessment as provided in G.S. 105-317(c).

(2) Upon such an appeal the State Board of Assessment shall proceed to hear the appeal in accordance with the procedures provided in subdivisions (b)(1) and (b)(2), above, and in scheduling the hearing upon such an appeal, the Board shall give it priority over appeals that may be pending before the Board under the provisions of subsection (b), above. The decision of the Board upon such an appeal shall be embodied in an order as provided in subdivision (c)(3), below.

(3) On the basis of the findings of fact and conclusions of law made after any hearing provided for by this subsection (c), the State Board of Assessment shall enter an order (incorporating the findings and conclusions):

a. Modifying or confirming the order adopting the schedules, standards, and rules challenged, or

b. Requiring the board of county commissioners to revise or modify its order of adoption in accordance with the instructions of the Board and to present the order as thus revised or modified for approval by the Board under rules and regulations prescribed by the Board.

(d) Witnesses and Documents.—Upon its own motion or upon the request of any party to an appeal, the State Board of Assessment, its members, or any authorized deputy shall examine witnesses under oath administered by any member or authorized deputy and examine the documents of any person if there is ground for believing that information contained in such documents is pertinent to the decision of any appeal pending before the Board, regardless of

whether such person is a party to the proceeding before the Board. Witnesses and documents examined under the authority of this subsection (d) shall be examined only after service of a subpoena as provided in subdivision (d)(1), below. The travel expenses of any witness subpoenaed and the cost of serving any subpoena shall be borne by the party that requested the subpoena.

(1) The State Board of Assessment, its members, or any authorized deputy is authorized and empowered to subpoena witnesses and to subpoena documents upon a subpoena to be signed by the chairman of the Board directed to the witness or witnesses or to the person or persons having custody of the documents sought. Subpoenas issued under this subdivision may be served by any officer authorized to serve subpoenas.

(2) Any person who shall willfully fail or refuse to appear, to produce subpoenaed documents in response to a subpoena, or to testify as provided in this subsection (d) shall be guilty of a misdemeanor and fined and/or imprisoned in the discretion of the court. (1939, c. 310, ss. 202, 1107, 1109; 1955, c. 1350, s. 10; 1967, c. 1196, s. 3; 1969, c. 7, ss. 1, 2; 1971, c. 806, s. 1.)

Editor's Note. — The cases cited in the following note were decided under former similar provisions.

Jurisdiction of State Board of Assessment is fixed by this section. In re Freight Carriers, Inc., 263 N.C. 345, 139 S.E.2d 633 (1965).

And Includes Power to Determine Tax Situs. — See In re Freight Carriers, Inc. 263 N.C. 345, 139 S.E.2d 633 (1965).

State Board Is Empowered to Make Final Valuation of Property. — The legislature's intent is that the agency designated to hear appeals in all matters pertaining to tax valuations should also be the one empowered to make the final valuation. The State Board of Assessment — unlike the courts — has the staff, the specialized knowledge and expertise necessary to make informed decisions upon questions relating to the valuation and assessment of property. King v. Baldwin, 276 N.C. 316, 172 S.E.2d 12 (1970).

Taxpayer Must Exhaust Administrative Remedy before Resorting to Courts. — The legislature has provided adequate means whereby the individual taxpayer may contest not only the valuation which the county commissioners have placed upon his own property but the entire tax list or assessment roll, and he must exhaust this administrative remedy before he can resort to the courts. King v. Baldwin, 276 N.C. 316, 172 S.E.2d 12 (1970).

The superior court has no authority to issue mandamus commanding the commissioners to revalue all real property in the county at its true value in money, since taxpayers must first exhaust the statutory administrative remedies in the county board of equalization and review and in the State Board of Assessment before they can resort to the superior court. King v. Baldwin, 276 N.C. 316, 172 S.E.2d 12 (1970).

But Judicial Review Is Available. — The administrative decisions of the State Board of Assessment are always subject to review by the superior court. In re Freight Carriers, Inc., 263 N.C. 345, 139 S.E.2d 633 (1965). See § 105-381.

And Jurisdiction of State Board Is Not Exclusive. — See In re Freight Carriers, Inc., 263 N.C. 345, 139 S.E.2d 633 (1965).

Steps in Obtaining Review of Valuation. — If the county commissioners have failed to value land at its true value in money — be the failure deliberate, an error in judgment, or caused by a misconception of the law — plaintiffs' initial step is to complain to the county board of equalization and review and request a hearing. If they are dissatisfied with the action taken by that board they may except to its order and appeal to the State Board. Thereafter, plaintiffs may resort to the courts, but only to obtain judicial review for errors of law or abuse of discretion by the State Board. King v. Baldwin, 276 N.C. 316, 172 S.E.2d 12 (1970).

§ **105-291. Powers of the Board.**—(a) General Powers.—The State Board of Assessment is authorized to exercise all powers reasonably necessary to perform the duties imposed upon it by this Subchapter and other laws of this State.

(b) Rule Making Power.—The Board may adopt such rules and regulations, not inconsistent with law, as the Board may deem necessary to promote the purposes for which it is constituted.

(c) General Investigatory Authority.—In exercising general and specific supervision over the valuation and taxation of property, the Board, its

members, or any authorized deputy shall have power to examine witnesses under oath administered by any member or authorized deputy and to examine the documents of any State department, county, city, town, or taxpayer if there is ground for believing that the witnesses have or that the documents contain information pertinent to the subject of the Board's inquiry. Witnesses and documents examined under the authority of this subsection (c) may be obtained through service of subpoenas as provided in subdivision (c)(1), below.

(1) To obtain the testimony of witnesses or to obtain access to the documents enumerated in this subsection (c), the Board, its members, or any authorized deputy is authorized and empowered to subpoena witnesses and to subpoena documents upon a subpoena to be signed by the chairman of the Board directed to the witness or to the person having custody of the documents sought, and to be served by any officer authorized to serve subpoenas.

(2) Any person who shall willfully fail or refuse to appear; to produce subpoenaed documents before the Board, its members, or authorized deputy in response to a subpoena; or to testify as provided in this subsection (c) shall be guilty of a misdemeanor and fined and/or imprisoned in the discretion of the court.

(d) Certification of Actions.—The Board shall have power to certify copies of its records, orders, and proceedings by attesting the copies with its official seal, and copies of records, orders, or proceedings so certified shall be received in evidence in all courts of this State with like effect as certified copies of other public records.

(e) Power to Require Reports.—In its discretion, the Board may require tax supervisors, clerks of boards of county commissioners, and county accountants to file with it, when called for, complete reports of the appraised and assessed value of all real and personal property in the counties, itemized as the Board may prescribe.

(f) Power to Prescribe Record Forms.—The Board may prescribe the forms, books, and records to be used in the listing, appraisal, and assessment of property and in the levying and collection of property taxes, and how the same shall be kept.

(g) Power to Recommend Appraisal Standards.—The Board may develop and recommend standards and rules to be used by tax supervisors and other responsible officials in the appraisal of specific kinds and categories of property for taxation. (1939, c. 310, s. 203; 1945, c. 955; 1951, c. 798; 1971, c. 806, s. 1.)

§ **105-292. Sessions of the Board.**—The State Board of Assessment shall hold four quarterly meetings each year in the City of Raleigh at the office of the Board. Other sessions may be held at the call of the chairman at any time or place in the State. (1939, c. 310, s. 204; 1971, c. 806, s. 1.)

§ **105-293. Duties of administrative officer.**—The administrative officer of the State Board of Assessment shall serve as secretary of the Board; shall perform all duties assigned to him by the Board; and, when authorized by the Board, shall serve as the Board's deputy for the purposes of this Subchapter. (1967, c. 1196, s. 4; 1971, c. 806, s. 1.)

Article 16.

County Listing, Appraisal, and Assessing Officials.

§ **105-294. County tax supervisor.**—(a) Appointment.—Persons occupying the position of county tax supervisor on July 1, 1971, shall continue in office until the first Monday in July, 1971. At its regular meeting on that date, and at its regular meeting on the first Monday in July in 1973 and every two years

thereafter, the board of county commissioners of each county shall appoint a county tax supervisor. The board of county commissioners may remove the tax supervisor from office during his term for good cause after giving him notice in writing and an opportunity to appear and be heard at a public session of the board. Whenever a vacancy occurs in this office, the board of county commissioners shall appoint a qualified person to serve as county tax supervisor for the period of the unexpired term.

(b) Qualifications.—Persons holding the position of tax supervisor on July 1, 1971, shall be deemed qualified to fill the position. Any other person selected after July 1, 1973, shall be one whose experience in the appraisal of real and personal property is satisfactory to the board of county commissioners and whose qualifications have been certified by the State Board of Assessment as provided in G.S. 105-289(d).

(c) Compensation.—The compensation of the tax supervisor shall be fixed by the board of county commissioners, and he shall be allowed such expenses as the commissioners may approve.

(d) Alternative to Separate Office of County Tax Supervisor.—Pursuant to Article VI, Sec. 9, of the North Carolina Constitution, the office of county tax supervisor is hereby declared to be an office that may be held concurrently with any other appointive or elective office (other than member of a board of county commissioners), and, subject to the following conditions, the board of county commissioners may appoint any elective or appointive officer as county tax supervisor:

(1) County officials who are performing the duties of tax supervisor on July 1, 1971, shall be deemed qualified to perform those duties.

(2) Any other official selected after July 1, 1973, to perform the duties of tax supervisor shall be one whose experience in the appraisal of real and personal property is satisfactory to the board and whose qualifications have been certified by the State Board of Assessment as provided in G.S. 105-289(d). (1939, c. 310, ss. 400, 401; 1953, c. 970, ss. 1, 2; 1971, c. 806, s. 1.)

§ **105-295. Oath of office for tax supervisor.**—Before entering upon his duties, the tax supervisor shall take and subscribe the following oath and file it with the clerk of the board of county commissioners:

I, ..., do solemnly swear (or affirm) that I will support and maintain the Constitution and laws of the United States, and the Constitution and laws of North Carolina not inconsistent therewith, and that I will faithfully discharge the duties of my office as tax supervisor of ..... County, North Carolina, and that I will not allow my actions as tax supervisor to be influenced by personal or political friendships or obligations, so help me God.

.....
(Signature)

(1939, c. 310, s. 402; 1971, c. 806, s. 1.)

This section, generally speaking, is directory. In re Appeal of Reeves Broadcasting Corp., 273 N.C. 571, 160 S.E.2d 728 (1968).

Failure to consider each and every indicia of value recited in this section does not vitiate the appraisal. In re Appeal of Reeves Broadcasting Corp., 273 N.C. 571, 160 S.E.2d 728 (1968).

Tobacco Allotments as Element of Value. — Mandamus will lie to compel the board of county commissioners to include tobacco allotments as an element of value in the appraisal and assessment of county real property for ad valorem taxes. Stocks v. Thompson, 1 N.C. App. 201, 161 S.E.2d 149 (1968).

§ **105-296. Powers and duties of tax supervisor.**—(a) The county tax supervisor shall have general charge of the listing and appraising of all property in the county in accordance with the provisions of law. He shall perform the duties imposed upon him by law, and he shall have and exercise

all powers reasonably necessary in the performance of his duties not inconsistent with the Constitution or the laws of this State.

(b) Within budgeted appropriations, he shall appoint the list takers and assessors and clerical assistants necessary to carry out the listing, appraisal, assessing, and billing functions required by law. He may allocate responsibility among them by territory, by subject matter, or on any other reasonable basis. Pursuant to Article VI, Sec. 9, of the North Carolina Constitution, the office of list taker and assessor is hereby declared to be an office that may be held concurrently with any other appointive office.

(c) At least 10 days before the date as of which property is to be listed, he shall advertise in a newspaper having general circulation in the county and post in at least five public places in each township in the county a notice containing at least the following:

(1) The date as of which property is to be listed.
(2) The date on which listing will begin.
(3) The date on which listing will end.
(4) The times between the date mentioned in subdivision (c)(2), above, and the date mentioned in subdivision (c)(3), above, during which lists will be accepted.
(5) The place or places at which lists will be accepted at the times established under subdivision (c)(4), above.
(6) A statement that all persons who, on the date as of which property is to be listed, own property subject to taxation must list such property within the period set forth in the notice and that any person who fails to do so will be subject to the penalties prescribed by law.

If the listing period is extended in any county by the board of county commissioners, the tax supervisor shall advertise in the newspaper in which the original notice was published and post in the same places a notice of the extension and of the times during which and the place or places at which lists will be accepted during the extended period.

(d) He shall convene the list takers for instruction in methods of securing a complete list of all property in the county and of appraising and assessing, in accordance with law, all property that is to be appraised and assessed in the approaching listing period. He shall conduct this instruction at any time after the appointment of list takers as provided in subsection (b), above, but not later than the week preceding the date as of which property is to be listed.

(e) He shall visit each list taker at least once during the listing period, and he shall confer with each list taker during the period as often as he or the list taker deems necessary to assure that all property shall be listed, appraised, and assessed according to law. He may require a list taker to visit any property subject to taxation in the county.

(f) He shall meet with each list taker prior to the date of the first meeting of the board of equalization and review for the purpose of reviewing the abstracts turned in by the list taker. He shall ascertain if property has been listed at the valuation required by law and if that standard of valuation has been applied uniformly throughout the county. If he determines that the list taker's work has been completed as required by law, he shall certify the list taker for compensation. He shall require that each list taker make out his account in detail specifying each day's services. The account shall be audited by the county accountant and approved by the board of county commissioners.

(g) He shall have power to subpoena any person for examination under oath and to subpoena documents whenever he has reasonable grounds for the belief that such person has knowledge or that such documents contain information that is pertinent to the discovery or valuation of any property subject to taxation in the county or that is necessary for compliance with the requirements as to what the tax list shall contain. The subpoena shall be signed

by the chairman of the board of equalization and review if that board is in session; otherwise, it shall be signed by the chairman of the board of county commissioners. It shall be served by an officer qualified to serve subpoenas. Any person who shall wilfully fail or refuse to appear, produce subpoenaed documents, or testify concerning the subject of the inquiry shall be guilty of a misdemeanor and fined and/or imprisoned in the discretion of the court.

(h) He may require any person engaged in operating a business enterprise in the county to submit, in connection with his regular tax list, a detailed inventory, statement of assets and liabilities, or other similar information pertinent to the discovery or appraisal of property taxable in the county. Inventories, statements of assets and liabilities, or other information secured by the tax supervisor under the terms of this subsection, but not expressly required by this Subchapter to be shown on the abstract itself, shall not be open to public inspection but shall be made available, upon request, to representatives of the Department of Revenue. Any tax supervisor or other official disclosing information so obtained, except as such disclosure may be necessary in listing or appraising property, in the performance of official duties, or in administrative or judicial proceedings relating to listing, appraising, or other official duties, shall be guilty of a misdemeanor and punishable by fine not exceeding fifty dollars ($50.00).

(i) Prior to the first meeting of the board of equalization and review, he shall have the power, for good cause, to change the appraisal of any property by the list taker if the property is subject to appraisal for the current year. Notice of a change in appraisal made by the tax supervisor shall be given to the taxpayer prior to the first meeting of the board of equalization and review. (1939, c. 310, ss. 403, 404; 1953, c. 970, s. 3; 1955, c. 1012, s. 1; 1957, c. 202; 1959, c. 704, s. 3; 1963, c. 302; 1971, c. 806, s. 1.)

§ **105-297. Assistant tax supervisors.**—The board of county commissioners may, upon the recommendation of the tax supervisor, appoint one or more assistant tax supervisors. The board may delegate to assistant tax supervisors appointed under this section responsibility for the appraisal of real property, the listing and appraisal of business property, or such other duties as the board deems advisable. Pursuant to Article VI, Sec. 9, of the North Carolina Constitution, the office of assistant tax supervisor is hereby declared to be an office that may be held concurrently with any other appointive office. (1939, c. 310, s. 409; 1955, c. 866; 1963, c. 625; 1967, cc. 59, 293; 1971, c. 802, s. 11; c. 806, s. 1.)

§ **105-298. Oath of office for list takers and assessors.**—Before entering upon his duties, each list taker and assessor shall take and subscribe the following oath and file it with the clerk of the board of county commissioners:

I, ..., do solemnly swear (or affirm) that I will support and maintain the Constitution and laws of the United States, and the Constitution and laws of North Carolina not inconsistent therewith, and that I will faithfully discharge the duties of my office as a list taker and assessor of ..... County, North Carolina, and that I will not allow my actions as list taker and assessor to be influenced by personal or political friendships or obligations, so help me God.

.....
(Signature)

(1939, c. 310, s. 406; 1971, c. 806, s. 1.)

§ **105-299. Employment of experts; registration.**—(a) Employment.—The board of county commissioners may employ persons having expert knowledge of the value and methods of appraising the kinds of property within the county to aid and assist the list takers, the tax supervisor, and the board of equalization and review in determining the true value of the

property in the county. Contracts for the employment of experts shall be deemed to be contracts for personal services and shall not be subject to the provisions of Article 8, Chapter 143 of the General Statutes.

(b) Registration.—Any person may register as an appraisal expert by filing the following information with the State Board of Assessment:

(1) A resume of his training and experience;
(2) A roster of his employees with a statement of the qualifications of each;
(3) A statement of his financial condition in such detail as the registrant deems advisable;
(4) A statement of his name and home office address;
(5) In the case of a corporation, partnership, unincorporated association, company, or firm, a statement of ownership. (1939, c. 310, s. 408; 1971, c. 806, s. 1.)

§ 105-300. Tax commission.—In all counties having a tax commission or comparable agency, the commission or agency shall, except for levying taxes, perform all the duties required by this Subchapter to be performed by the board of equalization and review and the board of county commissioners. All expenses incurred by the tax commission or agency or its appointees in accordance with this Subchapter shall be paid by the county. Pursuant to Article VI, Sec. 9, of the North Carolina Constitution, the office of member of a tax commission or comparable agency is hereby declared to be an office that may not be held concurrently with any other elective or appointive office. (1939, c. 310, s. 410; 1971, c. 806, s. 1.)

Article 17.

Administration of Listing.

§ 105-301. Place for listing real property.—All taxable real property that is not required by this Subchapter to be appraised originally by the State Board of Assessment shall be listed in the county in which it is situated. If all or part of the real property is situated within the boundaries of a municipal corporation, this fact shall be specified on the abstract as required by G.S. 105-309. Nothing in this section shall be construed to conflict with the provisions of G.S. 105-326 through 105-328. (1939, c. 310, s. 700; 1971, c. 806, s. 1.)

Opinions of Attorney General. — Mr. J.E. Rains, Randolph County Tax Supervisor, 40 N.C.A.G. 824 (1969) (issued under former similar provisions).

§ 105-302. In whose name real property is to be listed.—(a) Taxable real property shall be listed in the name of the owner, and it shall be the owner's duty to list it unless the board of county commissioners shall have adopted a permanent listing system as provided in G.S. 105-303(b). For purposes of this section, the board of county commissioners may require that real property be listed in the name of the owner of record as of the day as of which property is to be listed under G.S. 105-285.

(b) If real property is listed in the name of one other than the person in whose name it should be listed, and the name of the proper person is later ascertained, the abstract and tax records shall be corrected to list the property in the name of the person in whose name it should have been listed. The corrected listing shall have the same force and effect as if the real property had been listed in the name of the proper person in the first instance.

(c) For purposes of this Subchapter:

(1) The owner of the equity of redemption in real property subject to a mortgage or deed of trust shall be considered the owner of the

property, and such real property shall be listed in the name of the owner of the equity of redemption.

(2) Real property owned by a corporation shall be listed in the name of the corporation.

(3) Real property owned by an unincorporated association shall be listed in the name of the association.

(4) Real property owned by a partnership shall be listed in the name of the partnership.

(5) Real property held in connection with a sole proprietorship shall be listed in the name of the owner, and the name and address of the proprietorship shall be noted on the abstract.

(6) Real property of which a decedent died possessed, if not under the control of an executor or administrator, shall be listed in the names of the heirs or devisees if known, but such property may be listed as property of "the heirs" or "the devisees" of the decedent, without naming them, until they have given the tax supervisor notice of their names and of the division of the estate. It shall be the duty of an executor or administrator having control of real property to list it in his fiduciary capacity, as required by subdivision (c)(7), below, until he is divested of control of the property. However, the right of an administrator or executor of a deceased person to petition for the sale of real property to make assets shall not be considered control of the real property for the purposes of this subdivision.

(7) Real property, the title to which is held by a trustee, guardian, or other fiduciary, shall be listed by the fiduciary in his fiduciary capacity except as otherwise provided in this section.

(8) A life tenant or tenant for the life of another shall be considered the owner of real property, and it shall be his duty to list the property for taxation, indicating on the abstract that he is a life tenant or tenant for the life of another named individual.

(9) Upon request to and with the approval of the tax supervisor, undivided interests in real property owned by tenants in common who are not copartners may be listed by the respective owners in accordance with their respective undivided interests. Otherwise, real property held by tenants in common shall be listed in the names of all the owners.

(10) Real property owned by husband and wife as tenants by the entirety shall be listed on a single abstract in the names of both tenants, and the nature of their ownership shall be indicated thereon.

(11) When land is owned by one party and improvements thereon or special rights (such as mineral, timber, quarry, waterpower, or similar rights) therein are owned by another party, the parties shall list their interests separately unless, in accordance with contractual relations between them, both the land and the improvements and special rights are listed in the name of the owner of the land.

(12) If the person in whose name real property should be listed is unknown, or if title to real property is in dispute, the property shall be listed in the name of the occupant or, if there be no occupant, in the name of "unknown owner." Such a listing shall not affect the validity of the lien for taxes created by G.S. 105-355. When the name of the owner is later ascertained, the provisions of subsection (b), above, shall apply. (1939, c. 310, s. 701; 1971, c. 806, s. 1.)

Improper Listing as Affecting Purchaser's Title. — See Morrison v. McLauchlin, 88 N.C. 251 (1883); Stone v. Phillips, 176 N.C. 457, 97 S.E. 375 (1918); Wake County v. Faison, 204 N.C. 55, 167 S.E. 391 (1933); § 105-369, subsection (i).

Where Entry Copied from Former Tax Book. — In Rexford v. Phillips, 159 N.C. 213, 74 S.E. 337 (1912), neither the owner nor his agent had given in the land, and list taker had copied the entry from the former tax book, and it was held that the land was not rightfully on the tax

list, and a sale for taxes pursuant thereto was invalid. This case is discussed with approval in Stone v. Phillips, 176 N.C. 457, 97 S.E. 375 (1918).

§ 105-303. Obtaining information on real property transfers; permanent listing.—(a) To facilitate the accurate listing of real property for taxation, the board of county commissioners may require the register of deeds to comply with the provisions of subdivision (a)(1), below, or it may require him to comply with the provisions of subdivision (a)(2), below:

(1) When any conveyance of real property (other than a deed of trust or mortgage) is recorded, the board of county commissioners may require the register of deeds to certify to the tax supervisor:
   a. The name of the person conveying the property.
   b. The name of the person to whom the property is conveyed.
   c. A description of the property sufficient to locate and identify it.
   d. A statement as to whether the parcel is conveyed in whole or in part.

(2) When any conveyance of real property (other than a deed of trust or mortgage) is submitted for recordation, the board of county commissioners may require the register of deeds to refuse to record it unless it has been presented to the tax supervisor and the tax supervisor has noted thereon that he has obtained the information he desires from the conveyance and from the person recording it.

(b) With the approval of the State Board of Assessment, the board of county commissioners may install a permanent listing system. (The Board's approval shall not, however, be required for any such system installed prior to April 3, 1939.) Under such a system the provisions of subdivisions (b)(1) through (b)(4), below, shall apply.

(1) The tax supervisor shall be responsible for listing all real property on the abstracts and tax records each year in the name of the owner of record as of the day as of which property is to be listed under G.S. 105-285.

(2) Persons whose duty it is to list real property under the provisions of G.S. 105-302 shall be relieved of that duty, but annually, during the listing period established by G.S. 105-307, such persons shall furnish the tax supervisor (or proper list taker) with the information concerning improvements on and separate rights in real property required by G.S. 105-309 (c)(3) through (c)(5).

(3) The penalties imposed by G.S. 105-308 and 105-312 shall not be imposed for failure to list real property for taxation, but they shall be imposed for failure to comply with the provisions of subdivision (b)(2), above, with respect to reporting the construction or acquisition of improvements on and separate rights in real property. In such a case, the penalty prescribed by G.S. 105-312 shall be computed on the basis of the tax imposed on the improvements and separate rights.

(4) The State Board of Assessment may authorize the board of county commissioners to make additional modifications of the listing requirements of this Subchapter, but no such modification shall conflict with the provisions of subdivisions (b)(1) through (b)(3), above. (1939, c. 310, s. 701; 1971, c. 806, s. 1.)

§ 105-304. Place for listing tangible personal property.—(a) Listing Instructions.—This section shall apply to all taxable tangible personal property that has a tax situs in this State and that is not required by this Subchapter to be appraised originally by the State Board of Assessment. The place in this State at which such property is taxable shall be determined according to the rules prescribed in subsections (c) through (h), below. The person whose duty it is to list property shall list it in the county in which the place of taxation is located, indicating on the abstract the information required by G.S. 105-309(d).

If the place of taxation lies within a city or town that requires separate listing under G.S. 105-326(a), the person whose duty it is to list shall also list the property for taxation in the city or town.

(b) Definitions.—For purposes of this section:

(1) "Situated" means more or less permanently located.

(2) "Business premises" includes, for purposes of illustration, but is not limited to the following: Store, mill, dockyard, piling ground, shop, office, mine, farm, factory, warehouse, rental real estate, place for the sale of property (including the premises of a consignee), and place for storage (including a public warehouse).

(c) General Rule.—Except as otherwise provided in subsections (d) through (h), below, tangible personal property shall be taxable at the residence of the owner. For purposes of this section:

(1) The residence of an individual person who has two or more places in this State at which he occasionally dwells shall be the place at which he dwelt for the longest period of time during the calendar year immediately preceding the date as of which property is to be listed for taxation.

(2) The residence of a domestic or foreign taxpayer other than an individual person shall be the place at which its principal North Carolina place of business is located.

(d) Property of Taxpayers With No Fixed Residence in This State.—

(1) Tangible personal property owned by an individual nonresident of this State shall be taxable at the place in this State at which the property is situated.

(2) Tangible personal property owned by a domestic or foreign taxpayer (other than an individual person) that has no principal office in this State shall be taxable at the place in this State at which the property is situated.

(e) Farm Products.—Farm products produced in this State, if owned by their producer, shall be taxable at the place in this State at which they were produced.

(f) Property Situated or Commonly Used at Premises Other Than Owner's Residence.—Subject to the provisions of subsection (e), above:

(1) Tangible personal property situated at or commonly used in connection with a temporary or seasonal dwelling owned or leased by the owner of the personal property shall be taxable at the place at which the temporary or seasonal dwelling is situated.

(2) Tangible personal property situated at or commonly used in connection with a business premises hired, occupied, or used by the owner of the personal property (or by the owner's agent or employee) shall be taxable at the place at which the business premises is situated. Tangible personal property that may be used by the public generally or that is used to sell or vend merchandise to the public shall be regarded as falling within the provisions of this subdivision (f)(2).

(3) In applying the provisions of subdivisions (f)(1) and (f)(2), above, the temporary absence of tangible personal property from a temporary or seasonal dwelling or business premises on the day as of which property is to be listed shall not affect the application of the rules established in those subdivisions. The presence of tangible personal property at a temporary or seasonal dwelling or business premises on the day as of which property is to be listed shall be prima facie evidence that it is situated at or commonly used in connection with the temporary or seasonal dwelling or business premises.

(g) The tangible personal property of a decedent whose estate is in the process of administration or has not been distributed shall be taxable at the

place at which it would be taxable if the decedent were still alive and still residing at the place at which he resided at the time of his death.

(h) Tangible personal property within the jurisdiction of the State held by a resident or nonresident trustee, guardian, or other fiduciary having legal title to the property shall be taxable in accordance with the following rules:

(1) If any beneficiary is a resident of the State, an amount representing his portion of the property shall be taxable at the place at which it would be taxable if he were the owner of his portion.

(2) If any beneficiary is a nonresident of the State, an amount representing his portion of the property shall be taxable at the place at which it would be taxable if the fiduciary were the beneficial owner of the property. (1939, c. 310, s. 800; 1947, c. 836; 1951, c. 1102, s. 1; 1955, c. 1012, ss. 2, 3; 1969, c. 940; 1971, c. 806, s. 1.)

Editor's Note. — The cases and opinion of the Attorney General cited in the following note were decided or issued under former similar provisions.

Opinions of Attorney General. — Mr. Fred P. Parker, Jr., Wayne County Attorney, 40 N.C.A.G. 825 (1969).

"Situated". — "Situated" connotes a more or less permanent location. It does not mean a mere temporary presence. In re Freight Carriers, Inc., 263 N.C. 345, 139 S.E.2d 633 (1965).

Uniform Rule Established. — The rules and regulations fixed by the "Revenue Act" and the "Machinery Act" for the guidance of the officers charged with the listing and assessment of property for purposes of State taxation govern and control the action of county and other municipal officers charged with the listing and assessment of property for municipal taxation. The conclusion, therefore, is that the legislature has adopted a "uniform rule" which must be observed. Wiley v. Commissioners of Salisbury, 111 N.C. 397, 16 S.E. 542 (1892).

Situs is an absolute essential for tax exaction. Billings Transf. Corp. v. County of Davidson, 276 N.C. 19, 170 S.E.2d 873 (1969).

As no state may tax anything not within her jurisdiction without violating the Fourteenth Amendment of the Constitution of the United States. Billings Transf. Corp. v. County of Davidson, 276 N.C. 19, 170 S.E.2d 873 (1969).

The state of domicile may not levy an ad valorem tax on tangible personal property of its citizens which is permanently located in some other state throughout the tax year. This is forbidden by the Due Process Clause of the Fourteenth Amendment. Billings Transf. Corp. v. County of Davidson, 276 N.C. 19, 170 S.E.2d 873 (1969).

Tangible personal property permanently located in other states and employed therein the prosecution of plaintiff's business is not subject to taxation in another state. Billings Transf. Corp. v. County of Davidson, 276 N.C. 19, 170 S.E.2d 873 (1969).

State of Domicile May Tax Property Which Has Not Acquired Situs Elsewhere. — The state of domicile may tax the full value of a taxpayer's tangible personal property for which no tax situs beyond the domicile has been established so that the property may not be said to have "acquired an actual situs elsewhere." Billings Transf. Corp. v. County of Davidson, 276 N.C. 19, 170 S.E.2d 873 (1969).

Determination of Situs. — The actual situs of taxable property turns on the uninterrupted presence of the property within the taxing jurisdiction. Billings Transf. Corp. v. County of Davidson, 276 N.C. 19, 170 S.E.2d 873 (1969).

It is for the legislature to determine the situs of personal property for purposes of taxation, and it may provide different rules for different kinds of property, and change them from time to time, and the courts may not, for consideration of expediency, disregard the legislative will. Planters Bank & Trust Co. v. Town of Lumberton, 179 N.C. 409, 102 S.E. 629 (1920).

As to the situs of realty there can be no doubt, but the situs of personalty for purposes of taxation from time immemorial has been a matter for the law-making power, which has provided different rules for different kinds of personalty, and has changed them from time to time. In re Freight Carriers, Inc., 263 N.C. 345, 139 S.E.2d 633 (1965).

In Alvany v. Powell, 55 N.C. 50 (1854), Chief Justice Pearson declares that the true principle, upon which to determine whether personal property is liable to be taxed, is the situs of the property, and that the distinction attempted to be made between personalty and real estate, depending upon the domicile of the owner, is based upon a fiction which has no application to questions of revenue.

Generally, Personalty of Corporation Has Situs at Principal Office. — Except for its property which has acquired a business situs elsewhere, the legislature has fixed the tax situs of the personalty of a corporation at the place of its principal office in the State. In re Freight Carriers, Inc., 263 N.C. 345, 139 S.E.2d 633 (1965).

The legislature has fixed the tax situs of a corporation's tangible personal property subject to North Carolina's taxing jurisdiction at the

place of its principal office in North Carolina unless such property or a part thereof has a tax situs elsewhere and thus is not within the taxing jurisdiction of this State. Billings Transf. Corp. v. County of Davidson, 276 N.C. 19, 170 S.E.2d 873 (1969).

Where a corporation had its place of business and principal office in one town, with a part of the personal property located in another town, it was held that such property was only taxable in the town where the place of business and principal office were located. The same was said to be true of a partnership. City of Winston v. City of Salem, 131 N.C. 404, 42 S.E. 889 (1902).

Taxation of Corporations Engaged in Interstate Operations. — The state of domicile may constitutionally subject its own corporations to nondiscriminatory property taxes even though they are engaged in interstate commerce. It is only multiple taxation of interstate operations that violates the Commerce Clause. Billings Transf. Corp. v. County of Davidson, 276 N.C. 19, 170 S.E.2d 873 (1969).

Taxation of Movable Personal Property. — A state can impose upon a plaintiff's movable personal property the same tax imposed upon similar property used in like manner by its own citizens, and such tax may be fixed by an appraisement and valuation of the average amount of the property thus habitually used and employed. Billings Transf. Corp. v. County of Davidson, 276 N.C. 19, 170 S.E.2d 873 (1969).

With respect to tangible movable property, a mere general showing of its continuous use in other states is insufficient to exclude the taxing power of the state of domicile. Billings Transf. Corp. v. County of Davidson, 276 N.C. 19, 170 S.E.2d 873 (1969).

Taxation by Apportionment. — When a defined part of the domiciliary corpus has acquired a taxable situs in one or more nondomiciliary states, it may be taxed by those states on an apportionment basis; and taxation by apportionment precludes taxation of all of the property by the state of the domicile. Billings Transf. Corp. v. County of Davidson, 276 N.C. 19, 170 S.E.2d 873 (1969).

When an apportionment tax is imposed by a nondomiciliary state (a) it must be just and equitable; (b) it must bear a reasonable relation in its practical operation to the opportunities, the benefits, and the protection afforded by the taxing jurisdiction; and (c) the opportunities, benefits and protection must be available throughout the tax year. Billings Transf. Corp. v. County of Davidson, 276 N.C. 19, 170 S.E.2d 873 (1969).

Tax Situs of Fleet of Vehicles Operated Through State. — When a fleet of vehicles is operated into, through, and out of a nondomiciliary state, a "tax situs" sufficient to satisfy constitutional requirements is acquired if (a) the vehicles are operated along fixed routes and on regular schedules, or (b) the vehicles are habitually situated and employed within the nondomiciliary jurisdiction throughout the tax year. In that event, their continuous presence supports imposition of an ad valorem tax based upon the average number continuously present in the taxing state regardless of routes and schedules. Billings Transf. Corp. v. County of Davidson, 276 N.C. 19, 170 S.E.2d 873 (1969).

Property Held by Executors and Trustees. — Where a testator appointed executors of his will who were also therein named as trustees for certain beneficiaries, who moved to another town, after the matters of executorship had been closed, leaving those of the trusteeship continuing, it was held, under a former statute, that the personal property should have been listed at the place of residence of the beneficiaries; and the taxes not having been listed at all, it was proper for the commissioners of the town of residence of the beneficiaries to cause the personalty to be listed there and impose the penalty prescribed by law. Smith v. Town of Dunn, 160 N.C. 174, 76 S.E. 242 (1912).

Burden Is on Taxpayer to Prove Tax Situs Is in Another Jurisdiction. — The burden is on the taxpayer who contends that some portion of his tangible personal property is not within the taxing jurisdiction of his domiciliary state to prove that the same property has acquired a tax situs in another jurisdiction. Billings Transf. Corp. v. County of Davidson, 276 N.C. 19, 170 S.E.2d 873 (1969).

And Evidence That Part of Property Is Absent from State Is Not Sufficient. — Continuous presence of the property throughout the tax year in a nondomiciliary state is not shown by evidence which merely proves that some determinable fraction of its property is absent from the state for part of the tax year. Billings Transf. Corp. v. County of Davidson, 276 N.C. 19, 170 S.E.2d 873 (1969).

As to residence and domicile under former laws, see Town of Roanoke Rapids v. Patterson, 184 N.C. 135, 113 S.E. 603 (1922); Ransom v. Board of Comm'rs, 194 N.C. 237, 139 S.E. 232 (1927).

§ 105-305. Place for listing intangible personal property.—(a) Listing Instructions.—This section shall apply to all taxable intangible personal property that has a tax situs in this State, that is not required by this Subchapter to be appraised originally by the State Board of Assessment, and that is not subject to taxation under the provisions of Schedule H, G.S. 105-198

through 105-217. The place in this State at which such property is taxable shall be determined according to the rules prescribed in subsections (b) through (e), below. The person whose duty it is to list property shall list it in the county in which the place of taxation is located, indicating on the abstract the information required by G.S. 105-309(d). If the place of taxation lies within a city or town that requires separate listing under G.S. 105-326(a), the person whose duty it is to list shall also list the property for taxation in the city or town.

(b) General Rule.—Except as otherwise provided in subsections (c) through (e), below, intangible personal property shall be taxable at the residence of the owner. For the purposes of this section:

(1) The residence of a person who has two or more places in this State at which he occasionally dwells shall be the place at which he dwelt for the longest period of time during the calendar year immediately preceding the date as of which property is to be listed for taxation.

(2) The residence of a domestic or foreign taxpayer other than an individual person shall be the place at which its principal North Carolina office is located.

(c) Intangible personal property representing an interest or interests in real property that is situated in this State shall be taxable in the place in which the represented real property is located.

(d) The intangible personal property of a decedent whose estate is in the process of administration or has not been distributed shall be taxable in the place at which it would be taxable if the decedent were still alive and still residing in the place at which he resided at the time of his death.

(e) Intangible personal property within the jurisdiction of the State held by a resident or nonresident trustee, guardian, or other fiduciary having legal title to the property shall be taxable in accordance with the following rules:

(1) If any beneficiary is a resident of the State, an amount representing his portion of the property shall be taxable in the place at which it would be taxable if he were the owner of his portion.

(2) If any beneficiary is a nonresident of the State, an amount representing his portion of the property shall be taxable in the place at which it would be taxable if the fiduciary were the beneficial owner of the property. (1939, c. 310, s. 801; 1971, c. 806, s. 1.)

§ 105-306. In whose name personal property is to be listed.—(a) Taxable personal property shall be listed in the name of the owner on the day as of which property is to be listed for taxation, and it shall be the duty of the owner to list the property.

(b) If personal property is listed in the name of a person other than the one in whose name it should be listed, and the name of the proper person is later ascertained, the abstract and tax records shall be corrected to list the property in the name in which it should have been listed. The corrected listing shall have the same force and effect as if the personal property had been listed in the name of the proper person in the first instance.

(c) For purposes of this Subchapter:

(1) The owner of the equity of redemption in personal property subject to a chattel mortgage shall be considered the owner of the property.

(2) The vendee of personal property under a conditional bill of sale, or under any other sale contract through which title to the property is retained by the vendor as security for the payment of the purchase price, shall be considered the owner of the property if he has possession of or the right to use the property.

(3) Personal property owned by a corporation, partnership, or unincorporated association shall be listed in the name of the corporation, partnership, or unincorporated association.

(4) Personal property held in connection with a sole proprietorship shall be listed in the name of the owner, and the name and address of the proprietorship shall be noted on the abstract.

(5) Personal property of which a decedent died possessed, if not under the control of an executor or administrator, shall be listed in the names of the next of kin or legatees if known, but such property may be listed as property of "the next of kin" or "the legatees" of the decedent, without naming them, until they have given the tax supervisor notice of their names and of the division of the estate. It shall be the duty of an executor or administrator having control of personal property to list it in his fiduciary capacity, as required by subdivision (c)(6), below, until he is divested of control of the property.

(6) Personal property, the title to which is held by a trustee, guardian, or other fiduciary, shall be listed by the fiduciary in his fiduciary capacity except as otherwise provided in this section.

(7) If personal property is owned by two or more persons who are joint owners, each owner shall list the value of his interest. However, if the joint owners are husband and wife, the property owned jointly shall be listed on a single abstract in the names of both the husband and the wife.

(8) If the person in whose name personal property should be listed is unknown, or if the ownership of the property is in dispute, the property shall be listed in the name of the person in possession of the property, or, if there appears to be no person in possession, in the name of "unknown owner." When the name of the owner is later ascertained, the provisions of subsection (b), above, shall apply. (1939, c. 310, s. 802; 1971, c. 806, s. 1.)

Floor Plan Financing Arrangement property to Be Listed for Ad Valorem Tax Purposes in Name of Owner. — See opinion of Attorney General to Mr. Bonner R. Lee, Hyde County Accountant, 41 N.C.A.G. 42 (1970) (issued under former similar provisions).

§ **105-307. Length of listing period; preliminary work.**—The period during which property is to be listed for taxation each year shall begin on the first business day of the month of January and shall continue for 30 days. The board of county commissioners may, in any year, extend the period for an additional 30 days; in years of octennial appraisal of real property, the board may extend the period for an additional 60 days. Any action by the board of county commissioners extending the listing period shall be recorded in the minutes of the board, and notice thereof shall be published as required by G.S. 105-296(c). The entire period for listing, whether it be 30, 60, or 90 days, shall be considered the regular listing period for the particular year within the meaning of this Subchapter.

Nothing in this section shall be construed to prevent the tax supervisor, list takers, assistants, and experts employed under G.S. 105-299 from conducting preparatory work prior to the opening of the listing period, but no final appraisal shall be made before the day as of which the value of property is to be determined under the provisions of G.S. 105-285. (1939, c. 310, s. 905; 1971, c. 806, s. 1.)

§ **105-308. Duty to list; penalty for failure.**—Every person in whose name any property is to be listed under the terms of this Subchapter shall list the property with the tax supervisor (or proper list taker) within the time allowed by law on an abstract setting forth the information required by this Subchapter.

In addition to all other penalties prescribed by law, any person whose duty it is to list any property who willfully fails or refuses to list the same within the time prescribed by law shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00) or imprisonment not to exceed six

months. The failure to list shall be prima facie evidence that the failure was willful.

Any person who removes or conceals property for the purpose of evading taxation or who aids or abets the removal or concealment of property for the purpose of evading taxation shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00) or imprisonment not to exceed six months. (1939, c. 310, s. 901; 1957, c. 848; 1971, c. 806, s. 1.)

§ 105-309. What the abstract shall contain.—(a) Each person whose duty it is to list property for taxation shall file each year with the tax supervisor or proper list taker a tax list or abstract showing, as of the date prescribed by G.S. 105-285(b), the information required by this section. Subject to the provisions of subdivisions (a)(1) and (a)(2), below, each person whose duty it is to list property for taxation shall file a separate abstract.

(1) Tenants by the entirety shall file a single abstract listing the real property so held, together with all personal property they own jointly.

(2) Tenants in common shall file a single abstract listing the real property so held, together with all personal property that they own jointly, unless, as provided in G.S. 105-302(c)(9), the tax supervisor allows them to list their undivided interests in the real property on separate abstracts.

(b) Each abstract shall show the taxpayer's name; residence address; and, if required by the tax supervisor or list taker, business address.

(1) An individual trading under a firm name shall show his name and address and also the name and address of his business firm.

(2) An unincorporated association shall show both the name and address of the association and the names and addresses of its principal officers.

(3) A partnership shall show both the name and address of the partnership and the names and addresses of its full partners.

(c) Each tract, parcel, or lot of real property owned or controlled in the county shall be listed in accordance with the following instructions:

(1) Real property not divided into lots shall be described by giving:

a. The township in which located.

b. The total number of acres in the tract, or, if smaller than one acre, the dimensions of the parcel.

c. The tract name (if any), the names of at least two adjoining landowners, a reference to the tract's designation on any map maintained in the office of the tax supervisor or on file in the office of the register of deeds, or some other description sufficient to identify and locate the property by parol testimony.

d. If applicable, the number of acres of:

1. Cleared land;
2. Woods and timberland;
3. Land containing mineral or quarry desposits;
4. Land susceptible of development for waterpower;
5. Wasteland.

e. The portion of the tract or parcel located within the boundaries of any municipality.

(2) Real property divided into lots shall be described by giving:

a. The township in which located.

b. The dimensions of the lot.

c. The location of the lot, including its street number (if any).

d. The lot's designation on any map maintained in the office of the tax supervisor or on file in the office of the register of deeds, or some description sufficient to identify and locate the property by parol testimony.

e. The portion of the lot located within the boundaries of any municipality.

(3) In conjunction with the listing of any real property under subdivisions (c)(1) and (c)(2), above, there shall be given a short description of any buildings and other improvements thereon that belong to the owner of the land.

(4) Buildings and other improvements having a value in excess of one hundred dollars ($100.00) that have been acquired, begun, erected, damaged, or destroyed since the time of the last appraisal of the property shall be described.

(5) If some person other than the owner of a tract, parcel, or lot shall own any buildings or other improvements thereon or separate rights (such as mineral, quarry, timber, waterpower, or other rights) therein, that fact shall be specified on the abstract on which the land is listed, together with the name and address of the owner of the buildings, other improvements, or rights.

a. Buildings, other improvements, and separate rights owned by a taxpayer with respect to the lands of another shall be listed separately and identified so as to indicate the name of the owner thereof and the tract, parcel, or lot on which the buildings or other improvements are situated or to which the separate rights appertain.

b. In accordance with the provisions of G.S. 105-302(c)(11), buildings or other improvements or separate rights owned by a taxpayer with respect to the lands of another may be listed either in the name of the owner of the buildings, other improvements, or rights, or in the name of the owner of the land.

(d) Personal property shall be listed to indicate the township and municipality, if any, in which it is taxable and shall be itemized by the taxpayer in such detail as may be prescribed by an abstract form approved by the State Board of Assessment.

(1) Whenever the tax supervisor or list takers shall deem it necessary to obtain complete listings, they may require taxpayers to submit additional information, inventories, and itemized lists of personal property.

(2) At the request of the tax supervisor or list taker, the taxpayer shall furnish any information he may have with respect to the true value of the personal property he is required to list.

(e) At the end of the abstract each person whose duty it is to list property for taxation shall sign the affirmation required by G.S. 105-310. (1939, c. 310, s. 900; 1941, c. 221, s. 1; 1953, c. 970, s. 6; 1955, c. 34; 1971, c. 806, s. 1.)

Compliance with Statutory Procedure Essential. — The listing of property must be done in the manner prescribed by the statute. Rexford v. Phillips, 159 N.C. 213, 74 S.E. 337 (1912). This means that the listing must be done by the owner or by his duly accredited agent in cases where listing by an agent is permissible. Stone v. Phillips, 176 N.C. 457, 97 S.E. 375 (1918).

Time of Making List. — Under an earlier statute it was held that property can be listed for taxation only in the year, and for the year, in which taxes are due. North Carolina R.R. v. Commissioners of Alamance, 77 N.C. 4 (1877); Johnson v. Royster, 88 N.C. 194 (1883).

Sufficiency of Description. — The listing of land as a certain number of acres lying in a named township was held too vague to support a valid assessment, the land being insufficiently described. Rexford v. Phillips, 159 N.C. 213, 74 S.E. 337 (1912).

A description on a tax list made under the direction of the taxpayer in the words, "Tax list in No. 2 township, C. county, for the year 1893," was held sufficient, as between the taxpayer and a purchaser of his land at a tax sale, where it was the only land owned by the former in the township. Fulcher v. Fulcher, 122 N.C. 101, 29 S.E. 91 (1898).

§ 105-310. Affirmation; penalty for false affirmation.—There shall be annexed to the abstract on which the taxpayer's property is listed the following

affirmation, which shall be signed by an individual qualified under the provisions of G.S. 105-311:

> Under penalties prescribed by law, I hereby affirm that to the best of my knowledge and belief this listing, including any accompanying statements, inventories, schedules, and other information, is true and complete. (If this affirmation is signed by an individual other than the taxpayer, he affirms that he is familiar with the extent and true value of all the taxpayer's property subject to taxation in this county and that his affirmation is based on all the information of which he has any knowledge.)

Any individual who willfully makes and subscribes an abstract listing required by this Subchapter which he does not believe to be true and correct as to every material matter shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine not to exceed five hundred dollars ($500.00) or imprisonment not to exceed six months. (1939, c. 310, s. 902; 1971, c. 806, s. 1.)

§ 105-311. Duty to appear for purposes of listing and signing affirmation; use of agents and mail.—(a) Except as otherwise provided in this section, the person whose duty it is to list property for taxation shall appear before the tax supervisor or proper list taker for purposes of listing and shall sign the affirmation required by G.S. 105-310 to be annexed to the completed abstract on which the property is listed.

(1) In the case of an individual taxpayer who is unable to list his property, a guardian, authorized agent, or other person having knowledge of and charged with the care of the person and property of the taxpayer shall appear for purposes of listing and shall sign the required affirmation in the name of the taxpayer, noting thereon the capacity in which he signs.

(2) In the case of a corporation, partnership, or unincorporated association, a person specified in subdivision a or subdivision b, below, shall appear for purposes of listing the taxpayer's property and shall sign the required affirmation in the name of the taxpayer, noting thereon the capacity in which he signs, and no other agent shall be permitted to sign the affirmation required on such a taxpayer's abstract:

a. A principal officer of the taxpayer or

b. A full-time employee of the taxpayer who has been officially empowered by a principal officer of the taxpayer in his behalf to list the taxpayer's property for taxation in the county and to sign the affirmation annexed to the abstract or abstracts on which its property is listed.

(3) In the case of an individual who is not a resident of the county in which his property is to be listed, the taxpayer shall sign the affirmation required on the abstract on which his property is listed, but he may submit the completed abstract by mail or by an authorized agent.

(b) Any abstract submitted by mail may be accepted or rejected by the tax supervisor in his discretion. However, the board of county commissioners, with the approval of the State Board of Assessment, may by resolution provide for the general acceptance of completed abstracts submitted by mail. In no event shall an abstract submitted by mail be accepted unless the affirmation thereon is signed by the individual prescribed in subsection (a), above. (1939, c. 310, ss. 901, 903, 904; 1957, c. 848; 1971, c. 806, s. 1.)

§ 105-312. Discovered property; appraisal; penalty.—(a) Definitions.—For purposes of this Subchapter:

(1) The phrase "discovered property" shall include property that was not listed by the taxpayer or any other person during a regular listing

period and also property that was listed but with regard to the value, quantity, or other measurement of which the taxpayer made a substantial understatement in listing.

(2) The phrase "failure to list property" shall include both the omission to list property during a regular listing period and the taxpayer's substantial understatement of value, quantity, or other measurement with regard to property listed.

(3) The phrase "to discover property" shall refer to the determination that property has not been listed during a regular listing period and to the identification of the omitted item. For discoveries made after July 1, 1971 and in future years, the phrase shall also refer to the determination that listed property was returned by the taxpayer with a substantial understatement of value, quantity, or other measurement.

(4) The phrase "substantial understatement" as used in these definitions shall be interpreted to mean the omission of a material portion of the value, quantity, or other measurement of taxable property; the determination of materiality in each case shall be made by the official or agency by whom the discovery is made, subject to the taxpayer's right to appeal the determination to the county board of equalization and review and State Board of Assessment.

(b) Duty to Discover and List Property.—It shall be the duty of every official charged with listing, appraising, and assessing property under the terms of this Subchapter to discover property, to list discovered property, to appraise and assess it, and to take the action necessary to prevent failures to list property.

(c) Carrying Forward Real Property.—At the close of the regular listing period each year, the tax supervisor shall compare the tax lists submitted during the listing period just ended with the lists for the preceding year, and he shall carry forward to the lists of the current year all real property that was listed in the preceding year but that was not listed for the current year. When carried forward, the real property shall be listed in the name of the taxpayer who listed it in the preceding year unless, under the provisions of G.S. 105-302, it must be listed in the name of another taxpayer. Real property carried forward in this manner shall be deemed to be discovered property, and the procedures prescribed in subsection (d), below, shall be followed unless the property discovered is listed in the name of the taxpayer who listed it for the preceding year and the property is not subject to appraisal under either G.S. 105-286 or G.S. 105-287 in which case no notice of the listing and valuation need be sent to the taxpayer.

(d) Procedure for Listing, Appraising, and Assessing Discovered Property.—Subject to the provisions of subsection (c), above, and the presumptions established by subsection (f), below, discovered property shall be listed in the name of the person required by G.S. 105-302 or G.S. 105-306. The abstract listing discovered property shall be signed by the tax supervisor, list taker, or other person designated by the tax supervisor. If sufficient information as to the true value of the discovered property can be obtained at the time it is discovered, the tax supervisor shall make a tentative appraisal of the property. Both the listing and the appraisal shall be subject to the approval of the board of equalization and review, or, if that board has adjourned, the approval of the board of county commissioners, subject to the right of appeal to the State Board of Assessment under the provisions of G.S. 105-324. The tax supervisor shall then mail a notice to the person in whose name the discovered property has been listed at his last known address; if, under the provisions of G.S. 105-302 or G.S. 105-306, the property has been listed in the name of the occupant or person in possession, the notice shall be mailed to him. The required notice shall state that:

(1) The described property has been listed in the name of the addressee.
(2) The property has been tentatively appraised at a specified figure, or the property will be appraised at the meeting provided for in subdivision (d)(3), below.
(3) The listing of the property and the tentative appraisal will be presented for review and approval by the board of equalization and review, or, if that board has adjourned, by the board of county commissioners. (If the property has not been given a tentative appraisal by the tax supervisor, the notice shall state that the listing of the property will be presented for approval and that the appropriate board will appraise it at the designated meeting.)
(4) The board of equalization and review or board of county commissioners will meet at a specified time and place to review and approve the listing and appraisal of the property, or to appraise the property.
(5) The addressee shall have a right to be present at the meeting referred to in subdivision (d)(4), above; to be heard; and to present any objections that he may have to the listing or appraisal of the property.

(e) Record of Discovered Property.—When property is discovered, the taxpayer's original abstract (if one was submitted) may be corrected or a new abstract may be prepared to reflect the discovery. If a new abstract is prepared, it may be filed with the abstracts that were submitted during the regular listing period, or it may be filed separately with abstracts designated "Late Listings." Regardless of how filed, the listing shall have the same force and effect as if it had been submitted during the regular listing period.

(f) Presumptions.—When property is discovered and listed to a taxpayer in any year, it shall be presumed that it should have been listed by the same taxpayer for the preceding five years unless the taxpayer shall produce satisfactory evidence that the property was not in existence, that it was actually listed for taxation, or that it was not his duty to list the property during those years or some of them under the provisions of G.S. 105-302 and 105-306. If it is shown that the property should have been listed by some other taxpayer during some or all of the preceding years, the property shall be listed against the appropriate taxpayer for the proper years.

(g) Taxation of Discovered Property.—When property is discovered, it shall be taxed for the year in which discovered and for any of the preceding five years during which it escaped taxation in accordance with the assessed value it should have been assigned in each of the years for which it is to be taxed and the rate of tax imposed in each such year. The penalties prescribed by subsection (h), below, shall be computed and imposed regardless of the name in which the discovered property is listed. If the discovery is based upon an understatement of value, quantity, or other measurement rather than an omission from the tax list, the tax shall be computed on the additional valuation fixed upon the property, and the penalties prescribed by subsection (h), below, shall be computed on the basis of the additional tax.

(h) Computation of Penalties.—Having computed each year's taxes separately as provided in subsection (g), above, there shall be added a penalty of ten percent (10%) of the amount of the tax for the earliest year in which the property was not listed, plus an additional ten percent (10%) of the same amount for each subsequent listing period that elapsed before the property was discovered. This penalty shall be computed separately for each year in which a failure to list occurred; and the year, the amount of the tax for that year, and the total of penalties for failure to list in that year shall be shown separately on the tax records; but the taxes and penalties for all years in which there was a failure to list shall then be totalled on a single tax receipt.

(i) Collection.—For purposes of tax collection and foreclosure, the total figure obtained and recorded as provided in subsection (h), above, shall be

deemed to be a tax for the fiscal year beginning on July 1 of the calendar year in which the property was discovered. The schedule of discounts for prepayment and interest for late payment applicable to taxes for the fiscal year referred to in the preceding sentence shall apply when the total figure on the single tax receipt is paid.

(j) Tax Receipts Charged to Collector.—Tax receipts prepared as required by subsections (h) and (i), above, for the taxes and penalties imposed upon discovered property shall be delivered to the tax collector, and he shall be charged with their collection. Such receipts shall have the same force and effect as if they had been delivered to the collector at the time of the delivery of the regular tax receipts for the current year, and the taxes charged in the receipts shall be a lien upon the property in accordance with the provisions of G.S. 105-355.

(k) Power to Compromise.—After a tax receipt computed and prepared as required by subsections (g) and (h), above, has been delivered and charged to the tax collector as prescribed in subsection (j), above, the board of county commissioners, upon the petition of the taxpayer, may compromise, settle, or adjust the county's claim for taxes arising therefrom.

(l) Application to Municipal Corporations.—The provisions of this section shall apply to all cities, towns, and other municipal corporations having power to tax property. In such governmental units, the powers and duties assigned by this section to the tax supervisor shall be exercised by any person to whom they may be assigned by the governing body of the unit, and the powers and duties assigned to the board of county commissioners shall be exercised by the governing body of the unit. (1939, c. 310, s. 1109; 1971, c. 806, s. 1.)

Editor's Note. — The cases cited in the following note were decided under former similar provisions.

Construed as Whole. — In Madison County v. Coxe, 204 N.C. 58, 167 S.E. 486 (1933), it was held that Public Laws 1927, c. 71, s. 73, relating to the same subject matter as this section, must be construed as a whole, not piecemeal.

Discovery and Listing of Omitted Property.— The statute provides for discovery of taxable property not listed, by certain tax authorities, and listing same. Hardware Mut. Fire Ins. Co. v. Stinson, 210 N.C. 69, 185 S.E. 449 (1936).

Where the plaintiff guardian paid taxes on property of his ward and thereafter, in accordance with a ruling that the property was nontaxable, obtained a refund of the tax and did not list the property again, and the property of the ward was not exempt from taxation, it was held that the prior ruling of the county commissioners to the effect that the property was nontaxable did not prevent them from listing the property for taxation for the prior five years, including the year for which the tax was refunded. Lawrence v. Shaw, 210 N.C. 352, 186 S.E. 504 (1936).

Under the act of 1784 if the owner failed to attend at the time and place appointed to receive the lists of taxable property, the justice could make out a list for himself to the best of his knowledge. Tores v. Justices of County Court, 6 N.C. 167 (1812).

Rebuttal of Presumption. — The presumption created by statute, that the person in possession of personal property was the owner and in possession of said property on the taxing dates of the five preceding years, was held rebutted by the facts of the case. Coltrane v. Donnell, 203 N.C. 515, 166 S.E. 397 (1932).

Compromise Settlement Is Binding Unless Made in Bad Faith. — In the absence of a finding that the board of commissioners acted in bad faith in making a compromise settlement of a tax, or abused its discretion in so doing, mandamus to compel the commissioners to list and assess will be denied. Stone v. Board of Comm'rs, 210 N.C. 226, 186 S.E. 342 (1936).

Article 18.

Reports in Aid of Listing.

§ 105-313. Report of personal property by multi-county businesses.—Any person engaged in business in more than one county of this State and maintaining taxable personal property in connection with his business in more than one county of this State shall, upon the request of the administrative officer of the State Board of Assessment or the tax supervisor of any county in

which such property is maintained, file a report with the State Board of Assessment showing, as of January 1 of any year, the following information:

(1) A list of the counties of this State in which is situated taxable personal property maintained by the owner in connection with his business.

(2) The true value of the owner's taxable personal property maintained and situated in each county as of the date prescribed by G.S. 105-285(b).

(3) The total true value of the owner's taxable personal property maintained and situated in this State as of the date prescribed by G.S. 105-285(b).

This report shall be subscribed and sworn to by the owner or, if the owner is a corporation, partnership, or unincorporated association, by a principal officer of the owner who has knowledge of the facts contained in the report. (1971, c. 806, s. 1.)

§ 105-314. Information concerning tax situs of motor vehicles.—(a) Every motor vehicle owner applying to the State Department of Motor Vehicles for motor vehicle license tags shall specify in the application the county in which each such motor vehicle is subject to ad valorem taxation. If any such vehicle is not subject to ad valorem taxation in this State, that fact, with the reason therefor, shall be stated in the application. No State license tags shall be issued to any applicant until the requirements of this subsection have been met.

(b) Upon request from any county, the Commissioner of Motor Vehicles shall send to the tax supervisor of the county a list of motor vehicles subject to ad valorem taxation in that county as shown by the Commissioner's record of applications filed during the year preceding the day as of which property is to be listed. As compensation, the Commissioner shall charge the county the actual cost incurred in the preparation of this list. (1939, c. 310, s. 1000; 1941, c. 36, s. 4; 1955, c. 98; 1971, c. 806, s. 1.)

§ 105-315. Reports by persons having custody of tangible personal property of others.—(a) As of January 1, every person having custody of taxable tangible personal property that has been entrusted to him by another for storage, sale, renting, or any other business purpose shall furnish the appropriate tax supervisor the reports required by subdivisions (a)(1) and (a)(2), below:

(1) For farm products that are owned by the original producer and that were produced in a county of this State other than that in which the products are situated, there shall be furnished to the tax supervisor of the county in which the products were produced a statement showing the name of the producer, a description of the property, the quantity of the property, and the amount of money, if any, advanced against the products by the person having custody of them.

(2) For all other tangible personal property, there shall be furnished to the tax supervisor of the county in which the property is situated a statement showing the name of the owner of the property, a description of the property, the quantity of the property, and the amount of money, if any, advanced against the property by the person having custody of it.

(3) For purposes of illustration, but not by way of limitation, the term "person having custody of taxable tangible personal property" as used in this subsection (a) shall include warehouses, cooperative growers' and marketing associations, consignees, factors, commission merchants, and brokers.

(b) Any person who fails to make the reports required by subsection (a), above, by January 15 in any year shall be liable to the counties in which the

property is taxable for a penalty to be measured by any portion of the tax on the property that has not been paid at the time the action to collect this penalty is brought plus two hundred fifty dollars ($250.00). This penalty may be recovered in a civil action in the appropriate division of the General Court of Justice of the county in which the property is taxable. Upon recovery of this penalty, the tax on the property shall be deemed to be paid. (1939, c. 310, ss. 1001, 1002; 1955, c. 1069, ss. 2, 3; 1965, c. 592; 1971, c. 806, s. 1.)

Purpose of Section. — See Davenport v. Ralph N. Peters & Co., 386 F.2d 199 (4th Cir. 1967) (decided under former similar provisions).

§ 105-316. Reports by house trailer park, marina, and aircraft storage facility operators.—(a) As of January 1 each year:

(1) Every operator of a park or storage lot renting or leasing space for three or more house trailers or mobile homes shall furnish to the tax supervisor of the county in which the park or lot is located the name of the owner of and a description of each house trailer or mobile home situated thereon.

(2) Every operator of a marina or comparable facility renting or leasing space for three or more boats shall furnish to the tax supervisor of the county in which the marina or comparable facility is located the name of the owner of and a description of each boat for which space is rented or leased.

(3) Every operator of a storage facility renting or leasing space for three or more airplanes or other aircraft shall furnish to the tax supervisor of the county in which the storage facility is located the name of the owner of and a description of each airplane or aircraft for which space is rented or leased.

(b) Any person who fails to make any report required by subsection (a), above, by January 15 of any year shall be liable to the county in which the house trailers, mobile homes, boats, or airplanes are taxable for a penalty to be measured by any portion of the tax on the personal property that has not been paid at the time the action to collect this penalty is brought, plus two hundred fifty dollars ($250.00). This penalty may be recovered in a civil action in the appropriate division of the General Court of Justice of the county in which the personal property is taxable. Upon recovery of this penalty, the tax on the personal property shall be deemed to be paid. (1939, c. 310, s. 1002; 1955, c. 1069, s. 3; 1965, c. 592; 1971, c. 806, s. 1.)

Article 19.

Administration of Real and Personal Property Appraisal.

§ 105-317. Appraisal of real property; adoption of schedules, standards, and rules.—(a) Whenever any real property is appraised it shall be the duty of the persons making appraisals:

(1) In determining the true value of land, to consider as to each tract, parcel, or lot separately listed at least its advantages and disadvantages as to location; zoning; quality of soil; quantity and quality of timber; waterpower; water privileges; mineral, quarry, or other valuable deposits; fertility; adaptability for agricultural, commercial, industrial, or other uses; past income; probable future income; and any other factors that may affect its value.

(2) In determining the true value of a building or other improvement, to consider at least its location; type of construction; age; replacement cost; cost; adaptability for residence, commercial, industrial, or other uses; past income; probable future income; and any other factors that may affect its value.

(3) To appraise partially completed buildings in accordance with the degree of completion on January 1.

(b) In preparation for each revaluation of real property required by G.S. 105-286, it shall be the duty of the tax supervisor to see that:

(1) There be developed and compiled uniform schedules of values, standards, and rules to be used in appraising real property in the county. (The schedules of values, standards, and rules shall be prepared in sufficient detail to enable those making appraisals to adhere to them in appraising the kinds of real property commonly found in the county; they shall be:

a. Prepared prior to each revaluation required by G.S. 105-286;

b. In written or printed form; and

c. Available for public inspection upon request.)

(2) Every lot, parcel, tract, building, structure, and improvement being appraised be actually visited, observed, and appraised by a competent appraiser, either one appointed under the provisions of G.S. 105-296 or one employed under the provisions of G.S. 105-299.

(3) A separate property record be prepared for each tract, parcel, lot, or group of contiguous lots, which record shall show the information required for compliance with the provisions of G.S. 105-309 insofar as they deal with real property, as well as that required by this section. (The purpose of this subdivision (b)(3) is to require that individual property records by maintained in sufficient detail to enable property owners to ascertain the method, rules, and standards of value by which property is appraised.)

(c) The schedules of values, standards, and rules required by subdivision (b)(1), above, shall be reviewed and approved by the board of county commissioners before they are used. When the board of county commissioners approves the schedules, standards, and rules, it shall issue an order adopting them and shall cause a copy of the order to be published in the form of a notice in a newspaper having general circulation in the county, stating in the notice that the schedules, standards, and rules to be used in the next scheduled reappraisal of real property have been adopted and that they are open to examination by any property owner of the county at the office of the tax supervisor for a period of 10 days from the date of publication of the notice.

(1) Any property owner of the county (separately or in conjunction with other property owners of the county) asserting that the schedules, standards, and rules adopted by the board of county commissioners under the provisions of this section fail to meet the appraisal standard established by G.S. 105-283 may except to the order and appeal therefrom to the State Board of Assessment at any time within 30 days after the date of the publication of the adoption order by filing a written notice of the appeal with the clerk of the board of county commissioners and with the State Board of Assessment. At the time of filing the notices of appeal, the appellant or appellants shall file with the clerk of the board of county commissioners and with the State Board of Assessment a written statement of the grounds of appeal. Upon timely appeal, the State Board of Assessment shall proceed under the provisions of G.S. 105-290(c).

(2) The appeal procedure provided herein shall be the exclusive administrative means for challenging the order of the board of county commissioners adopting schedules, standards, and rules under this section. (1939, c. 310, s. 501; 1959, c. 704, s. 4; 1967, c. 944; 1971, c. 806, s. 1.)

Editor's Note. — Session Laws 1971, c. 806, s. 4, provides: "In G.S. 153-9, subsection (51), in G.S. 153-64.1, and in all other sections of the General Statutes, each reference to G.S. 105-278 shall be deemed to be a reference to G.S. 105-296 as that section appears in Section 1 of this Act. In G.S. 153-64.1 and in all other sections of the General Statutes, each reference to G.S. 105-295 shall be deemed to be a reference to G.S. 105-317 as that section appears in Section 1 of this Act."

The reference to § 105-296 in the

above-quoted section should have been to § 105-286.

The cases cited in the following note were decided under former similar provisions.

This section, generally speaking, is directory. In re Appeal of Reeves Broadcasting Corp., 273 N.C. 571, 160 S.E.2d 728 (1968).

Failure to consider each and every indicia of value recited in this section does not vitiate the appraisal. In re Appeal of Reeves Broadcasting Corp., 273 N.C. 571, 160 S.E.2d 728 (1968).

Net income produced is an element which may properly be considered in determining value, but it is only one element. In re Property of Pine Raleigh Corp., 258 N.C. 398, 128 S.E.2d 855 (1963).

But Fact-Finding Board May Also Consider Earning Capacity. — If it appears that the income actually received is less than the fair earning capacity of the property, the earning capacity should be substituted as a factor rather than the actual earnings. The fact-finding board can properly consider both. In re Property of Pine Raleigh Corp., 258 N.C. 398, 128 S.E.2d 855 (1963).

The former language in this section, "the past income therefrom, its probable future income," was not necessarily actual income. The language was sufficient to include the income which could be obtained by the proper and efficient use of the property. In re Property of Pine Raleigh Corp., 258 N.C. 398, 128 S.E.2d 855 (1963).

Tobacco Allotments as Element of Value. — Mandamus will lie to compel the board of county commissioners to include tobacco allotments as an element of value in the appraisal and assessment of county real property for ad valorem taxes. Stocks v. Thompson, 1 N.C. App. 201, 161 S.E.2d 149 (1968).

§ 105-317.1. Appraisal of personal property; elements to be considered.—(a) Whenever any personal property is appraised it shall be the duty of the persons making appraisals to consider the following as to each item (or lot of similar items):

(1) The replacement cost of the property;
(2) The sale price of similar property;
(3) The age of the property;
(4) The physical condition of the property;
(5) The productivity of the property;
(6) The remaining life of the property;
(7) The effect of obsolescence on the property;
(8) The economic utility of the property, that is, its usability and adaptability for industrial, commercial, or other purposes; and
(9) Any other factor that may affect the value of the property.

(b) In determining the true value of inventories and other goods and materials held and used in connection with the mercantile, manufacturing, producing, processing, or other business enterprise of any taxpayer, the persons making the appraisal shall consider the valuation of such property as reflected by the taxpayer's records and as reported by the taxpayer to the North Carolina Department of Revenue and to the Internal Revenue Service for income tax purposes, taking into account the accuracy of the taxpayer's records, the taxpayer's method of accounting, and the level of trade at which the taxpayer does business. (1971, c. 806, s. 1.)

ARTICLE 20.

Approval, Preparation, and Disposition of Records.

§ 105-318. Forms for listing, appraising, and assessing property.—The State Board of Assessment may design and prescribe the books and forms to be used throughout the State in the listing, appraising, and assessing of property for taxation. If the board exercises the authority granted by the preceding sentence, it is authorized to make arrangements for the purchase and distribution of approved books and forms through the Division of Purchase and Contract, the cost thereof to be billed to the counties. If the Board does not exercise the authority granted by the first sentence of this section, each county and municipality shall submit the books and forms it proposes to adopt for these purposes to the Board for approval before they are employed. (1939, c. 310, s. 907; 1971, c. 806, s. 1.)

§ 105-319. Tax records; preparation of scroll and tax book.—(a) For each year there shall be prepared for each county and tax-levying municipality a scroll (showing property valuations) and a tax book (showing the amount of taxes due) or a combined record (showing both property valuation and taxes due). The governing body of the county or municipality shall have authority to determine whether the tax records shall be prepared in combined form or in a separate scroll and tax book. When used in this Subchapter, the term "tax records" shall mean the scroll, tax book, and combined record. No tax records shall be adopted by any county or municipality until they have been approved by the State Board of Assessment.

(b) County tax records shall, unless otherwise authorized by the board of county commissioners, be prepared separately for each township. The tax records of both counties and municipalities shall, unless otherwise authorized by the unit governing body, be divided into two parts:

(1) Individual taxpayers (including corporate fiduciaries when, in their fiduciary capacity, they list the property of individuals).

(2) Corporations, partnerships, other business firms, unincorporated associations, and all other taxpayers other than individual persons.

(c) The tax records shall show at least the following information:

(1) In alphabetical order, the name of each taxpayer whose property is listed and assessed for taxation.

(2) The assessment of each taxpayer's real property listed for unit-wide taxation (divided into as many categories as the State Board of Assessment may prescribe).

(3) The assessment of each taxpayer's personal property listed for unit-wide taxation (divided into as many categories as the State Board of Assessment may prescribe).

(4) The total assessed value of each taxpayer's real and personal property listed for unit-wide purposes.

(5) The amount of ad valorem tax due by each taxpayer for unit-wide purposes.

(6) The amount of dog license tax due by each taxpayer.

(7) The total assessed value of each taxpayer's real and personal property listed for taxation in any special district or subdivision of the unit.

(8) The amount of ad valorem tax due by each taxpayer to any special district or subdivision of the unit.

(9) The amount of penalties, if any, imposed under the provisions of G.S. 105-312.

(10) The total amount of all taxes and penalties due by each taxpayer to the unit and to special districts and subdivisions of the unit.

(d) Listings and assessments and any changes therein made during the period between the close of the regular listing period and the first meeting of the board of equalization and review, as well as those made during the regular listing period, shall be entered on the county tax records, and the county tax records shall be submitted to the board of equalization and review at its first meeting. Additions and changes made by the board of equalization and review shall be entered on the county tax records in accordance with the provisions of G.S. 105-326. Municipal corporations shall be governed by the provisions of G.S. 105-326 through 105-328 with regard to matters dealt with in this subsection (d). (1939, c. 310, s. 1101; 1963, c. 784, s. 1; 1969, c. 1279; 1971, c. 806, s. 1.)

Constitutionality. — See Bryant v. State Bd. of Assessment, 293 F. Supp. 1379 (E.D.N.C. 1968) (construing former similar provisions).

§ 105-320. Tax receipts; preparation.—(a) No taxing unit shall adopt a tax receipt form until it has been approved by the State Board of Assessment, and no tax receipt form shall be approved unless it shows at least the following information:

(1) The name and mailing address of the taxpayer charged with taxes.
(2) The assessment of the taxpayer's real property listed for unit-wide taxation.
(3) The assessment of the taxpayer's personal property listed for unit-wide taxation.
(4) The total assessed value of the taxpayer's real and personal property listed for unit-wide taxation.
(5) The total assessed value of the taxpayer's real and personal property listed for taxation in any special district or subdivision of the unit.
(6) The rate of tax levied for each unit-wide purpose, the total rate levied for all unit-wide purposes, and the rate levied by or for any special district or subdivision of the unit in which the taxpayer's property is subject to taxation. (In lieu of showing this information on the tax receipt, it may be furnished on a separate sheet of paper, properly identified, at the time the official receipt is delivered upon payment).
(7) The amount of ad valorem tax due by the taxpayer for unit-wide purposes.
(8) The amount of ad valorem tax due by the taxpayer to any special district or subdivision of the unit.
(9) The amount of dog license tax due by the taxpayer.
(10) The amount of penalties, if any, imposed under the provisions of G.S. 105-312.
(11) The total amount of all taxes and penalties due by the taxpayer to the unit and to special districts and subdivisions of the unit.
(12) The amount of discount allowed for prepayment of taxes under the provisions of G.S. 105-360.
(13) The amount of interest charged for late payment of taxes under the provisions of G.S. 105-360.

(b) The governing body of the county or municipality shall designate the person or persons who shall compute and prepare the tax receipts for all taxes charged upon the tax records. (1939, c. 310, s. 1102; 1961, c. 380; 1971, c. 806, s. 1.)

§ 105-321. Disposition of tax records and receipts; order of collection.—(a) County tax records shall be filed in the office of the tax supervisor unless the board of county commissioners shall require them to be filed in some other public office of the county. City and town tax records shall be filed in some public office of the municipality designated by the governing body of the city or town. In the discretion of the governing body, a duplicate copy of the tax records may be delivered to the tax collector at the time he is charged with the collection of taxes.

(b) Before delivering the tax receipts to the tax collector in any year, the board of county commissioners or municipal governing body shall adopt and enter in its minutes an order directing the tax collector to collect the taxes charged in the tax records and receipts. A copy of this order shall be delivered to the tax collector at the time the tax receipts are delivered to him, but the failure to do so shall not affect the tax collector's rights and duties to employ the means of collecting taxes provided by this Subchapter. The order of collection shall have the force and effect of a judgment and execution against the taxpayers' real and personal property and shall be drawn in substantially the following form:

State of North Carolina
County (or City or Town) of .....
To the Tax Collector of the County (or City or Town) of .....
.....:

You are hereby authorized, empowered, and commanded to collect the taxes set forth in the tax records filed in the office of ..... and in the tax receipts herewith delivered to you, in the amounts and from the taxpayers likewise therein set forth. Such taxes are hereby declared to be a

first lien upon all real property of the respective taxpayers in the County (or City or Town) of ....., and this order shall be a full and sufficient authority to direct, require, and enable you to levy on and sell any real or personal property of such taxpayers, for and on account thereof, in accordance with law.

Witness my hand and official seal, this ..... day of ....., 19.....

..... (Seal)
Chairman, Board of Commissioners of
..... County
(Mayor, City (or Town) of .....)

Attest:

.....
Clerk of Board of Commissioners of ..... County
(Clerk of the City (or Town) of .....)

(c) The original tax receipts, together with any duplicate copies that may have been prepared, shall be delivered to the tax collector by the governing body on or before the first day of September each year if the tax collector has made settlement as required by G.S. 105-352. The tax collector shall give his receipt for the tax receipts and duplicates delivered to him for collection.

(d) At the time the tax receipts are delivered to the tax collector, there shall also be delivered to him a list of all appeals pending before the State Board of Assessment affecting property that has been listed and assessed for taxation within the unit. (1939, c. 310, s. 1103; 1971, c. 806, s. 1.)

Article 21.

Review and Appeals of Listings and Valuations.

§ 105-322. County board of equalization and review.—(a) Personnel.—The board of equalization and review of each county shall be composed of the members of the board of county commissioners. However, nothing in this Subchapter shall be construed as repealing any law creating a special board of equalization and review or creating any tax commission or board charged with the duties of a board of equalization and review in any county.

(b) Compensation.—The board of county commissioners shall fix the compensation and allowances to be paid members of the board of equalization and review for their services and expenses.

(c) Oath.—Before entering upon his duties, each member of the board of equalization and review shall take and subscribe the following oath and file it with the clerk of the board of county commissioners:

I, ..., do solemnly swear (or affirm) that I will support and maintain the Constitution and laws of the United States, and the Constitution and laws of North Carolina not inconsistent therewith, and that I will faithfully discharge the duties of my office as a member of the Board of Equalization and Review of ..... County, North Carolina, and that I will not allow my actions as a member of the Board of Equalization and Review to be influenced by personal or political friendships or obligations, so help me God.

.....
(Signature)

(d) Clerk and Minutes.—The tax supervisor shall serve as clerk to the board of equalization and review, shall be present at all meetings, shall maintain accurate minutes of the actions of the board, and shall give to the board such information as he may have or can obtain with respect to the listing and valuation of taxable property in the county.

(e) Time of Meeting.—Each year the board of equalization and review shall hold its first meeting not earlier than the first Monday in April and not later

than the first Monday in May. The board shall complete its duties on or before the third Monday following its first meeting unless, in its opinion, a longer period of time is necessary or expedient to a proper execution of its responsibilities. In no event shall the board sit later than July 1 except to hear and determine requests made under the provisions of subdivision (g)(2), below, when such requests are made within the time prescribed by law. From the time of its first meeting until its adjournment, the board shall meet at such times as it deems reasonably necessary to perform its statutory duties and to receive requests and hear the appeals of taxpayers under the provisions of subdivision (g)(2), below.

(f) Notice of Meetings and Adjournment.—A notice of the date, hours, place, and purpose of the first meeting of the board of equalization and review shall be published at least three times in some newspaper having general circulation in the county, the first publication to be at least 10 days prior to the first meeting. The notice shall also state the dates and hours on which the board will meet following its first meeting and the date on which it expects to adjourn; it shall also carry a statement that in the event of earlier or later adjournment, notice to that effect will be published in the same newspaper. Should a notice be required on account of earlier adjournment, it shall be published at least once in the newspaper in which the first notice was published, such publication to be at least five days prior to the date fixed for adjournment. Should a notice be required on account of later adjournment, it shall be published at least once in the newspaper in which the first notice was published, such publication to be prior to the date first announced for adjournment.

(g) Powers and Duties.—

(1) It shall be the duty of the board of equalization and review to examine and review the tax lists of the county for the current year to the end that all taxable property shall be listed on the abstracts and tax records of the county and appraised according to the standard required by G.S. 105-283, and the board shall correct the abstracts and tax records to conform to the provisions of this Subchapter. In carrying out its responsibilities under this subdivision (g)(1), the board, on its own motion or on sufficient cause shown by any person, shall:

a. List, appraise, and assess any taxable real or personal property that has been omitted from the tax lists.

b. Correct all errors in the names of persons and in the description of properties subject to taxation.

c. Increase or reduce the appraised value of any property that, in the board's opinion, shall have been listed and appraised at a figure that is below or above the appraisal required by G.S. 105-283; however, the board shall not change the appraised value of any real property from that at which it was appraised for the preceding year except in accordance with the terms of G.S. 105-286 and 105-287.

d. Cause to be done whatever else shall be necessary to make the lists and tax records comply with the provisions of this Subchapter.

e. Embody actions taken under the provisions of subdivisions (g)(1)a through (g)(1)d, above, in appropriate orders and have the orders entered in the minutes of the board.

f. Give written notice to the taxpayer at his last-known address in the event the board shall, by appropriate order, increase the appraisal of any property or list for taxation any property omitted from the tax lists under the provisions of this subdivision (g)(1).

(2) On request, the board of equalization and review shall hear any taxpayer who owns or controls property taxable in the county with respect to the listing or appraisal of his property or the property of others.

a. A request for a hearing under this subdivision (g)(2) shall be made in

writing to or by personal appearance before the board prior to its adjournment. However, if the taxpayer requests review of a decision made by the board under the provisions of subdivision (g)(1), above, notice of which was mailed fewer than 15 days prior to the board's adjournment, the request for a hearing thereon may be made within 15 days after the notice of the board's decision was mailed.

b. Taxpayers may file separate or joint requests for hearings under the provisions of this subdivision (g)(2) at their election.

c. At a hearing under provisions of this subdivision (g)(2), the board, in addition to the powers it may exercise under the provisions of subdivision (g)(3), below, shall hear any evidence offered by the appellant, the tax supervisor, and other county officials that is pertinent to the decision of the appeal. Upon the request of an appellant, the board shall subpoena witnesses or documents if there is a reasonable basis for believing that the witnesses have or the documents contain information pertinent to the decision of the appeal.

d. On the basis of its decision after any hearing conducted under this subdivision (g)(2), the board shall adopt and have entered in its minutes an order reducing, increasing, or confirming the appraisal appealed or listing or removing from the tax lists the property whose omission or listing has been appealed. The board shall notify the appellant by mail as to the action taken on his appeal not later than 30 days after the board's adjournment.

(3) In the performance of its duties under subdivisions (g)(1) and (g)(2), above, the board of equalization and review may exercise the following powers:

a. It may appoint committees composed of its own members or other persons to assist it in making investigations necessary to its work. It may also employ expert appraisers in its discretion. The expense of the employment of committees or appraisers shall be borne by the county. The board may, in its discretion, require the taxpayer to reimburse the county for the cost of any appraisal by experts demanded by him if the appraisal does not result in material reduction of the valuation of the property appraised and if the appraisal is not subsequently reduced materially by the board or by the State Board of Assessment.

b. The board, in its discretion, may examine any witnesses and documents. It may place any witnesses under oath administered by any member of the board. It may subpoena witnesses or documents on its own motion, and it must do so when a request is made under the provisions of subdivision (g)(2)c, above.

A subpoena issued by the board shall be signed by the chairman of the board, directed to the witness or to the person having custody of the document, and served by an officer authorized to serve subpoenas. Any person who willfully fails to appear or to produce documents in response to a subpoena or to testify when appearing in response to a subpoena shall be guilty of a misdemeanor and punished by a fine or by imprisonment or by both in the discretion of the court. (1939, c. 310, s. 1105; 1965, c. 191; 1967, c. 1196, s. 6; 1971, c. 806, s. 1.)

Editor's Note. — The cases cited in the following note were decided under former similar provisions.

The designation "property of others" in subdivision (2) of subsection (g) is broad enough to include every piece of rural land or the county's entire tax list if the commissioners have failed to value it as required by law. King v. Baldwin, 276 N.C. 316, 172 S.E.2d 12 (1970).

Steps in Obtaining Review of Valuation. — If the county commissioners have failed to value land at its true value in money—be the

failure deliberate, an error in judgment, or caused by a misconception of the law—plaintiffs' initial step is to complain to the county board of equalization and review and request a hearing. If they are dissatisfied with the action taken by that board they may except to its order and appeal to the State Board. Thereafter plaintiffs may resort to the courts, but only to obtain judicial review for errors of law or abuse of discretion by the State Board. King v. Baldwin, 276 N.C. 316, 172 S.E.2d 12 (1970).

State Board Empowered to Make Final Valuation of Property. — The legislature's intent is that the agency designated to hear appeals in all matters pertaining to tax valuations should also be the one empowered to make the final valuation. The State Board of Assessment—unlike the courts—has the staff, the specialized knowledge and expertise necessary to make informed decisions upon questions relating to the valuation and assessment of property. King v. Baldwin, 276 N.C. 316, 172 S.E.2d 12 (1970).

Taxpayer Must Exhaust Administrative Remedies before Resorting to Courts. — The legislature has provided adequate means whereby the individual taxpayer may contest not only the valuation which the county commissioners have placed upon his own property but the entire tax list or assessment roll, and he must exhaust this administrative remedy before he can resort to the courts. King v. Baldwin, 276 N.C. 316, 172 S.E.2d 12 (1970).

The superior court has no authority to issue mandamus commanding the commissioners to revalue all real property in the county at its true value in money, since taxpayers must first exhaust the statutory administrative remedies in the county board of equalization and review and in the State Board of Assessment before they can resort to the superior court. King v. Baldwin, 276 N.C. 316, 172 S.E.2d 12 (1970).

Purpose of Notice before Meeting. — The notice required before the meeting is general, and has reference to a general revision of the lists of the whole county, with a view to an equal and uniform assessment among the several townships, and it is to give opportunity to all who may be dissatisfied with the valuation of their property to make complaint and have it corrected. Commissioners of Cleaveland County v. Atlanta & C. Air Line Ry., 86 N.C. 541 (1882).

Designated Date of Meeting Exclusive of Others. — See Wolfenden v. Board of Comm'rs, 152 N.C. 83, 67 S.E. 319 (1910).

Valuation by Owner Subject to Review by Board. — The valuation upon personal property is made by the taxpayer when he lists his property, and is binding upon the list taker, but it may be corrected by the board of equalization at the dates fixed by the statute, upon due notice to the taxpayer. Pocomoke Guano Co. v. City of New Bern, 172 N.C. 258, 90 S.E. 202 (1916).

Revision without Notice Void. — Where the value of the solvent credits of a taxpayer is increased without due notice to him or his agent, such increase in value is a nullity. Wolfenden v. Board of Comm'rs, 152 N.C. 83, 67 S.E. 319 (1910).

County Board Must Pass upon Question of Tax Situs. — Where the question of tax situs is raised before the county board, it is an integral part of its duties to pass upon the question. In re Freight Carriers, Inc., 263 N.C. 345, 139 S.E.2d 633 (1965).

And in doing so, it is not passing upon taxpayer's liability for tax. In re Freight Carriers, Inc., 263 N.C. 345, 139 S.E.2d 633 (1965).

Determination of tax situs is a requirement precedent to any legal listing, assessment, and valuation for tax purposes. In re Freight Carriers, Inc., 263 N.C. 345, 139 S.E.2d 633 (1965).

Before Whom Complaint Made. — The complaint against excessive valuation must be made before the board of county commissioners, and the aldermen of the city have no jurisdiction to change such valuation. Pocomoke Guano Co. v. City of New Bern, 172 N.C. 258, 90 S.E. 202 (1916).

Requisites of Complaint. — The complaint in an action against a city to recover for taxes paid must allege that the valuation complained of is greater than that fixed by the county board of equalization, or the tax he was forced to pay was greater than it would have been if correctly computed at the legal rate on the valuation properly ascertained, or a demurrer thereto will be sustained. Pocomoke Guano Co. v. City of New Bern, 172 N.C. 258, 90 S.E. 202 (1916).

Appeal. — The county commissioners have exclusive original jurisdiction to grant relief against excessive valuation of property for taxation, and unless they proceed upon some erroneous principle, there is no appeal where the statute gives none. Wade v. Commissioners of Craven County, 74 N.C. 81 (1876). As to appeal to State Board of Assessment, see §§ 105-290 and 105-324 and notes thereto.

Subsection (e) Mandatory as to Time Prescribed for Completing Work. — The duty imposed on the board of equalization and review to complete its work within the time prescribed by subsection (e), at least to the extent that authority is given the board to act ex mero motu, is mandatory. Spiers v. Davenport, 263 N.C. 56, 138 S.E.2d 762 (1964).

When Duties and Powers Cease. — After the board of county commissioners has completed the revision of the tax lists as authorized by the statute, its duties and powers as a revising board cease and determine until the time appointed by the statute for the next succeeding year. Wolfenden v. Board of Comm'rs, 152 N.C. 83, 67 S.E. 319 (1910).

§ 105-323. Giving effect to decisions of the board of equalization and review.—All changes in listings, names, descriptions, appraisals, and assessments made by the board of equalization and review shall be reflected upon the abstracts and tax records by insertion of rebates given, additional charges made, or any other insertion; by correction; or by any other charge. The tax records shall then be totalled, and at least a majority of the members of the board of equalization and review shall sign the following statement to be inserted at the end of the tax records:

State of North Carolina
County of .....

We, the undersigned members of the Board of Equalization and Review of ..... County, hereby certify that these tax records constitute the fixed and permanent tax list and assessment roll and record of taxes due for the year 19. . . . , subject to only such changes as may be allowed by law.

.....

.....

Members of the Board of Equalization and Review of ..... County

The omission of this endorsement shall not affect the validity of the tax records or of any taxes levied on the basis of the assessments appearing in them. (1939, c. 310, s. 1106; 1971, c. 806, s. 1.)

§ 105-324. Appeals to State Board of Assessment from listing and valuation decisions of boards of equalization and review and boards of county commissioners.—(a) The provisions of this section shall govern appeals from listing and valuation decisions of boards of equalization and review and boards of county commissioners made under the provisions of G.S. 105-286, 105-287, 105-322, 105-325, and 105-312.

(b) Any property owner of a county or member of the board of county commissioners or board of equalization and review may except to an order of the board of equalization and review entered under the provisions of G.S. 105-286, G.S. 105-287, G.S. 105-322, or G.S. 105-312 and appeal therefrom to the State Board of Assessment. To perfect an appeal the appellant or appellants shall, within 30 days after the board of equalization and review has mailed the notice of its decision as required by G.S. 105-322(g)(2)d, file a written notice of appeal and a written statement of the grounds of appeal with the clerk of the board of county commissioners and with the State Board of Assessment. Upon timely appeal, the State Board of Assessment shall proceed under the provisions of G.S. 105-290(b).

(c) Any property owner of the county or member of the board of county commissioners may except to an order of the board of county commissioners entered under the provisions of G.S. 105-287, G.S. 105-325, or G.S. 105-312 and appeal therefrom to the State Board of Assessment. To perfect an appeal the appellant or appellants shall, within 30 days after the board of county commissioners has entered the listing or valuation order challenged, file a written notice of appeal and a written statement of the grounds of appeal with the clerk of the board of county commissioners and with the State Board of Assessment. Upon timely appeal, the State Board of Assessment shall proceed under the provisions of G.S. 105-290(b). (1939, c. 310, s. 1107; 1969, c. 7, s. 2; 1971, c. 806, s. 1.)

Editor's Note. — The cases cited in the following note were decided under former similar provisions.

Steps in Obtaining Review of Valuation. — If the county commissioners have failed to value land at its true value in money—be the failure deliberate, an error in judgment, or caused by a misconception of the law—plaintiffs' initial step is to complain to the county board of equalization and review and request a hearing. If they are dissatisfied with the action taken by that board they may except to its order and appeal to the State Board. Thereafter plaintiffs may resort to the courts, but only to obtain judicial review for errors of law or abuse of discretion by the State Board. King v. Baldwin, 276 N.C. 316, 172 S.E.2d 12 (1970).

Valuation by State Board Is Final and Conclusive. — This section contemplates that valuation fixed by the State Board shall be final and conclusive where no error of law or abuse of discretion is alleged. Belk's Dep't Store v. Guilford County, 222 N.C. 441, 23 S.E.2d 897 (1943), citing Wade v. Commissioners of Craven County, 74 N.C. 81 (1876).

The State Board has full authority, notwithstanding irregularities at the county level, to determine the valuation and enter it accordingly. Such valuation so fixed is final and conclusive unless error of law or abuse of discretion is shown. In re Appeal of Reeves Broadcasting Corp., 273 N.C. 571, 160 S.E.2d 728 (1968).

The legislature's intent is that the agency designated to hear appeals in all matters pertaining to tax valuations should also be the one empowered to make the final valuation. The State Board of Assessment—unlike the courts—has the staff, the specialized knowledge and expertise necessary to make informed decisions upon questions relating to the valuation and assessment of property. King v. Baldwin, 276 N.C. 316, 172 S.E.2d 12 (1970).

Judicial review of the State Board's administrative decisions is always available. In re Appeal of Reeves Broadcasting Corp., 273 N.C. 571, 160 S.E.2d 728 (1968).

When a judicial review is sought in the superior court on the record made before the State Board, that court is without authority to make findings at variance with the findings of the State Board which are supported by material and substantial evidence because that is the exclusive function of the State Board of Assessment. In re Appeal of Reeves Broadcasting Corp., 273 N.C. 571, 160 S.E.2d 728 (1968).

The legislature has provided adequate means whereby the individual taxpayer may contest not only the valuation which the county commissioners have placed upon his own property but the entire tax list or assessment roll, and he must exhaust this administrative remedy before he can resort to the courts. King v. Baldwin, 276 N.C. 316, 172 S.E.2d 12 (1970).

The superior court has no authority to issue mandamus commanding the commissioners to revalue all real property in the county at its true value in money, since taxpayers must first exhaust the statutory administrative remedies in the county board of equalization and review and in the State Board of Assessment before they can resort to the superior court. King v. Baldwin, 276 N.C. 316, 172 S.E.2d 12 (1970).

§ 105-325. Powers of board of county commissioners to change abstracts and tax records after board of equalization and review has adjourned.—(a) After the board of equalization and review has finished its work and the changes it effected or ordered have been entered on the abstracts and tax records as required by G.S. 105-323, the board of county commissioners shall not authorize any changes to be made on the abstracts and tax records except as follows:

(1) To give effect to decisions of the State Board of Assessment on appeals taken under G.S. 105-324.

(2) To add to the tax records any valuation certified by the State Board of Assessment for property appraised in the first instance by the Board or to give effect to corrections made in such appraisals by the Board.

(3) Subject to the provisions of subdivisions (a)(3)a and (a)(3)b, below, to correct the name of any taxpayer appearing on the abstract or tax records erroneously; to substitute the name of the person who should have listed property for the name appearing on the abstract or tax records as having listed the property; and to correct an erroneous description of any property appearing on the abstract or tax records.

a. Any correction or substitution made under the provisions of this subdivision (a)(3) shall have the same force and effect as if the name of the taxpayer or description of the property had been correctly listed in the first instance, but the provisions of this subdivision (a)(3)a shall not be construed as a limitation on the taxation and penalization of discovered property required by G.S. 105-312.

b. If a correction or substitution under this subdivision (a)(3) will adversely affect the interests of any taxpayer, he shall be given written notice thereof and an opportunity to be heard before the change is entered on the abstract or tax records.

(4) To correct appraisals, assessments, and amounts of taxes appearing erroneously on the abstracts or tax records as the result of clerical or

mathematical errors. (If the clerical or mathematical error was made by the taxpayer, his agent, or an officer of the taxpayer and if the correction demonstrates that the property was listed at a substantial understatement of value, quantity, or other measurement, the provisions of G.S. 105-312 shall apply.)

(5) To add to the tax records and abstracts or to correct the tax records and abstracts to include property discovered under the provisions of G.S. 105-312.

(6) Subject to the provisions of subdivisions (a)(6)a, (a)(6)b, (a)(6)c, and (a)(6)d, below, to appraise or reappraise property when the tax supervisor reports to the board that, since adjournment of the board of equalization and review, facts have come to his attention that render it advisable to raise or lower the appraisal of some particular property of a given taxpayer in the then current calendar year.

a. The power granted by this subdivision (a)(6) shall not authorize appraisal or reappraisal because of events or circumstances that have taken place or arisen since the day as of which property is to be listed.

b. No appraisal or reappraisal shall be made under the authority of this subdivision (a)(6) unless it could have been made by the board of equalization and review had the same facts been brought to the attention of that board.

c. If a reappraisal made under the provisions of this subdivision (a)(6) demonstrates that the property was listed at a substantial understatement of value, quantity, or other measurement, the provisions of G.S. 105-312 shall apply.

d. If an appraisal or reappraisal made under the provisions of this subdivision (a)(6) will adversely affect the interests of any taxpayer, he shall be given written notice thereof and an opportunity to be heard before the appraisal or reappraisal shall become final.

(b) The board of county commissioners may give the tax supervisor general authority to make any changes authorized by subsection (a), above, except those permitted under subdivision (a)(6), above.

(c) Orders of the board of county commissioners and actions of the tax supervisor upon delegation of authority to him by the board that are made under the provisions of this section may be appealed to the State Board of Assessment under the provisions of G.S. 105-324(c). (1939, c. 310, s. 1108; 1971, c. 806, s. 1.)

Article 22.

Listing, Appraising, and Assessing by Cities and Towns.

§ 105-326. Listing property for city and town taxation; duty of owner; authority of governing body to obtain lists from county.—(a) All property subject to ad valorem taxation in any city or town shall be listed annually during the period prescribed by G.S. 105-307 in the city or town in which it is taxable in the name of the person required by G.S. 105-302 and 105-306 on an abstract prepared according to G.S. 105-309 and affirmed as required by G.S. 105-310. In lieu of requiring property owners to list their property with the city or town, the governing body of any city or town may make provision for obtaining from the abstracts and tax records of the county in which the municipality is situated lists of the property subject to taxation by the city or town.

(b) Regardless of whether a city or town adopts the alternative provided in the second sentence of subsection (a), above, the provisions of G.S. 105-311 and 105-312 shall apply to the listing of property for municipal taxation, as shall the

penalties imposed by G.S. 105-308 and 105-312 for failure to list. In the preparation of abstracts, tax records, and tax receipts the city or town shall be governed by the provisions of G.S. 105-318, 105-319, 105-320, and 105-321. The powers and duties assigned to the tax supervisor by the statutes cited as being applicable to municipalities shall be imposed upon and exercised by some official designated by the governing body of the city or town, and the powers and duties assigned therein to the board of county commissioners shall be imposed upon and exercised by the governing body of the city or town. (1939, c. 310, s. 1201; 1971, c. 806, s. 1.)

§ 105-327. Appraisal and assessment of property subject to city and town taxation.—For the property it is entitled to tax, a city or town situated in a single county shall accept and adopt the appraisals and assessments fixed by the authorities of that county as modified by the State Board of Assessment under the provisions of this Subchapter. However, the requirement of this section shall not be construed to modify the appraisal and assessment authority given cities and towns with respect to discovered property by G.S. 105-312. (1939, c. 310, s. 1201; 1971, c. 806, s. 1.)

§ 105-328. Listing, appraisal, and assessment of property subject to taxation by cities and towns situated in more than one county.—(a) For purposes of municipal taxation, all property subject to taxation by a city or town situated in two or more counties may, by resolution of the governing body of the municipality, be listed and appraised as provided in G.S. 105-326 and 105-327. In such a case, the governing body may also adopt the assessments placed upon the property by the counties in which the city or town is situated if, in the opinion of the governing body, the same appraisal and assessment standards will thereby apply uniformly throughout the municipality. If the governing body shall determine that adoption of the assessments fixed by the counties will not result in uniform appraisals and assessments throughout the municipality, the governing body may, by horizontal adjustments, equalize the appraisal values fixed by the counties and then, in accordance with the procedure prescribed by G.S. 105-284, select and adopt an assessment ratio to be applied to the appraised values of property subject to municipal taxation as equalized by the governing body. Taxes levied by the city or town shall be levied uniformly on the assessments so determined.

(b) Should the governing body of a city or town situated in two or more counties not adopt the procedure provided in subsection (a), above, all property subject to taxation by the municipality shall be listed, appraised, and assessed as provided in subdivisions (b)(1) through (b)(6), below.

(1) The governing body of the city or town shall appoint a municipal tax supervisor on or before the first Monday in July in each odd-numbered year. The governing body may remove the municipal tax supervisor from office during his term for good cause after giving him notice in writing and an opportunity to appear and be heard at a public session of the appointing body. Whenever a vacancy occurs in the office, the governing body shall appoint a qualified person to serve as municipal tax supervisor for the period of the unexpired term. Persons holding the position of municipal tax supervisor on July 1, 1971, shall be deemed qualified to fill the position. Any other person selected thereafter shall be one whose experience in the appraisal of real and personal property is satisfactory to the governing body and whose qualifications have been certified by the State Board of Assessment as provided in G.S. 105-289(d). Pursuant to Article VI, Sec. 9, of the North Carolina Constitution, the office of municipal tax supervisor is hereby declared to be an office that may be held concurrently with any other appointive office.

(2) With the approval of the governing body, the municipal tax

supervisor may appoint such list takers and assistants as may be required to perform the work assigned them by law.

(3) The municipal tax supervisor, list takers, and assistants shall, with respect to property subject to city or town taxation, have the powers and duties accorded the county tax supervisor, list takers, and assistants by this Subchapter.

(4) The governing body shall, with respect to property subject to city or town taxation, be vested with the powers and duties vested by this Subchapter in boards of county commissioners and boards of equalization and review. Appeals may be taken from the municipal board of equalization and review or governing body to the State Board of Assessment in the manner provided in this Subchapter for appeals from county boards of equalization and review and boards of county commissioners.

(5) All expenses incident to the listing, appraisal, and assessment of property for the purpose of city or town taxation shall be borne by the municipality for whose benefit the work is undertaken.

(6) The intent of this subsection (b) is to provide cities and towns that are situated in two or more counties with machinery for listing, appraising, and assessing property for municipal taxation equivalent to that established by this Subchapter for counties. The powers to be exercised by, the duties imposed on, and the possible penalties against municipal governing bodies, boards of equalization and review, tax supervisors, list takers, and assistants shall be the same as those provided in this Subchapter by, on, or against county boards of commissioners, boards of equalization and review, tax supervisors, list takers, and assistants. (1939, c. 310, s. 1202; 1971, c. 806, s. 1.)

§§ **105-329 to 105-332:** Reserved for future codification purposes.

Article 23.

Public Service Companies.

§ **105-333. Definitions.**—When used in this Article unless the context requires a different meaning:

(1) "Airline company" means a public service company engaged in the business of transporting passengers and property by aircraft for hire within, into, or from this State.

(2) "Bus line company" means a public service company engaged in the business of transporting passengers and property by motor vehicle for hire over the public highways of this State (but not including a bus line company operating primarily upon the public streets within a single local taxing unit), whether the transportation be within, into, or from this State.

(3) "Distributable system property" means all real property and tangible and intangible personal property owned or used by a railroad company other than nondistributable system property.

(4) "Electric membership corporation" means a public service company which is organized, reorganized, or domesticated under the provisions of Chapter 117 of the General Statutes and which is engaged in the business of supplying electricity for light, heat, or power to consumers in this State.

(5) "Electric power company" means a public service company engaged in the business of supplying electricity for light, heat, or power to consumers in this State.

(6) "Express company" means a public service company engaged in the business of conveying to, from, or through this State or a part thereof money, merchandise, or other articles and commodities by express

(but not including a motor freight carrier company as defined in subdivision (10), below).

(7) "Flight equipment" means aircraft fully equipped for flying and used in any operation within this State.

(8) "Gas company" means a public service company engaged in the business of supplying artificial or natural gas to, from, within, or through this State through pipe or tubing for light, heat, or power to consumers in this State.

(9) "Locally assigned rolling stock" means motor vehicles (other than tractors and trailers) which are owned or leased by a motor freight carrier company and specifically assigned to a terminal or other premises. It shall also mean tractors and trailers that are owned or leased by a motor freight carrier company and specifically assigned to a terminal or other premises and regularly used at the premises to which assigned for the pick up of local freight which originates at those premises and for the delivery of local freight which terminates at those premises.

(10) "Motor freight carrier company" means a public service company engaged in the business of transporting property by motor vehicle for hire over the public highways of this State, whether the transportation be within, into, or from this State. It also means an intrastate motor freight carrier engaged in the business of transporting property by tractor trailer or tandem type vehicle, whether or not the carrier is regulated by the North Carolina Utilities Commission.

(11) "Nondistributable system property" means the following properties owned by a railroad company: Land other than right-of-way, depots, machine shops, warehouses, office buildings, other structures, and the contents of the structures listed in this subdivision.

(12) "Nonsystem property" means the real property and tangible and intangible personal property (except that assessed under Schedule H of the Revenue Act) owned by a public service company but not used in its public service activities.

(13) "Pipeline company" means a public service company engaged in the business of transporting natural gas, petroleum products, or other products through pipelines to, from, within, or through this State, or having control of pipelines for such a purpose.

(14) "Public service company" means railroad company, express company, pipeline company, gas company, electric power company, electric membership corporation, telephone company, telegraph company, cable television company, bus line company, motor freight carrier company, airline company, and any other company performing a public service that is regulated by the Interstate Commerce Commission, the Federal Power Commission, the Federal Communications Commission, the Federal Aviation Agency, or the North Carolina Utilities Commission. (For purposes of appraisal under this Article, this definition shall include a pipeline company whether or not it performs a public service and whether or not it is regulated by one of the agencies named in the preceding sentence.)

(15) "Railroad company" means a public service company engaged in the business of operating a railroad (either wholly or partially within this State) on rights-of-way acquired or leased and held exclusively by the company or otherwise.

(16) "Rolling stock" means motor vehicles, machines, buses, trucks, tractor trucks, trailers, semitrailers, combinations thereof, and locomotives or cars, which are propelled by mechanical or electrical power and used upon the highways or, in the case of railroads, upon tracks.

(17) "System property" means the real property and tangible and intangible personal property used by a public service company in its public service activities.

(18) "Telegraph company" means a public service company engaged in the business of transmitting telegraph messages to, from, within, or through this State.

(19) "Telephone company" means a public service company engaged in the business of transmitting telephone messages and conversations to, from, within, or through this State.

(20) "Water company" means a public service company engaged in the business of supplying water through pipes or tubing to consumers in this State. (1939, c. 310, ss. 1600-1605; 1943, c. 634, s. 3; 1965, c. 287, s. 17; 1971, c. 806, s. 1; c. 1121, s. 4.)

Editor's Note. — Session Laws 1971, c. 1121, s. 4, deleted "water company" following "cable television company" in subdivision (14).

§ 105-334. Duty to file report; penalty for failure to file.—(a) Every public service company, whether incorporated under the laws of this State or any other state or any foreign nation, whose property is subject to taxation in this State, shall prepare and deliver to the State Board of Assessment each year a report showing (as of January 1) such information with regard to the property it owns and the system property it leases as the State Board of Assessment may by regulation prescribe. This report shall be filed on or before the last day of March, and the following affirmation, which shall be annexed to the report, shall be signed by a principal officer of the public service company making the report:

Under penalties prescribed by law, I hereby affirm that to the best of my knowledge and belief this report, including any accompanying statements, inventories, schedules, and other information is true and complete.

(b) Any individual who willfully subscribes a report required by this section which he does not believe to be true and correct as to every material matter shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine not to exceed five hundred dollars ($500.00) or imprisonment not to exceed six months.

(c) For good cause the Board may grant reasonable extensions of time for filing the required reports.

(d) The Board may require any additional reports or information it deems necessary to properly carry out its duties under this Article.

(e) The provisions of G.S. 105-291 and 105-312 are made specifically applicable to all proceedings taken under this Article. (1939, c. 310, ss. 1600-1606; 1943, c. 634, s. 3; 1965, c. 287, s. 17; 1971, c. 806, s. 1.)

§ 105-335. Appraisal of property of public service companies.—(a) Duty to Appraise.—In accordance with the provisions of subsection (b), below, the State Board of Assessment shall appraise for taxation the true value of each public service company (other than bus line, motor freight carrier, and airline companies) as a system (both inside and outside this State). Certain specified properties of bus line, motor freight carrier, and airline companies shall be appraised by the Board in accordance with the provisions of subsection (c), below, and all other properties of such companies shall be listed; appraised, and assessed in the manner prescribed by this Subchapter for the properties of taxpayers other than public service companies.

(b) Property of Public Service Companies Other Than Those Noted in Subsection (c).—

(1) System Property.—Each year, as of January 1, the State Board of Assessment shall appraise at its true value (as defined in G.S. 105-283) the system property owned or leased by each public service company

both inside and outside this State. In making this appraisal, the Board shall be governed by the provisions of G.S. 105-336, and in determining the portion of the total value of the company's system property subject to taxation in this State, the Board shall adhere to the provisions of G.S. 105-337.

(2) Nonsystem Personal Property.—Each year, as of January 1, the State Board of Assessment shall appraise at its true value (as defined in G.S. 105-283) each public service company's nonsystem personal property (except that assessed under Schedule H of the Revenue Act) subject to taxation in this State.

(3) Nonsystem Real Property.—In accordance with the county in which the public service company's nonsystem real property is located and the schedules set out in G.S. 105-286 and 105-287, the State Board of Assessment shall appraise at its true value (as defined in G.S. 105-283) each public service company's nonsystem real property subject to taxation in this State.

(c) Property of Bus Line, Motor Freight Carrier, and Airline Companies.—

(1) Rolling Stock.—Each year, as of January 1, the State Board of Assessment shall appraise at its true value (as defined in G.S. 105-283) (i) the rolling stock owned or leased by or operated under the control of each bus line company, and (ii) the rolling stock (other than locally assigned rolling stock) owned or leased by or operated under the control of each motor freight carrier company, which bus line company or motor freight carrier company is domiciled in this State or which is regularly engaged in business in this State at some premises occupied by the owner or lessee of the rolling stock or its agent. In making this appraisal, the Board shall be governed by the provisions of G.S. 105-336, and in determining the portion of the total value of the company's rolling stock subject to taxation in this State, the Board shall adhere to the provisions of G.S. 105-337. Locally assigned rolling stock shall be appraised by the State Board of Assessment as of January 1 each year in accordance with the provisions of G.S. 105-283.

(2) Flight Equipment.—Each year, as of January 1, the State Board of Assessment shall appraise at its true value (as defined in G.S. 105-283) the flight equipment owned or leased by or operated under the control of each airline company that is domiciled in the State or that is regularly engaged in business at some airport in this State. In making this appraisal, the Board shall be governed by the provisions of G.S. 105-336, and in determining the portion of the total value of the company's flight equipment subject to taxation in this State, the Board shall adhere to the provisions of G.S. 105-337. (1939, c. 310, s. 1608; 1971, c. 806, s. 1.)

Province of Local Officers. — In assessing railroad property, local officers only list and assess such property as is off the right-of-way. Caldwell Land & Lumber Co. v. Smith, 151 N.C. 70, 65 S.E. 641 (1909) (decided under former similar provisions).

The rolling stock of a railroad company, used upon the branch roads, or roads otherwise acquired, ascertained by a pro rata standard based on the relative length thereof to the whole line is liable to taxation. Wilmington & W.R.R. v. Alsbrook, 110 N.C. 137, 14 S.E. 652 (1892) (decided under former similar provisions).

Abandoned Portion of Railroad. — Where a railroad, under an order of the Interstate Commerce Commission, abandoned its operations as a common carrier on a portion of its road, and thereafter did not operate over such portion of its line except to haul away the scrap as the roadbed was dismantled and salvaged, it was held that such abandoned portion of the road ceased to be vested with a character which would bring it within the jurisdiction of the State Board of Assessment for appraisal and taxation. Warren v. Maxwell, 223 N.C. 604, 27 S.E.2d 721 (1943) (decided under former statute).

A road definitely abandoned and retired from the operative system, after a proper order respecting the convenience and necessity of its further operation as a carrying road has been

granted for such abandonment, was no longer within the purview of the predecessor to this statute. Warren v. Maxwell, 223 N.C. 604, 27 S.E.2d 721 (1943).

Former Law. — As to construction of prior law providing for the assessment of railroad property by the former Corporation Commission, see Atlantic & N.C.R.R. v. City of New Bern, 147 N.C. 165, 60 S.E. 925 (1908).

§ 105-336. Methods of appraising certain properties of public service companies.—(a) Appraising System Property of Public Service Companies Other Than Those Noted in Subsection (b).—In determining the true value of each public service company (other than one covered by subsection (b), below) as a system the State Board of Assessment shall give consideration to the following:

(1) The market value of the company's capital stock and debt, taking into account the influence of any nonsystem property.

(2) The book value of the company's system property as reflected in the books of account kept under the regulations of the appropriate federal or State regulatory agency and what it would cost to replace or reproduce the system property, less a reasonable allowance for depreciation.

(3) The gross receipts and operating income of the company.

(4) Any other factor or information that in the judgment of the Board has a bearing on the true value of the company's system property.

(b) Appraising Rolling Stock and Flight Equipment.—In determining the true value of the rolling stock of bus line and motor freight carrier companies and the flight equipment of airline companies, the State Board of Assessment shall consider the book value of the property as reflected in the books of account kept under the regulations of the appropriate federal or State regulatory agency and what it would cost to replace or reproduce the property in its existing condition. (1939, c. 310, s. 1608; 1971, c. 806, s. 1.)

§ 105-337. Apportionment of taxable values to this State.—With respect to any public service company operating both inside and outside this State, it shall be the duty of the State Board of Assessment to apportion for taxation in this State a fair and reasonable share of the value of the company as a system or its rolling stock or flight equipment as appraised under the provisions of G.S. 105-336. Thus, when the Board has determined true value in accordance with the provisions of G.S. 105-336(a) or G.S. 105-336(b), it shall ascertain the portion of the total value subject to taxation in this State by applying property, business, and mileage factors thereto in accordance with the ratio that the company's property, business, or mileage in this State bears to its total property, business, or mileage. In its discretion, the Board may use one or more of the factors listed in the preceding sentence in order to achieve a fair and accurate result in the apportionment of the value of the property of any public service company. As used in this section,

(1) The term "business factor" means data that reflect the use of the company's property, such as gross revenue, net income, tons of freight carried, revenue ton miles, passenger miles, car miles, ground hours, and comparable data.

(2) The term "mileage factor" means factual information as to the linear miles of the company's track, wire, lines, pipes, routes, and similar operational routes and factual information as to the miles traveled by the company's rolling stock.

(3) The term "property factor" means investment in property; it may be either gross or net investment or any other reasonable figure reflecting the company's investment in property. (1939, c. 310, s. 1609; 1971, c. 806, s. 1.)

§ 105-338. Allocation of appraised valuation of system property among local taxing units.—(a) State Board's Duty.—For purposes of taxation by local taxing units in this State, the State Board of Assessment shall allocate the

valuations of public service company property among the local taxing units in accordance with the provisions of this section.

(b) System Valuation of Companies Other Than Those Noted in Subsection (c).—

(1) System Property of Railroad Companies.—The appraised valuation of the distributable system property of a railroad shall be allocated for taxation to the local taxing units in accordance with the ratio of the miles of all the company's tracks in the local taxing unit to the total miles of all the company's tracks in this State, adjusted to reflect density of traffic in the local taxing unit.

(2) System Property of Telephone Companies.—

a. The State Board of Assessment shall divide each telephone company's system property in this State into the following two classes and shall determine the original cost of that property and the percentage thereof represented by the property in each of the two classes.

—Class 1: Property located in this State that is identified under the applicable uniform system of accounts as central office equipment, large P.B.X. equipment, motor vehicles, tools and work equipment, office furniture and equipment, materials and supplies, and land and buildings (including towers and other structures).

—Class 2: Property located in this State that does not come within Class 1.

The State Board of Assessment shall then apply the percentages obtained in accordance with this subdivision to the appraised valuation of the company's system property in this State and thereby derive the proportions of appraised valuation to be allocated as Class 1 and Class 2 valuations to local taxing units in accordance with subdivision (b)(2)b, below.

b. Having made the division required by subdivision (b)(2)a, above, the State Board of Assessment shall allocate the appraised valuation of the properties in each class among the local taxing units of the State as follows:

—Class 1: The appraised valuations of property in this class shall be allocated among the local taxing units in which such property of the company is situated on January 1 in the proportion that the original cost of such property in the taxing unit bears to the original cost of all such property in this State.

—Class 2: The appraised valuations of property in this class shall be allocated among the local taxing units in which the company operates in the proportion that the miles of the company's single aerial wire and single wire in cable (including single tube in co-axial cable) in the taxing unit bears to the total of such wire miles of the company in this State.

(3) System Property of Other Companies Appraised by the State Board of Assessment.—

a. The provisions of this subdivision (b)(3) shall govern the allocation of the property of all companies appraised by the State Board of Assessment except railroad, telephone, bus line, motor freight carrier, and airline companies.

b. The appraised valuation of the system property of such a company shall be allocated for taxation to the local taxing units in which the company operates in the proportion that the original cost of the taxable system property in the local taxing unit on January 1 bears to the original cost of all the taxable system property in this State. If in any local taxing unit the company owns system property acquired prior to January 1, 1972, for

which the original cost cannot be definitely ascertained, a reasonable estimate of the original cost of that property shall be made by the company, and this estimate shall be used by the State Board of Assessment for allocation purposes as if it were the actual original cost of the property.

(c) Property of Bus Line, Motor Freight Carrier, and Airline Companies.

(1) The appraised valuation of a bus line company's rolling stock shall be allocated for taxation to each local taxing unit according to the ratio of the company's scheduled miles during the calendar year preceding January 1 in each such unit to the company's total scheduled miles in this State for the same period. In no event, however, shall the State Board make an allocation to a taxing unit if, when computed, the valuation for that taxing unit amounts to less than five hundred dollars ($500.00).

(2) The appraised valuation of the rolling stock (other than locally assigned rolling stock) owned or leased by a motor freight carrier company shall be allocated for taxation to each local taxing unit in which the company has a terminal according to the ratio of the tons of freight handled in the calendar year preceding January 1 at the company's terminals within the taxing unit to the total tons of freight handled by the company in this State in the same period. If the company has no terminal in this State, the total of the appraised valuation shall be allocated to the taxing unit in which the company has its principal place of business in this State, or, if it has no principal place of business in this State, to the taxing unit in which the company has his or its legal residence. If the company has no terminal in this State, no principal place of business in this State, and no residence in this State, the appraised valuation shall be allocated to the taxing units in which the company operates according to the ratio of the tons of freight handled during the year preceding January 1 at the premises at which the company regularly conducts business in the taxing unit to the total tons of freight handled by the company in this State in the same period.

(3) The appraised valuation of an airline company's flight equipment shall be allocated for taxation to each local taxing unit in which an airport used by the company is situated according to the ratio obtained by averaging the following two ratios: The ratio of the company's ground hours in the taxing unit in the year preceding January 1 to the company's ground hours in the State in the same period, and the ratio of the company's gross revenue in the taxing unit in the year preceding January 1 to the company's gross revenue in the State in the same period. (1939, c. 310, s. 1610; 1971, c. 806, s. 1.)

§ 105-339. Certification of appraised valuations of nonsystem property and locally assigned rolling stock.—Having determined the appraised valuations of the nonsystem properties of public service companies in accordance with subdivisions (b)(2) and (b)(3) of G.S. 105-335 and the appraised valuations of locally assigned rolling stock in accordance with subdivision (c)(1) of G.S. 105-335, the State Board of Assessment shall assign those appraised valuations to the taxing units in which such properties are situated by certifying the valuations to the appropriate counties and municipalities. Each local taxing unit to which appraised valuations are certified in accordance with this section shall apply to such valuations its assessment ratio adopted pursuant to G.S. 105-284 and shall tax the assessed valuations thus obtained at the rate of tax levied against other property subject to taxation therein. (1939, c. 310, s. 1610; 1971, c. 806, s. 1.)

Reason Why Board Must Act within Fixed Time. — The reason why the board of equalization is required to act within a fixed time is apparent. The taxing authority must

know the value of the taxable property before it can fix a rate sufficient to meet governmental needs. This rate must be fixed prior to September. Spiers v. Davenport, 263 N.C. 56, 138 S.E.2d 762 (1964).

§ 105-340. Certification of appraised valuations of railroad companies.—(a) Having determined the appraised valuation of the "nondistributable" system property of a railroad company, the State Board of Assessment shall assign the valuations for taxation to the local taxing units in which such property is situated in the same manner as is provided for nonsystem property in G.S. 105-339.

(b) Having determined the appraised valuation of the "distributable" system property of a railroad company and having allocated the valuations in accordance with G.S. 105-338(b)(1), the State Board of Assessment shall then certify the amounts of those allocations to the local taxing units to which such amounts are due in accordance with the provisions of G.S. 105-341.

(c) Each local taxing unit to which appraised valuations are certified in accordance with this section shall apply to such valuations its assessment ratio adopted pursuant to G.S. 105-284 and shall tax the assessed valuations thus obtained at the rate of tax levied against other property subject to taxation therein. (1939, c. 310, s. 1620; 1971, c. 806, s. 1.)

§ 105-341. Certification of public service company system appraised valuations.—Having determined the appraised valuations of public service company system property in accordance with subdivision (b)(1) of G.S. 105-335 and having allocated the valuations in accordance with G.S. 105-338(b)(2) and (3), the State Board of Assessment shall assign each local taxing unit's appraised valuations by certifying them to the appropriate counties and municipalities. Each local taxing unit to which valuations are certified in accordance with this section shall apply to such valuations its assessment ratio adopted pursuant to G.S. 105-284 and shall tax the assessed valuations thus obtained at the rate of tax levied against other property subject to taxation therein. (1939, c. 310, s. 1610; 1971, c. 806, s. 1.)

Former §§ 105-341 to 105-343 Continued in Effect until July 1, 1972. — As to continuation in effect until July 1, 1972, of former §§ 105-341 to 105-343, relating to levy of the poll tax and the exemption of certain veterans therefrom, see note catchlined "Revision of Subchapter" under § 105-271.

Former § 105-341 was amended by Session Laws 1971, c. 1231. The amendment substituted "18" for "twenty-one" in subsection (a).

§ 105-342. Notice, hearing, and appeal.—(a) Right to Information.—Upon written request to the State Board of Assessment, any public service company whose property values are subject to appraisal, apportionment, and allocation for purposes of taxation under this Article shall be entitled to be informed of the elements that the Board considered in the appraisal of the company's property, the result in dollars produced by each element (including the methods and mathematical calculations used in determining those results), the specific factors and ratios the Board used in apportioning the appraised valuation of the company's property to this State, and the factors and the specific mathematical calculations the Board used in allocating the company's valuation among the local taxing units of this State. Upon written request to the State Board of Assessment, any local taxing unit in this State shall be entitled to the same information with regard to any public service company whose property values are subject to appraisal, apportionment, and allocation for purposes of taxation under this Article.

(b) Appraisal and Apportionment Review.—The appraised valuation of a public service company's property and the share thereof apportioned for taxation in this State under G.S. 105-335, 105-336, and 105-337 shall be deemed tentative figures until the provisions of this subsection (b) have been complied with. As soon as practicable after the tentative figures referred to in the preceding sentence have been determined, the State Board of Assessment shall

give the taxpayer written notice of the proposed figures and shall state in the notice that the taxpayer shall have 20 days after the date on which the notice was mailed in which to submit a written request to the Board for a hearing on the tentative appraisal or apportionment or both. If a timely request for a hearing is not made, the tentative figures shall become final and conclusive at the close of the twentieth day after the notice was mailed. If a timely request is made, the Board shall fix a date and place for the requested hearing and give the taxpayer at least 20 days' written notice thereof. The hearing shall be conducted under the provisions of subsection (d), below.

(c) Review of Appraised Valuations to be Certified to Local Taxing Units.—Any public service company whose system property is subject to appraisal under this Article may, on or before July 1 of any year, submit to the State Board of Assessment a written request for a hearing at which the public service company may submit evidence that there exist inequitable differences between the level of appraisal used by the State Board in determining the true value of the public service company's system property and that used by a specific county in determining the true value of locally appraised property in that county under G.S. 105-283. The public service company shall also furnish a copy of the request for a hearing to the chairman of the board of commissioners of the county whose appraisals are at issue. If a timely request is made, the Board shall fix a place and date for the requested hearing and shall give notice thereof to the taxpayer, to the chairman of the board of commissioners of the county whose appraisals are at issue, and to each other public service company that has system property taxable in the same county. The Board shall delay making the certification required under G.S. 105-341 until the hearing has been held and the Board's order has been issued. If the Board finds that an inequitable difference does in fact exist, the Board shall adjust the appraised valuation of the appealing public service company that has been allocated to that county and the municipalities therein by eliminating the inequitable difference. It shall make the same adjustment in the appraised valuations of other public service companies that have been allocated to that county and the municipalities therein. The Board shall then certify the adjusted valuations as provided in G.S. 105-341. The hearing provided in this subsection shall be conducted under the provisions of subsection (d), below.

(d) Hearing and Appeal.—At any hearing under this section, the State Board of Assessment shall hear all evidence and affidavits offered by the taxpayer and may exercise the authority granted by G.S. 105-290(d) to obtain information pertinent to decision of the issue. The Board shall make findings of fact and conclusions of law and issue an order embodying its decision. As soon as practicable thereafter, the Board shall serve a written copy of its decision upon the taxpayer by personal service or by registered or certified mail, return receipt requested. The taxpayer shall have 30 days after the date on which the notice is served in which to seek judicial review of the Board's decision under the provisions of G.S. 143-306, et seq. (1971, c. 806, s. 1.)

Former §§ 105-341 to 105-343 Continued in Effect until July 1, 1972. — As to continuation in effect until July 1, 1972 of former §§ 105-341 to 105-343, relating to levy of the poll tax and the exemption of certain veterans therefrom, see note catchlined "Revision of Subchapter" under § 105-271.

§ 105-343. Penalty for failure to make required reports.—Any public service company which fails or refuses to prepare and deliver to the State Board of Assessment any report required by this Article shall forfeit and pay to the State of North Carolina one hundred dollars ($100.00) for each day the report is delayed beyond the date on which it is required to be submitted. This penalty may be recovered in an action in the appropriate division of the General Court of Justice of Wake County in the name of the State on the relation of the State Board of Assessment. When collected, the penalty shall be paid into the general fund of the State. The Board shall have the power to

reduce or waive the penalty provided in this section for good cause. (1939, c. 310, s. 1606; 1971, c. 806, s. 1.)

Former §§ 105-341 to 105-343 Continued in Effect until July 1, 1972. — As to continuation in effect until July 1, 1972 of former §§ 105-341 to 105-343, relating to levy of the poll tax and the exemption of certain veterans therefrom, see note catchlined "Revision of Subchapter" under § 105-271.

§ 105-344. Failure to pay tax; remedies; penalty.—If any public service company fails or refuses to pay any taxes imposed on its property by any taxing unit of this State, the taxing unit may bring an action in the appropriate division of the General Court of Justice of the county in which the taxing unit is located for the recovery of the tax. Not less than 15 days before such an action is instituted, the taxing unit shall notify the taxpayer by registered or certified mail of its intention to bring the action. The judgment rendered in such an action shall include the tax imposed and unpaid and, as an additional tax, a penalty of fifty percent (50%) of the amount of the tax with interest on the sum of these taxes at the rate of nine percent (9%) per annum from the date the tax was due to be paid, plus reasonable attorneys' fees for the prosecution of the action to be fixed by the court. (The awarding of attorneys' fees by the court shall not prevent the taxing unit from paying its attorney an additional fee pursuant to contract, nor shall it prevent the taxing unit from requiring that the attorneys' fees awarded by the court be paid into the general fund of the taxing unit in accordance with any arrangement between the taxing unit and its attorneys.) The judgment rendered by the court may include a mandamus ordering the payment of the judgment, penalty, interest, and costs including the attorneys' fees as part of the costs.

If, during the pendency of an action brought under this section, additional or subsequent taxes shall accrue, those taxes, together with penalties and interest, may be included in the judgment if, prior to rendition of the judgment, the tax collector of the taxing unit files with the court a certificate of the additional taxes, penalties, and interest.

In any action brought under this section, the appraised valuation of the taxpayer's property as determined, allocated, and certified to the taxing unit by the State Board of Assessment shall be conclusive and shall not be subject to collateral attack. (1939, c. 310, s. 1611; 1971, c. 806, s. 1; c. 931, s. 1.)

Cross Reference. — For § 105-344 as it was before the 1971 revision of Subchapter II of this Chapter, see § 105-249.3.

Editor's Note. — Session Laws, 1971, c. 931, s. 1 substituted "nine percent (9%)" for "twelve percent (12%)" in the third sentence.

Article 24.

§§ 105-345, 105-346: Reserved for future codification purposes.

Article 25.

Levy of Taxes and Presumption of Notice.

§ 105-347. Levy of property taxes.—Each year—not later than the date prescribed by applicable law or, in the absence of specific statutory provisions, not later than the first day of August—the tax levying authorities of counties and municipalities shall levy on property rates of taxes, not exceeding any constitutional or statutory limits, necessary to meet the general and other legally authorized expenses of the taxing units. (1939, c. 310, s. 1400; 1971, c. 806, s. 1.)

Reason Why Board Must Act within Fixed Time. — The reason why the board of equalization is required to act within a fixed time is apparent. The taxing authority must know the value of the taxable property before it can fix a rate sufficient to meet governmental needs. Spiers v. Davenport, 263 N.C. 56, 138 S.E.2d 762 (1964) (decided under former similar provisions).

§ 105-348. All interested persons charged with notice of taxes.—All persons who have or who may acquire any interest in any real or personal property that may be or may become subject to a lien for taxes are hereby charged with notice that such property is or should be listed for taxation, that taxes are or may become a lien thereon, and that if taxes are not paid the proceedings allowed by law may be taken against such property. This notice shall be conclusively presumed, whether or not such persons have actual notice. (1939, c. 310, s. 1705; 1971, c. 806, s. 1.)

Article 26.

Collection and Foreclosure of Taxes.

§ 105-349. Appointment, term, qualifications, and bond of tax collectors and deputies.—(a) Appointment and Term.—The governing body of each county and municipality shall appoint a tax collector on or before July 1, 1971, to serve for a term to be determined by the appointing body and until his successor has been appointed and qualified. Until the first such appointments are made, county and municipal taxes shall be collected by the tax collectors presently serving under prior provisions of law. The governing body may remove the tax collector from office during his term for good cause after giving him notice in writing and an opportunity to appear and be heard at a public session of the governing body. No hearing shall be required, however, if the tax collector is removed for failing to meet the prerequisites prescribed by G.S. 105-352(b) for delivery of the tax receipts. Unless otherwise provided by G.S. 105-373, whenever any vacancy occurs in this office, the governing body shall appoint a qualified person to serve as tax collector for the period of the unexpired term.

(b) Qualifications.—The governing body shall appoint as tax collector a person of character and integrity whose experience in business and collection work is satisfactory to the governing body.

(c) Bond.—No tax collector shall be allowed to begin his duties until he shall have furnished bond conditioned upon his honesty and faithful performance in such amount as the governing body may prescribe. A tax collector shall not be permitted to collect any taxes not covered by his bond, nor shall a tax collector be permitted to continue collecting taxes after his bond has expired without renewal.

(d) Compensation.—The compensation and expense allowances of the tax collector shall be fixed by the governing body.

(e) Alternative to Separate Office of Tax Collector.—Pursuant to Article VI, Sec. 9, of the North Carolina Constitution, the office of tax collector is hereby declared to be an office that may be held concurrently with any appointive or elective office other than those hereinafter designated, and the governing body may appoint as tax collector any appointive or elective officer who meets the personal and bonding requirements established by this section. A member of the governing body of a taxing unit may not be appointed tax collector, nor may the duties of the office be conferred upon him. A person appointed or elected as the treasurer or chief accounting officer of a taxing unit may not be appointed tax collector, nor may the duties of the office of tax collector be conferred upon him except with the written permission of the secretary of the Local Government Commission who, before giving his permission, shall satisfy himself that the unit's internal control procedures are sufficient to prevent improper handling of public funds.

(f) Deputy Tax Collectors.—The governing body of a county or municipality is authorized to appoint one or more deputy tax collectors and to establish their terms of office, compensation, and bonding requirements. A deputy tax collector shall have authority to perform, under the direction of the tax

collector, any act that the tax collector may perform unless the governing body appointing the deputy specifically limits the scope of the deputy's authority.

(g) Oath.—Every tax collector and deputy tax collector shall take and subscribe the oath set out below and file it with the clerk of the governing body of the taxing unit:

I, ..., do solemnly swear (or affirm) that I will support and maintain the Constitution and laws of the United States, and the Constitution and laws of North Carolina not inconsistent therewith, and that I will faithfully discharge the duties of my office as (deputy) tax collector of the County (City, Town, or other appropriate unit of local government) of ....., North Carolina, and that I will not allow my actions as tax collector to be influenced by personal or political friendships or obligations, so help me God.

.....
(Signature)

(1939, c. 310, ss. 1701, 1702; 1957, c. 537; 1971, c. 806, s. 1.)

Local Modification. — New Hanover, as to subsection (a): 1971, c. 928.

§ **105-350. General duties of tax collectors.**—It shall be the duty of each tax collector:

(1) To employ all lawful means to collect all property, dog, license, privilege, and franchise taxes with which he is charged by the governing body.

(2) To give such bond as may be required of him by the governing body under the provisions of G.S. 105-349.

(3) To perform such duties in connection with the preparation of the tax records and tax receipts as the governing body may direct under the provisions of G.S. 105-319 and 105-320.

(4) To keep adequate records of all collections he makes.

(5) To account for all moneys coming into his hands in such form and detail as may be required by the chief accounting officer of the taxing unit.

(6) To make settlement at the times required by G.S. 105-373 and at any other time the governing body may require him to do so.

(7) To submit to the governing body at each of its regular meetings a report of the amount he has collected on each year's taxes with which he is charged, the amount remaining uncollected, and the steps he is taking to encourage or enforce payment of uncollected taxes.

(8) To send bills or notices of taxes due to taxpayers if instructed to do so by the governing body.

(9) To visit delinquent taxpayers to encourage payment of taxes if instructed to do so by the governing body. (1939, c. 310, s. 1703; 1971, c. 806, s. 1.)

§ **105-351. Authority of successor collector.**—The successor in office of any tax collector may continue and complete any legally authorized process or proceeding begun by his predecessor for the collection of taxes. (1939, c. 310, s. 1703; 1971, c. 806, s. 1.)

§ **105-352. Delivery of tax receipts to tax collector; prerequisites; procedure upon default.**—(a) Time of Delivery.—As provided in G.S. 105-321, upon order of the governing body, the tax receipts shall be delivered to the tax collector on or before the first day of September.

(b) Settlement, Bond, and Prepayments.—Before the tax receipts for the current year are delivered to the tax collector, he shall have:

(1) Delivered to the chief accounting officer of the taxing unit the duplicate receipts issued for prepayments received by the tax collector.

(2) Demonstrated to the satisfaction of the chief accounting officer that all moneys received by the tax collector as prepayments have been deposited to the credit of the taxing unit.
(3) Made his annual settlement (as defined in G.S. 105-373) for all taxes in his hands for collection.
(4) Provided bond or bonds as required by G.S. 105-349(c) for taxes for the current year and all prior years in his hands for collection. (In no event shall the governing body accept a bond of lesser amount than that prescribed by any local act applying to the taxing unit.)

In the event prepayments have been received by a person other than the regular tax collector, that person shall, before the tax receipts are delivered to the tax collector, deliver the prepayment receipt duplicates to the chief accounting officer and demonstrate to the satisfaction of that officer that all moneys received by him as prepayments have been deposited to the credit of the taxing unit. If the chief accounting officer has accepted prepayments, he shall, not later than the day on which the tax receipts are delivered to the tax collector, make settlement with the governing body in such manner and form as the governing body may prescribe.

(c) Procedure upon Default.—If, when the tax receipts for the current year have been computed and prepared, the regular tax collector shall not have met the requirements of subsection (b), above, the governing body shall immediately appoint a special tax collector and, after he has given satisfactory bond for the full amount of the taxes as required by G.S. 105-349(c), deliver to him the tax receipts for the current year and order him to make collections as provided in G.S. 105-321. In the discretion of the governing body, the cost of the special tax collector's bond and compensation may be deducted from the compensation of the regular tax collector. If the regular tax collector shall thereafter meet the requirements of subsection (b), above, the special collector shall make full settlement (in the manner provided in G.S. 105-373 for tax collectors retiring from office), and the governing body, as provided in G.S. 105-321, shall deliver the tax receipts for the current year to the regular tax collector and order their collection.

(d) Civil and Criminal Penalties.—
(1) Any member of the governing body who shall vote to deliver the tax receipts to a tax collector before the tax collector has met the requirements prescribed by this section shall be individually liable for the amount of taxes charged against the tax collector for which he has not made satisfactory settlement; and any member of the governing body who so votes, or who willfully fails to perform any duty imposed by this section, shall be guilty of a misdemeanor punishable by fine or imprisonment, or both, in the discretion of the court.
(2) Any tax collector or other official who fails to account for prepayments as prescribed by this section shall be guilty of a misdemeanor punishable by fine or imprisonment, or both, in the discretion of the court. (1939, c. 310, s. 1707; 1971, c. 806, s. 1.)

§ 105-353. Place for collection of taxes.—Taxes shall be payable at the office of the tax collector. For the convenience of taxpayers, the governing body may require the tax collector to be present to collect taxes in person or by deputy at other designated places within the taxing unit at times prescribed by the governing body. If the governing body exercises this authority, the tax collector shall give timely notice of the places and times at which he will be present for collection; this notice shall be published in a newspaper having general circulation in the taxing unit and posted at three or more public places within the taxing unit. (1939, c. 310, s. 1712; 1971, c. 806, s. 1.)

§ 105-354. Collections for districts and other units of local government.—Whenever a taxing unit collects taxes for some district or other unit of local government, those taxes, for collection and foreclosure purposes.

shall be treated as taxes of the taxing unit making the collection. (1971, c. 806, s. 1.)

§ 105-355. Creation of tax lien; date as of which lien attaches.—(a) Lien on Real Property.—Regardless of the time at which liability for a tax for a given fiscal year may arise or the exact amount thereof be determined, the lien for taxes levied on a parcel of real property shall attach to the parcel taxed on the date as of which property is to be listed under G.S. 105-307, and the lien for taxes levied on personal property shall attach to all real property of the taxpayer in the taxing unit on the same date. All penalties, interest, and costs allowed by law shall be added to the amount of the lien and shall be regarded as attaching at the same time as the lien for the principal amount of the taxes. For purposes of this subsection (a):

(1) Taxes levied on real property listed in the name of a life tenant under G.S. 105-302(c)(8) shall be a lien on the fee as well as the life estate.

(2) Taxes levied on improvements on or separate rights in real property owned by one other than the owner of the land, whether or not listed separately from the land under G.S. 105-302(c)(11), shall be a lien on both the improvements or rights and on the land.

(b) Lien on Personal Property.—Taxes levied on real and personal property (including penalties, interest, and costs allowed by law) shall be a lien on personal property from and after levy or attachment and garnishment of the personal property levied upon or attached. (1939, c. 310, s. 1704; 1971, c. 806, s. 1.)

Editor's Note. — The cases and opinion of the Attorney General cited in the following note were decided or issued under former similar provisions.

Opinions of Attorney General. — Mr. Rom B. Parker, Halifax County Attorney, 40 N.C.A.G. 265 (1969); Mr. Jule McMichael, Rockingham County Attorney, 40 N.C.A.G. 14 (1970).

Lien Attaches Only to Land of Taxpayer Liable. — Though liability for the payment of taxes does not arise out of contract, a tax is a debt of the taxpayer, and a lien for taxes cannot be fastened upon the land of a person other than the taxpayer liable for the tax. Duplin County v. Jones, 267 N.C. 68, 147 S.E.2d 603 (1966).

Land Owned by Entireties Is Not Subject to Lien for Taxes on Personal Property Owned Separately. — When land, owned by a husband and wife as tenants by the entireties, is listed for taxation by the husband in his name as owner it is not subject to a lien for taxes assessed on account of personal property, listed by him at the same time in his own name, some of which is owned by him and some by his wife but none by both together. Duplin County v. Jones, 267 N.C. 68, 147 S.E.2d 603 (1966).

As to present provisions as to listing land owned by husband and wife as tenants by the entirety, see § 105-302.

§ 105-356. Priority of tax liens.—(a) On Real Property.—The lien of taxes imposed on real and personal property shall attach to real property at the time prescribed in G.S. 105-355(a). The priority of that lien shall be determined in accordance with the following rules:

(1) Subject to the provisions of the Revenue Act prescribing the priority of the lien for State taxes, the lien of taxes imposed under the provisions of this Subchapter shall be superior to all other liens, assessments, charges, rights, and claims of any and every kind in and to the real property to which the lien for taxes attaches regardless of the claimant and regardless of whether acquired prior or subsequent to the attachment of the lien for taxes.

(2) The liens of taxes of all taxing units shall be of equal dignity.

(3) The priority of the lien for taxes shall not be affected by transfer of title to the real property after the lien has attached, nor shall it be affected by the death, receivership, or bankruptcy of the owner of the real property to which the lien attaches.

(b) On Personal Property.—The lien of taxes on real and personal property shall attach to personal property at the time prescribed in G.S. 105-355(b). The priority of that lien shall be determined in accordance with the following rules:

(1) The tax lien, when it attaches to personal property, shall, insofar as it represents taxes imposed upon the property to which the lien attaches, be superior to all other liens and rights whether such other liens and rights are prior or subsequent to the tax lien in point of time.

(2) The tax lien, when it attaches to personal property, shall, insofar as it represents taxes imposed upon property other than that to which the lien attaches, be inferior to prior valid liens and perfected security interests and superior to all subsequent liens and security interests.

(3) As between the tax liens of different taxing units, the tax lien first attaching shall be superior. (1939, c. 310, s. 1704; 1971, c. 806, s. 1.)

Purchase of Warehouse Receipt without Knowledge of Lien Senior in Time.— Under § 105-241, a lien for State taxes on personal property is not enforceable against a bona fide purchaser for value, except upon a levy upon such property under an execution or a tax warrant; but when a tax lien is perfected, it is, by subsection (b) of this section, superior to all other liens or rights prior or subsequent in time. By § 25-7-502(1)(c) a bona fide purchaser of a warehouse receipt acquires good title against a lien senior in time of which the purchaser had no notice. Thus, an enforceable lien on oil stored in North Carolina would not arise until it was executed on; but it could not be attached when a warehouse receipt therefor was in the hands of one who purchased it not knowing of the lien. Davenport v. Ralph N. Peters & Co., 386 F.2d 199 (4th Cir. 1967) (decided under former provisions similar to this section).

§ 105-357. Payment of taxes.—(a) Medium of Payment.—Taxes shall be payable in existing national currency. Deeds to real property, notes of the taxpayer or others, bonds or notes of the taxing unit, and payments in kind shall not be accepted in payment of taxes, nor shall any taxing unit permit the payment of taxes by offset of any bill, claim, judgment, or other obligation owed to the taxpayer by the taxing unit.

(b) Acceptance of Checks.—In the tax collector's discretion and at his own risk, he may accept checks in payment of taxes. Should he do so, the tax collector shall have the option to issue the tax receipt immediately or to withhold the receipt until the check has been collected. If a tax collector accepts a check and issues a tax receipt and the check is thereafter returned unpaid (without negligence on the part of the tax collector in presenting the check for payment), the taxes for which the check was given shall be deemed unpaid; and the tax collector shall immediately correct the copy of the tax receipt and other appropriate records in his office to show the fact of nonpayment, and he shall give written notice by certified or registered mail to the person to whom the tax receipt was issued to return it to the tax collector. After correcting the records in his office to show the fact of nonpayment, the tax collector shall proceed to collect the taxes by the use of any remedies allowed for the collection of taxes or by bringing a civil action on the check.

(1) Effect on Tax Lien.—If the tax collector accepts a check in payment of taxes on real property, issues the receipt therefor, and the check is later returned unpaid, the taxing unit's lien for taxes on the real property shall be inferior to the rights of purchasers for value and of persons acquiring liens of record for value if such purchasers or lienholders acquire their rights in good faith and without actual knowledge that the check has not been collected, after examination of the copy of the tax receipt in the tax collector's office during the time that record showed the taxes as paid or after examination of the official receipt issued to the taxpayer prior to the date on which the tax collector notified him to return the receipt.

(2) Penalty.—In addition to interest for nonpayment of taxes provided by G.S. 105-360 and in addition to any criminal penalties provided by law for the giving of worthless checks, the penalty for giving in payment of taxes a check that is returned because of insufficient funds or nonexistence of an account of the drawer shall be ten percent (10%) of

the amount of the check. This penalty shall be added to and collected in the same manner as the taxes for which the check was given. (1939, c. 310, s. 1710; 1971, c. 806, s. 1.)

Opinions of Attorney General. — Mr. Fred P. Parker, Jr., Wayne County Attorney, 40 N.C.A.G. 817 (1969) (issued under former similar provisions).

Failure to Follow Statutory Procedure upon Return of Check. — The fact that a county tax collector accepted a check in payment of taxes, and the check was returned, and he paid the taxes in his settlement with the board of county commissioners, did not give him a lien which might be foreclosed under former § 105-414. The collector having failed to correct the tax record so as to show that the check had been returned and that the taxes were not paid, the tax lien was not reinstated. He could have protected himself and preserved the tax lien if he had followed the procedure outlined in this section; this he failed to do, and the returned check was but a simple promise to pay. Since the provisions of this section enacted for the protection of the collector were not complied with and he elected to hold the returned check as evidence of the nonpayment of the taxes, he was in no better position than if he had accepted a note in lieu of the check. Miller v. Neal, 222 N.C. 540, 23 S.E.2d 852 (1943).

§ 105-358. Partial payments.—Unless otherwise directed by the governing body, the tax collector shall accept partial payments on taxes and issue partial payment receipts therefor.

When a payment is made on the tax for any year or on any installment, it shall first be applied to accrued penalties, interest, and costs and then to the principal amount of the tax or installment. In its discretion, the governing body may prescribe by uniform regulation the minimum amount or percentage of tax liability that may be accepted as a partial payment. (1939, c. 310, ss. 1708, 1709; 1971, c. 806, s. 1.)

§ 105-359. Prepayments.—(a) To Whom Made.—Payments of taxes made before the tax receipts have been delivered to the tax collector, herein referred to as prepayments, shall be made to the regular tax collector unless the governing body shall have designated some other person to receive them. The regular tax collector or person named to receive prepayments shall give bond satisfactory to the governing body.

(b) When Accepted.—No taxing unit shall be required to accept any tender of prepayment until the annual budget estimate has been filed as required by law.

(c) Estimation of Liability; Overpayment and Underpayment.—If the tax rate has not been finally fixed or if the assessed valuation of the taxpayer's property has not been finally determined at the time a prepayment is tendered, the tax collector shall compute the amount of the tax liability on the basis of the best information available to him. If it is later ascertained that there has been an overpayment, the excess (without interest) shall be refunded by the taxing unit. If it is later ascertained that there was an underpayment, the unpaid balance of the tax shall be due, and the balance due shall be allowed the discount or charged the interest in effect with respect to taxes for the same year at the time the balance is paid.

(d) Receipts.—A receipt issued for a prepayment made on the basis of an estimate of the tax rate or assessed valuation shall so state, and such a receipt shall not release property from the tax lien created by G.S. 105-355(a). An official and final receipt shall be made available to the taxpayer as soon as possible after determination that the tax has been fully paid.

(e) Duties of Chief Accounting Officer.—It shall be the duty of the chief accounting officer of the taxing unit to:

(1) Secure and retain in his office, available to taxpayers upon request, the official receipts for taxes paid in full by prepayment.

(2) Credit on the tax receipts to be delivered to the tax collector all taxes that have been paid in full or in part by prepayment.

(3) Prepare and deliver refunds for overpayments made by way of prepayment.

(4) Reduce the charge to be made against the tax collector by deducting from the total amount of taxes levied so much of the amount received as prepayments as is not required to be refunded under the provisions of subsection (c), above.

Any chief accounting officer who fails to perform the duties imposed upon him by this subsection (e) shall be guilty of a misdemeanor and subject to fine or imprisonment, or both, in the discretion of the court. (1939, c. 310, ss. 1706, 1707; 1969, c. 921, s. 2; 1971, c. 806, s. 1.)

Designation of County Official to Collect Prepayments. — By its failure to designate specifically any county official to collect prepayments under this section, and by its instructions to the sheriff as to the manner of collecting taxes and the payment of commissions, and by its acquiescence in the manner in which commissions were paid to the sheriffs in the past years, a county board of commissioners in effect designated the sheriff as collector of prepayments of taxes under this section. Barbour v. Goodman, 247 N.C. 655, 101 S.E.2d 696 (1958) (decided under former similar provisions).

§ 105-360. Due date; interest for nonpayment of taxes; discounts for prepayment.—(a) All taxes levied by counties and municipalities under the provisions of this Subchapter shall be due and payable on the first day of September of the fiscal year for which the taxes are levied. If paid:

(1) On or after the due date and before the first day of January thereafter, taxes shall be paid at par or face amount.

(2) On or after the first day of January following the due date and before the first day of February thereafter, there shall be added to the taxes interest at the rate of two percent (2%).

(3) On or after the first day of February following the due date, there shall be added to the taxes, in addition to the two percent (2%) provided in subdivision (a)(2), above, interest at the rate of three fourths of one percent (3/4%) per month or fraction thereof until the taxes plus penalties and interest have been paid.

(b) Any person who was on active duty as a member of the armed forces of the United States during World War II, the Korean Conflict, or the Viet Nam Era, upon exhibiting a certificate of his discharge from the armed forces to the appropriate tax collector, shall be relieved of the payment of any interest that may have accrued during the period of such service on taxes levied against his property. For purposes of this subsection (b), World War II shall mean the period beginning December 7, 1941, and ending December 31, 1946; the Korean Conflict shall mean the period beginning June 27, 1950, and ending January 31, 1955; and the Viet Nam Era shall mean the period beginning August 5, 1964, and ending on such date as shall be prescribed by Presidential proclamation or concurrent resolution of the Congress.

(c) Under the conditions established by this subsection (c), the governing body of any county or municipality levying taxes under the provisions of this Subchapter shall have authority to establish a schedule of discounts to be applied to taxes paid prior to the due date prescribed in subsection (a) above. To exercise this authority, the governing body shall:

(1) Not later than the first day of May preceding the due date of the taxes to which it first applies, adopt a resolution or ordinance specifying the amounts of the discounts and the periods of time during which they are to be applicable.

(2) Submit the resolution or ordinance to the State Board of Assessment for approval.

(3) Upon approval by the State Board of Assessment, publish the discount schedule at least once in some newspaper having general circulation in the taxing unit.

When such a resolution or ordinance is submitted to the State Board of Assessment, the Board may approve it or disapprove it in whole or in part if, in the opinion of the Board, the discounts or the periods of time for which discounts are allowed are excessive or unreasonable. Such a resolution or ordinance, once adopted and approved by the State Board of Assessment, shall continue in effect until repealed. Nothing in this subsection (c) shall prevent the governing body of any taxing unit from providing by resolution that the schedule of discounts for prepayment of taxes in effect in the taxing unit on June 30, 1971, shall continue in effect through November 1, 1971, but no longer. (1939, c. 310, s. 1403; 1943, c. 667; 1945, c. 247, s. 3; c. 1041; 1947, c. 888, s. 1; 1969, c. 921, s. 1; 1971, c. 806, s. 1.)

Discrimination between Different Counties.—A statute which discriminates between the different counties of the State, as to the times when the payment of taxes can be compelled, is not unconstitutional, since its provisions affect every one alike in the localities to which they are applicable and contain no violation of the principle of equation of taxation. State v. Jones, 121 N.C. 616, 28 S.E. 347 (1897).

§ 105-361. Statement of amount of taxes due.—(a) Duty to furnish a Certificate.—On the request of any of the persons prescribed in subdivision (a)(1), below, and upon the condition prescribed by subdivision (a)(2), below, the tax collector shall furnish a written certificate stating the amount of any taxes and special assessments for the current year and for prior years in his hands for collection (together with any penalties, interest, and costs accrued thereon) that under G.S. 105-355(a) are made a lien on a parcel of real property in the taxing unit.

(1) Who May Make Request.—Any of the following persons shall be entitled to request the certificate:
   a. An owner of the real property;
   b. An occupant of the real property;
   c. A person having a lien on the real property;
   d. A person having a legal interest or estate in the real property;
   e. The authorized agent or attorney of any person described in subdivisions (a)(1)a through d, above.

(2) Duty of Person Making Request.—The tax collector shall not be required to furnish a certificate unless the person making the request specifies in whose name the real property was listed for taxation for each year for which the information is sought.

(b) Reliance on the Certificate.—When a person who requested and received a certificate as provided in subsection (a), above, has relied on it by paying to the tax collector the amount of taxes and special assessments stated therein to be a lien on the real property, and when the tax collector has accepted such payment, the lien shall be discharged.

The collector shall be liable on his bond for any loss to the taxing unit arising from an understatement of the tax obligation in the preparation of a certificate furnished under this section.

(c) Penalty.—Any tax collector who fails or refuses to furnish a certificate when requested under the conditions prescribed in this section shall be liable for a penalty of fifty dollars ($50.00) recoverable in a civil action by the person who made the request.

(d) Oral Statements.—An oral statement made by the tax collector as to the amount of taxes, penalties, interest, and costs due on any real or personal property shall bind neither the tax collector nor the taxing unit. (1939, c. 310, s. 1711; 1971, c. 806, s. 1.)

§ 105-362. Discharge of lien on real property.—(a) General Rule.—The tax lien on real property shall continue until the principal amount of the taxes plus penalties, interest, and costs allowed by law have been fully paid.

(b) Release of Separate Parcels from Tax Lien.—

(1) When the lien of taxes of any taxing unit for any year attaches to two or more parcels of real property owned by the same taxpayer, the lien may be discharged as to any parcel at any time prior to advertisement of tax foreclosure sale in accordance with either subdivision (b)(1)a or subdivision (b)(1)b:

a. Upon payment, by or on behalf of the listing taxpayer, of the taxes for the year on the parcel or parcels to be released, plus all personal property taxes owed by the listing taxpayer for the same year.

b. Upon payment, by or on behalf of any person (other than the listing taxpayer) who has a legal interest in the parcel or parcels to be released, of the taxes for the year on the parcel or parcels to be released, plus a proportionate part of personal property taxes owed by the listing taxpayer for the same year. The proportionate part shall be a percentage of the personal property taxes equal to the percentage of the total assessed valuation of the taxpayer's real property in the taxing unit represented by the assessed valuation of the parcel or parcels to be released.

(2) When real property listed as one parcel is divided, a part thereof may be released as provided in subdivision (b)(1), above, after the assessed valuation of the part to be released has been determined and certified to the tax collector by the tax supervisor.

(3) It shall be the duty of the tax collector accepting a payment made under this subsection (b) for the purpose of releasing the tax lien from less than all of the taxpayer's real property:

a. To give the person making the payment a receipt setting forth a description of the real property released from the tax lien and bearing a statement that such property is being released from the tax lien.

b. To indicate on the tax receipts, tax records, and other official records of his office what real property has been released from the tax lien.

If the tax collector fails to issue the receipt or make the record entries required by this subdivision (3), the omission may be supplied at any time.

(4) When any parcel of real property has been released under the provisions of this subsection (b) from the lien of taxes of any taxing unit for any year, the property shall not thereafter be subject to the lien of any other regularly levied taxes of the same taxing unit for the same year, whether such other taxes be levied against the listing owner of the property or against some other person acquiring title thereto. No tax foreclosure judgment for such other taxes shall become a lien on the released property; and, upon appropriate request and satisfactory proof of the release by any interested person, the clerk of the superior court shall indicate on the judgment docket that the judgment is not a lien on the released property. However, failure to make such an entry shall not have the effect of making the judgment a lien on the released property. (1939, c. 310, s. 1704; 1971, c. 806, s. 1.)

Duration of Lien.—The General Assembly, pursuant to the Constitution, has established the procedure for levying and collecting taxes, and when levied the tax lien shall continue until the taxes, plus interest, penalties, and costs, as allowed by law, have been fully paid. City of Charlotte v. Kavanaugh, 221 N.C. 259, 20 S.E.2d 97 (1942) (decided under former similar provisions).

§ 105-363. Remedies of cotenants and joint owners of real property.—(a) Payment of Taxes on Share of One Cotenant.—Any one of several tenants in

common or joint tenants (other than copartners) of real property may pay that portion of the taxes, interest, and costs that are a lien upon his undivided share of the property and thereby release the tax lien from his share. Thereafter, in any partition sale of the property the share of the joint owner who has paid his portion of the taxes shall be set apart free from the tax lien, and his share of the proceeds of any sale shall not be diminished by disbursements to pay any taxes, interest, or costs. In the event the tax lien is foreclosed and the property is sold for failure to pay taxes, the share of any joint owner who has paid his portion of the taxes shall be excepted from the advertisement and sale.

(b) Payment of Entire Amount of Taxes by One Cotenant.—Any one of several tenants in common or joint tenants (other than copartners) of real property may pay the entire amount of the taxes, interest, and costs constituting a lien on the property, and any amount so paid that is in excess of his share of the taxes, interest, and costs and that was not paid through agreement with or on behalf of the other joint owners shall constitute a lien in his favor upon the shares of the other joint owners. Such a lien may be enforced in a proceeding for actual partition, a proceeding for partition and sale, or by any other appropriate judicial proceeding. (1901, c. 558, ss. 13, 14, 47; Rev., s. 2860; C. S., s. 7983; 1971, c. 806, s. 1.)

Editor's Note. — The cases cited in the following note were decided under former similar provisions.

Payment by One Tenant in Common. — One tenant in common may pay his or her part of the tax and let the other share go, and three years' possession by the purchaser under the tax deed bars the former rightful owner, under § 1-52, subdivision (10). Ruark v. Harper, 178 N.C. 249, 100 S.E. 584 (1919).

Petitioners in a proceeding for sale of land for partition may not object to the allowance of a sum advanced by one of the parties to pay taxes on the property, as provided by this section, when there is no exception or appeal entered of record by the testator's administrator. Everton v. Rodgers, 206 N.C. 115, 173 S.E. 48 (1934).

Where One Tenant in Possession. — This section refers to cases where all the tenants are on the same footing, all or none being in possession. It does not authorize one tenant in common to take title for the whole tract, nor does it apply to a case where one tenant was in possession for all. Smith v. Smith, 150 N.C. 81, 63 S.E. 177 (1908).

§ 105-364. Collection of taxes outside the taxing unit.—(a) Duty of Governing Body.—It shall be the duty of the governing body of each taxing unit to require reports from the tax collector at such times as it may prescribe (but not less frequently than in connection with the tax collector's annual settlement) concerning the efforts he has made to locate taxpayers who have removed from the taxing unit, the efforts he has made to locate personal property in other taxing units belonging to delinquent taxpayers, and the efforts he has made under the provisions of this section to collect taxes.

(b) Duty to Certify Unpaid Taxes.—If a taxpayer has no personal property or real property subject to the tax lien in the taxing unit but does have personal property in some other taxing unit in this State, or if a taxpayer has removed from the taxing unit, leaving no personal property or real property subject to the tax lien there, and is known to be in some other taxing unit in this State, the tax collector shall forward the tax receipt (with a certificate stating that the taxes are unpaid) for collection to the tax collector of the taxing unit in which the taxpayer is known to have personal property or in which he is known to be. The tax collector may not, however, certify an unpaid tax receipt to another taxing unit if 10 years have elapsed since the date the unpaid taxes became due.

(c) Effect of Certificate; Duty of Receiving Tax Collector.—In the hands of the tax collector receiving them, the copy of the tax receipt and the certificate of nonpayment shall have the force and effect of an unpaid tax receipt of his own taxing unit, and it shall be the receiving tax collector's duty to proceed immediately to collect the taxes by any means by which he could lawfully collect taxes of his own taxing unit. Within 30 days after receiving such a tax receipt and certificate, the collector receiving them shall report to the tax

collector that sent them that he has collected the tax, that he has begun proceedings to collect the tax, or that he is unable to collect it. If the tax collector reports that he has begun proceedings to collect the tax, he shall, not later than 90 days after so reporting, make a final report to the tax collector who certified the tax receipt stating that he has collected the tax or that he is unable to collect it.

(1) In acting on a tax receipt and certificate under the provisions of this section, the tax collector receiving them shall, in addition to collecting the amount of taxes certified as due, also collect for his services a fee equal to ten percent (10%) of the amount of taxes actually collected. This collection fee shall be retained by the tax collector making the collection for his own use and shall not be turned over to the taxing unit by which he is employed.

(2) Within five days after making a collection under the provisions of this section, the tax collector receiving the tax receipt and certificate shall remit the funds collected, less the fee provided for in subdivision (c)(1), above, to the tax collector of the taxing unit that levied the tax.

(3) If the tax collector receiving the tax receipt and certificate reports that he is unable to collect the tax, he shall make his report under oath and shall state therein that he has used due diligence and is unable to collect the tax by levy, attachment and garnishment, or any other legal means.

(d) Liability on Bond.—A tax collector who receives a tax receipt and certificate from the tax collector of another taxing unit under the provisions of subsection (b), above, shall be liable on his bond to the taxing unit that levied the tax for the amount of the taxes certified if:

(1) The tax collector receiving the certified tax receipt fails to make any report to the certifying tax collector within 30 days after receiving the certified tax receipt.

(2) The tax collector receiving the certified tax receipt fails to swear to any report stating that he is unable to collect the certified tax.

(3) Having reported that he has begun proceedings to collect a certified tax, the tax collector receiving the certified tax receipt fails to make a final report within 90 days after reporting that he has begun proceedings for collection. (1939, c. 310, s. 1714; 1955, c. 909; 1963, c. 132; 1971, c. 806, s. 1.)

§ 105-365. Preference accorded taxes in liquidation of debtors' estates.—In all cases in which a taxpayer's assets are in the hands of a receiver or assignee for the benefit of creditors or are otherwise being liquidated or managed for the benefit of creditors, the taxes owed by the debtor (together with interest, penalties, and costs) shall be a preferred claim, second only to administration expenses and specific liens. The provisions of this section shall not be construed to modify or reduce the priority given by G.S. 105-356 to tax liens on real and personal property or to alter or preclude the exercise of any remedies against personal property provided for in G.S. 105-366. (1939, c. 310, s. 1704; 1971, c. 806, s. 1.)

§ 105-366. Remedies against personal property.—(a) Authority to Proceed against Personal Property; Relation between Remedies against Personal Property and Remedies against Real Property.—All tax collectors shall have authority to proceed against personal property to enforce the collection of taxes as provided in this section and in G.S. 105-367 and 105-368. Any tax collector may, in his discretion, proceed first against personal property before employing the remedies for enforcing the lien for taxes against real property, and he shall proceed first against personal property:

(1) When directed to do so by the governing body of the taxing unit; or

(2) When requested to do so by the taxpayer or by a mortgagee or other

person holding a lien upon the real property subject to the lien for taxes if the person making the request furnishes the tax collector with a written statement describing the personal property to be proceeded against and giving its location.

No sale of a tax lien or foreclosure of a tax lien on real property may be attacked as invalid on the ground that payment of the tax should have been procured from personal property.

(b) Remedies after Taxes Are Due.—At any time after taxes are due and before the filing of a tax foreclosure complaint under G.S. 105-374 or the docketing of a judgment for taxes under G.S. 105-375, and subject to the provisions of G.S. 105-356 governing the priority of liens, the tax collector may levy upon and sell or attach the following property for failure to pay taxes:

(1) Any personal property owned by the taxpayer, regardless of the time at which it was acquired and regardless of the existence or date of creation of mortgages or other liens thereon.

(2) Any personal property transferred by the taxpayer to a relative (which shall mean any parent, grandparent, child, grandchild, brother, sister, aunt, uncle, niece, or nephew, or their spouses, of the taxpayer or his spouse).

(3) Personal property in the hands of a receiver for the taxpayer. (It shall not be necessary for the tax collector to apply for an order of the court directing payment or authorizing the levy or attachment, but he may proceed as though the property were not in the hands of a receiver, and the tax collector's filing of a claim in a receivership proceeding shall not preclude him from proceeding to levy under G.S. 105-367 or to attach under G.S. 105-368.)

(4) Personal property of a deceased taxpayer if the levy or attachment is made before final settlement of the estate.

(5) The stock of goods or fixtures of a wholesale or retail merchant (as defined in Schedule E of the Revenue Act) in the hands of a purchaser or transferee thereof, or any other personal property of the purchaser or transferee of such property, if the taxes on the goods or fixtures remain unpaid 30 days after the date of the sale or transfer, but in such a case the levy or attachment must be made within six months of the sale or transfer.

(6) Personal property of the taxpayer that has been repossessed by one having a security interest therein so long as the property remains in the hands of the person who has repossessed it or the person to whom it has been transferred other than by bona fide sale for value.

(7) Personal property due the taxpayer or to become due to him within the calendar year.

(8) Personal property of a partner in satisfaction of taxes on partnership property, but only after the tax collector:

a. Has sold the taxing unit's lien for taxes against the partnership real property, if any; and

b. Exhausted the partnership's personal property through the use of levy and attachment and garnishment; and

c. Exercised the authority granted him by G.S. 105-364 in an effort to collect the taxes due on the partnership's property.

(9) Personal property transferred by the taxpayer by any type of transfer other than those mentioned in this subsection (b) and other than by bona fide sale for value if the levy or attachment is made within six months of the transfer.

(c) Remedies Before Taxes Are Due.—If between the date as of which property is to be listed and the first day of September of the fiscal year for which the taxes are imposed the tax collector has reasonable grounds for believing that the taxpayer is about to remove his property from the taxing

unit or transfer it to another person or is in imminent danger of becoming insolvent, the tax collector may levy on or attach that property or any other personal property of the taxpayer, in the manner provided in G.S. 105-367 and 105-368, prior to the first day of September for the taxes to become due on that date. When collected under this subsection (c), the amount of taxes not yet determined shall be computed under the provisions of G.S. 105-359, and any applicable discount shall be allowed.

(d) Remedies against Sellers and Purchasers of Stocks of Goods or Fixtures of Wholesale or Retail Merchants.—

(1) Any wholesale or retail merchant (as defined in Schedule E of the Revenue Act) who sells or transfers the major part of his stock of goods, materials, supplies, or fixtures, other than in the ordinary course of business or who goes out of business, shall:
   a. At least 48 hours prior to the date of the pending sale, transfer, or termination of business, give notice thereof to the tax supervisors and tax collectors of the taxing units in which his business is located; and
   b. Within 30 days of the sale, transfer, or termination of business, pay all taxes due or to become due on the transferred property on the first day of September of the current calendar year.

(2) Any person to whom the major part of the stock of goods, materials, supplies, or fixtures of a wholesale or retail merchant (as defined in Schedule E of the Revenue Act) is sold or transferred, other than in the ordinary course of business, or who becomes the successor in business of a wholesale or retail merchant shall withhold from the purchase money paid to the merchant an amount sufficient to pay the taxes due or to become due on the transferred property on the first day of September of the current calendar year until the former owner or seller produces either a receipt from the tax collector showing that the taxes have been paid or a certificate that no taxes are due. If the purchaser or successor in business fails to withhold a sufficient amount of the purchase money to pay the taxes as required by this subsection (d) and the taxes remain unpaid after the 30-day period allowed, he shall be personally liable for the amount of the taxes unpaid, and his liability may be enforced by means of a civil action brought in the name of the taxing unit against him in an appropriate trial division of the General Court of Justice in the county in which the taxing unit is located.

(3) Whenever any wholesale or retail merchant (as defined in Schedule E of the Revenue Act (sells or transfers the major part of his stock of goods, materials, supplies, or fixtures, other than in the ordinary course of business, or goes out of business, and the taxes due or to become due on the transferred property on the first day of September of the current calendar year are unpaid 30 days after the date of the transfer or termination of business, the tax collector, to enforce collection of the unpaid taxes, may:
   a. Levy on or attach any personal property of the seller, or
   b. Levy on or attach any of the property transferred in the hands of the transferee or successor in business, or any other personal property of the transferee or successor in business, but in either case the levy or attachment must be made within six months of the transfer or termination of business.

(4) In using the remedies provided in this subsection (d), the amount of taxes not yet determined shall be computed in accordance with G.S. 105-359, and any applicable discount shall be allowed. (1939, c. 310, s. 1713; 1951, c. 1141, s. 1; 1955, cc. 1263, 1264; 1957, c. 1414, ss. 2-4; 1969, c. 305; c. 1029, s. 1; 1971, c. 806, s. 1.)

Sale by Assignee for Benefit of Creditors Prior to Levy.—Where an assignee for the benefit of the creditors of a taxpayer sells personal property of his assignor, on which a tax had been assessed, but not levied, prior to the assignment, the proceeds in the hands of the assignee are not subject to garnishment for the payment of the tax, but belong to the creditors. Town of Shelby v. Tiddy, 118 N.C. 792, 24 S.E. 521 (1896).

A tax list in the hands of a tax collector is equivalent to an execution, and the tax collector, in lieu of selling real estate for the collection of taxes due thereon, may seize personal property belonging to the taxpayer and sell same or so much thereof as may be necessary for the satisfaction of all taxes due by the taxpayer. Town of Apex v. Templeton, 223 N.C. 645, 27 S.E.2d 617 (1943).

When Merchant Transfers Goods without Paying Personal Property Tax, and When Taxing Unit Fails to Levy on the Property within Six Months, the Purchaser Becomes Personally Liable.—See opinion of Attorney General to Mr. Fred P. Parker, Jr., 41 N.C.A.G. 482 (1971).

§ 105-367. Procedure for levy.—(a) The levy upon and sale of tangible personal property for tax collection purposes (including levy and sale fees) shall be governed by the laws regulating levy and sale under execution except as otherwise provided in this section.

(b) The tax collector or any duly appointed deputy tax collector shall make the levy and conduct the sale; it shall not be necessary for the sheriff to make the levy or conduct the sale. However, upon the authorization of the governing body of the taxing unit, the tax collector may direct an execution against personal property for taxes to the sheriff in the case of county or municipal taxes or to a municipal policeman in the case of municipal taxes. In either case the officer to whom the execution is directed shall proceed to levy on and sell the personal property subject to levy in the manner and with the powers and authority normally exercised by sheriffs in levying upon and selling personal property under execution.

(c) In addition to the notice of sale required by the laws governing sale of property levied upon under execution, the tax collector may advertise the sale in any reasonable manner and for any reasonable period of time he deems necessary to produce an adequate bid for the property. The taxing unit shall advance the cost of all advertising.

(d) Levy and sale fees, plus actual advertising costs, shall be added to and collected in the same manner as taxes. The advertising costs, when collected, shall be used to reimburse the taxing unit for advertising costs it has advanced. Levy and sale fees, when collected, shall be treated in the same manner as other fees received by the collecting official. (1939, c. 310, s. 1713; 1951, c. 1141, s. 1; 1955, cc. 1263, 1264; 1957, c. 1414, ss. 2-4; 1969, c. 305; c. 1029, s. 1; 1971, c. 806, s. 1.)

§ 105-368. Procedure for attachment and garnishment.—(a) Subject to the provisions of G.S. 105-356 governing the priority of the lien acquired, the tax collector may attach wages and other compensation, rents, bank deposits, the proceeds of property subject to levy, or any other intangible personal property in the circumstances and to the extent prescribed in G.S. 105-366(b), (c), and (d).

In the case of property due the taxpayer or to become due to him within the current calendar year, the person owing the property to the taxpayer or having the property in his possession shall be liable for the taxes to the extent of the amount he owes or has in his possession. However, when wages or other compensation for personal services is attached, the garnishee shall not pay to the tax collector more than ten percent (10%) of such compensation for any one pay period.

(b) To proceed under this section, the tax collector shall serve or cause to be served upon the taxpayer and the person owing or having in his possession the wages, rents, debts, or other property sought to be attached a notice as

hereinafter provided, which notice may be served by any deputy or employee of the tax collector or by any officer having authority to serve summonses. If the taxpayer no longer resides within the State or cannot be located therein, the notice may be served upon him by registered or certified mail, return receipt requested, and such service shall be conclusively presumed to have been made upon the exhibition of the return receipt. The notice shall contain:

(1) The name of the taxpayer and his address, if known.

(2) The amount of the taxes, penalties, interest, and costs (including the fees allowed by this section) and the year or years for which the taxes were imposed.

(3) The name of the taxing unit or units by which the taxes were levied.

(4) A brief description of the property sought to be attached.

(5) A copy of the applicable law, that is, G.S. 105-366 and 105-368. Notices concerning two or more taxpayers may be combined if they are to be served upon the same garnishee, but the taxes, penalties, interest, and costs charged against each taxpayer must be set forth separately.

(c) If the garnishee has no defense to offer or no setoff against the taxpayer, he shall within 10 days after service of the notice answer it by sending to the tax collector by registered mail a statement to that effect, and if the amount demanded by the tax collector is then due to the taxpayer or subject to his demand, the garnishee shall remit it to the tax collector with his statement; but if the amount due to the taxpayer or subject to his demand is to mature in the future, the garnishee's statement shall set forth that fact, and the demand shall be paid to the tax collector upon maturity. Any payment by the garnishee under the provisions of this subsection (c) shall completely satisfy any liability therefor on his part to the taxpayer.

(d) If the garnishee has a defense or setoff against the taxpayer, he shall state it in writing under oath, and, within 10 days after service of the garnishment notice, he shall send two copies of his statement to the tax collector by registered mail. If the tax collector admits the defense or setoff, he shall so advise the garnishee in writing within 10 days after receipt of the garnishee's statement, and the attachment or garnishment shall thereupon be discharged to the amount required by the defense or setoff, and any amount attached or garnished which is not affected by the defense or setoff shall be remitted to the tax collector as provided in subsection (c), above.

If the tax collector does not admit the defense or setoff, he shall set forth in writing his objections thereto and send a copy thereof to the garnishee within 10 days after receipt of the garnishee's statement, or within such further time as may be agreed on by the garnishee, and at the same time the tax collector shall file a copy of the notice of garnishment, a copy of the garnishee's statement, and a copy of the tax collector's objections thereto in the appropriate division of the General Court of Justice of the county in which the garnishee resides or does business, where the issues made shall be tried as in civil actions.

(e) If the garnishee has not responded to the notice of garnishment as required by subsections (c) and (d), above, within 15 days after service of the notice, the tax collector may file in the appropriate division of the General Court of Justice of the county in which the garnishee resides a copy of the notice of garnishment, accompanied by a written statement that the garnishee has not responded thereto and a request for judgment, and the issues shall be tried as in civil actions.

(f) The taxpayer may raise any defenses to the attachment or garnishment that he may have in the manner provided in subsection (d), above, for the garnishee.

(g) The fee for serving a notice of garnishment shall be the same as that charged in a civil action. If judgment is entered in favor of the taxing unit by default or after hearing, the garnishee shall become liable for the taxes,

penalties, and interest due by the taxpayer, plus the fees and costs of the action, but payment shall not be required from amounts which are not to become due to the taxpayer until they actually come due. The garnishee may satisfy the judgment upon paying the amount thereof, and if he fails to do so, execution may issue as provided by law. From any judgment or order entered, either the taxing unit or the garnishee may appeal as provided by law. If, before or after judgment, adequate security is filed for the payment of the taxes, penalties, interest, and costs, the tax collector may release the attachment or garnishment, or execution may be stayed at the request of the tax collector pending appeal, but the final judgment shall be paid or enforced as above provided. If judgment is rendered against the taxing unit, it shall pay the fees and costs of the action. All fees collected by officers shall be disposed of in the same manner as other fees collected by such officers.

(h) Tax collectors may proceed against the wages, salary, or other compensation of officials and employees of this State and its agencies, instrumentalities, and political subdivisions in the manner provided in this section. If the taxpayer is an employee of the State, the notice of attachment shall be served upon him and upon the head or chief officer of the department, agency, instrumentality, or institution by which he is employed. If the taxpayer is an employee of a political subdivision of the State (county, municipality, etc.), the notice of attachment shall be served upon him and upon the officer charged with making up the payrolls of the political subdivision by which he is employed. All deductions from the wages or salary of a taxpayer made pursuant to this subsection (h) and remitted to the tax collector shall, pro tanto, constitute a satisfaction of the salary or wages due the taxpayer.

(i) (1) Any person who, after written demand therefor, refuses to give the tax collector or tax supervisor a list of the names and addresses of all of his employees who may be liable for taxes, shall be guilty of a misdemeanor.

(2) Any tax collector or tax supervisor who receives, upon his written demand, any list of employees may not release or furnish that list or any copy thereof, or disclose any name or information thereon, to any other person, and may not use that list in any manner or for any purpose not directly related to and in furtherance of the collection and foreclosure of taxes. Any tax collector or tax supervisor who violates or allows the violation of this subdivision (i)(2) shall be guilty of a misdemeanor. (1939, c. 310, s. 1713; 1951, c. 1141, s. 1; 1955, cc. 1263, 1264; 1957, c. 1414, ss. 2-4; 1969, c. 305; c. 1029, s. 1; 1971, c. 806, s. 1.)

§ 105-369. Sale of tax liens on real property for failure to pay taxes.—(a) Report of Unpaid Taxes that Are Liens on Real Property.—On the first Monday in February in each year, each county tax collector and on the second Monday in February in each year, each municipal tax collector shall report to the governing body the total amount of unpaid taxes for the current fiscal year that are liens on real property, and the governing body shall thereupon order the tax collector to sell such tax liens at one of the times specified in subsection (b), below. For purposes of this section, district taxes collected by county tax collectors shall be regarded as county taxes and district taxes collected by municipal tax collectors shall be regarded as municipal taxes.

(b) Time for Sale.—The county tax lien sale shall be held on the first Monday in March, April, May, or June, and the municipal tax lien sale shall be held on the second Monday in any of the four specified months. (If the taxes of two or more taxing units are collected by the same tax collector, only one sale shall be held for the tax liens of both, or all, on either the first or second Monday of a month in which tax lien sales may be conducted.) If the date chosen for the lien sale is a legal holiday, the sale shall be held on the following

Tuesday. No tax lien sale may be delayed or restrained by order of any court in this State. Failure to hold the tax lien sale within the time prescribed by this subsection (b) shall not affect the validity of the taxes or the tax liens, nor shall it affect the validity of the tax lien sale when thereafter held.

(c) Place and Hour of Sale.—County tax lien sales shall be held at the courthouse; municipal tax lien sales shall be held at either the city or town hall or the county courthouse. Tax lien sales shall be held at an hour to be determined by the tax collector and specified in the advertisement required by subsection (d), below.

(d) Advertisement of Sale.—Notice of the time, place, and purpose of the tax lien sale shall be given by advertisement at some public place at the courthouse (in the case of county taxes) or city or town hall (in the case of municipal taxes) and by advertisement once each week for four successive weeks preceding the sale in one or more newspapers having general circulation in the taxing unit. The final newspaper publication shall be not less than five days before the date of the sale. If there is no newspaper having general circulation in the taxing unit, the advertisement shall be posted in at least one public place in each township (in the case of county taxes) or in at least three public places in the municipality (in the case of municipal taxes) in addition to the notice posted at the courthouse or city or town hall. The costs of newspaper advertising shall be paid by the taxing unit. (If the taxes of two or more taxing units are collected by the same tax collector, the tax liens of each unit shall be advertised separately unless, under the provisions of a special act or contractual agreement between the taxing units, joint advertisement is permitted.)

(e) Contents of Advertisement and Notice.—The posted notice and newspaper advertisement required by subsection (d), above, shall set forth the following information:

(1) The purpose of the tax lien sale.
(2) The place at which the tax lien sale will be conducted.
(3) The date on which the tax lien sale will be conducted.
(4) The hour at which the tax lien sale will begin.
(5) The name of each person to whom is listed real property on which the taxing unit has a lien for unpaid taxes, together with a brief description of each parcel of land to which such a lien has attached and a statement of the principal amount of the taxes constituting a lien against the parcel.
(6) A statement that the amounts advertised will be increased by interest and costs and that the omission of interest and costs from the amounts advertised will not constitute a waiver of the taxing unit's claim for those items.
(7) A statement that no bid will be received unless it is at least equal to the principal amount of the taxes advertised plus interest and costs accrued thereon at the date of sale.
(8) In the event the list of tax liens has been divided for purposes of advertisement in more than one newspaper, a statement of the names of all newspapers in which advertisements will appear and the dates on which they will be published.

(f) Manner of Sale.—The sale may be conducted by the tax collector or by a deputy tax collector designated by the tax collector. The sale shall be held by public outcry at the time and place specified and in strict accordance with the terms stated in the advertisement.

(1) Sale of Liens on Several Parcels Owned by One Taxpayer.—In the tax collector's discretion, he may sell separately the tax lien on each of several parcels belonging to the same taxpayer, or he may sell as one lot the tax liens on all parcels belonging to the same taxpayer.
(2) Bids by Private Persons.—In the tax collector's discretion, he may demand immediate payment from any successful bidder at the lien

sale, and he may reject the bid if the bidder fails to comply with the demand.

(3) Taxing Unit as Purchaser.—In the absence of a bid at least equal to the principal amount of the taxes plus interest and costs accrued thereon, the taxing unit shall, without submitting a formal bid, become the purchaser for an amount equal to that sum. (If the taxes of two or more taxing units are to be collected by the same tax collector and there is an absence of an adequate bid, the taxing unit whose liens have the largest total value may become the purchaser, or the taxing units may become joint purchasers for the benefit of each according to its interest.)

(4) Failure of Tax Collector to Attend Sale.—If any tax collector shall fail to attend any duly advertised tax lien sale in person or by competent deputy, he shall be guilty of a misdemeanor punishable by fine or imprisonment, or both, in the discretion of the court, and he shall also be liable on his bond to a penalty of three hundred dollars ($300.00).

(g) Costs of Sale.—Costs of sale, which shall be included in the minimum sale price as provided in subsection (e), above, shall consist of a sale fee not exceeding fifty cents (50¢) per parcel and actual advertising costs. Actual advertising costs per parcel shall be determined by the tax collector on any reasonable basis. Advertising costs and sale fees collected through sale of the tax lien shall be deemed to be taxes.

(h) Payments during Advertising Period.—At any time between the beginning of the advertisement and the time of the tax lien sale, any parcel may be withdrawn from the sale list by payment of the taxes plus interest that has accrued to the time of payment and a proportionate part of the advertising cost to be determined by the tax collector. Thereafter, the tax collector shall delete that parcel from the advertisement, but if he fails to do so he shall not be liable for his failure to make the deletion unless the tax lien on the parcel is actually sold.

(i) Listing and Advertising in Wrong Name.—No tax lien sale shall be void because the real property to which the lien attached was listed or advertised in the name of a person other than the person in whose name the property should have been listed for taxation if the property was in other respects correctly described on the abstract or in the advertisement.

(j) Acts of De Facto Officers.—In all actions, proceedings, and controversies involving the title to real property affected by a tax lien sale or held under and by virtue of a tax foreclosure proceeding authorized by this Subchapter, all acts of tax supervisors, tax collectors, members of unit governing bodies, and other officers de facto shall be deemed and construed to be of the same validity as acts of officers de jure.

(k) Proof of Sale.—The tax receipts, tax records, and tax sale certificates of the office of the tax collector conducting a tax lien sale, or properly certified copies thereof, shall be deemed sufficient evidence to prove the sale of the tax lien on any real property under this section or the payment of the taxes thereon.

(l) Wrongful Sale; Reimbursement; Penalties.—

(1) When by mistake or wrongful act of the tax collector a tax lien has been sold on real property on which no tax was due, the tax lien shall be void; the taxing unit shall reimburse the purchaser by paying him the amount he expended in purchasing the lien with interest thereon at six percent (6%) per annum; and the tax collector shall be liable to the taxing unit upon his bond for all amounts so expended by the taxing unit in excess of the amount received by it from the tax lien sale.

(2) Any tax collector or deputy tax collector who shall sell or assist in selling the tax lien on any real property knowing the property not to be subject to taxation or knowing that the taxes for which the lien is

sold have been paid or who shall knowingly and willfully sell or assist in selling the tax lien on any real property for payment of taxes in order to defraud the owner of the real property, or who shall knowingly and willfully cause foreclosure proceedings to be instituted on a tax lien so sold shall be guilty of a misdemeanor. Upon conviction, the tax collector or deputy tax collector shall be subject to a fine of not less than one thousand dollars ($1,000) nor more than three thousand dollars ($3,000) or imprisonment not exceeding one year, or both, and he shall be required to pay the injured party all damages sustained by his act. (1939, c. 310, s. 1715; 1955, c. 993; 1971, c. 806, s. 1.)

The power to sell real estate for taxes was repealed by Session Laws 1939, c. 310, and the sheriff or tax collector is limited to the sale of the tax lien. Crandall v. Clemmons, 222 N.C. 225, 22 S.E.2d 448 (1942).

The tax lien can be enforced only by an action in the county in which the land is situated in the nature of an action to foreclose a mortgage. Crandall v. Clemmons, 222 N.C. 225, 22 S.E.2d 488 (1942). See §§ 105-374 and 105-375.

§ 105-370. Evidence of purchase of tax lien.—(a) Purchase by Taxing Unit.—The governing body of each taxing unit that becomes the purchaser at a tax lien sale shall determine whether or not the tax collector shall be required to issue tax lien sale certificates to and in the name of the purchasing unit. If the governing body determines that the issuance of certificates is not necessary to provide adequate records of tax liens and tax collections, it shall direct the tax collector to mark or stamp the original tax receipts "Sold to .... (name of the taxing unit) on ..... (date of tax lien sale)." If the issuance of certificates is deemed necessary, they shall be issued in substantially the form set forth in subsection (c), below, with duplicates on which shall be reflected all payments or assignments. Whether or not certificates are issued, interest at the rate of nine percent (9%) per annum shall accrue on the amount bid by the taxing unit for the lien from the date of the tax lien sale, and the taxing unit may foreclose the tax lien and sell the property by any method authorized by law.

(b) Sale to Private Purchaser.—In the event a private person is the successful bidder at the tax lien sale, the tax collector shall issue to him a certificate of sale for each tax lien he has purchased. The certificate, which shall be in substantially the form set forth in subsection (c), below, shall be issued as soon as possible after the tax lien sale, but in no event shall it be issued before the purchase price has been paid. A copy of each tax lien sale certificate shall be retained by the tax collector in a special book or file designated "Certificates of Sale for Taxes for the Year ....." and shall be the official record for the purpose of determining whether a lien exists in favor of any certificate owner other than a taxing unit. When a tax sale certificate is issued to a purchaser, the original and all copies of the tax receipt for the taxes represented by the lien sale certificate shall be stamped or marked "Paid," and the original shall be retained in the tax collector's office.

(c) Tax Sale Certificate Form.—The certificate evidencing purchase of a tax lien shall be in substantially the following form:

North Carolina

..... (name of taxing unit)

I, ..., tax collector of ..... (taxing unit), do hereby certify that the tax lien on the following described real property in the taxing unit, to wit:

..... (description of real property) was, on the ..... day of ....., 19 ...., duly sold by me in the manner provided by law for the delinquent taxes of ..... (listing taxpayer) for the year 19...., amounting to $....., including interest and costs allowed by law, when and where ..... (name of purchaser) purchased the lien on the above-described real

property at the price of $. . . . . , which amount was the highest and best bid for the tax lien. I further certify that unless payment of the lien is made within the time and in the manner provided by law, including the interest thereon, ... (the purchaser), his heirs or assigns, may foreclose the lien by any proceeding authorized by law.

In witness whereof, I have hereunto set my hand this . . . . . day of . . . . . , 19. . . .

. . . . . Tax Collector

(d) Prima Facie Evidence.—A tax sale certificate issued or a tax receipt marked or stamped in accordance with the provisions of subsections (a), (b), and (c), above, shall be prima facie evidence of the regularity of all prior proceedings incident to the tax lien sale and of the due performance of all things essential to the validity thereof. (1939, c. 310, s. 1716; 1945, c. 247, ss. 1, 2; 1971, c. 806, s. 1; c. 931, s. 1.)

Editor's Note. — Session Laws 1971, c. 931, s. 1, substituted "nine percent (9%)" for "twelve percent (12%)" in the last sentence in subsection (a).

Tax Lien Certificates Held Insufficient to Make Out Prima Facie Case in Action to Foreclose Lien.—Where, in a county's action to foreclose tax lien certificates, the introduction in evidence by the county of the tax lien certificates for the years in question with tax certificates attached on 150 acres of land outstanding in the name of a certain person, but without evidence that the 150 acre tract listed in the name of such person and referred to in the tax lien certificates was the same land as that described in the deed executed to defendants by another, it was held insufficient to make out a prima facie case to sell the land of the defendants. Hyde County v. Bridgman, 238 N.C. 247, 77 S.E.2d 628 (1953) (decided under former similar provisions).

§ 105-371. Rights of private holder of tax sale certificate.—(a) Lien and Interest.—The private person who purchases a tax lien sale certificate, his heirs and assigns, shall have a lien on the real property for the amount of the purchase price plus interest at the rate of nine percent (9%) per annum on the portion of the purchase price that equals the total of the amount of the tax and penalties, interest thereon to the date of the lien sale, the cost of advertising, and the sale fee. The purchaser's lien shall be of the same dignity as similar liens owned by taxing units, and it may be foreclosed by an action in the nature of an action to foreclose a mortgage as provided in G.S. 105-374. The purchaser, his heirs and assigns, shall also have a lien for other taxes and special assessments on the real property paid by him after he acquired the tax sale certificate, whether the taxes and special assessments were charged before or after the certificate was acquired, and that lien shall have the same priority as the lien represented by the certificate.

(b) Payments on Tax Sale Certificates.—Payments made on any tax lien sale certificate shall be made to the tax collector for the use of the owner of the certificate, and all such payments shall be credited by the tax collector on his copy of the certificate and shall be remitted to the owner of the certificate upon proper receipt therefor. The tax collector shall be liable on his bond to the holder of the certificate for failure to account for or to remit payments received by him on the certificate.

(c) Assignment of Tax Sale Certificates.—The private owner of a tax lien sale certificate may assign it at any time, but the assignment shall not be effective until the tax collector has received written notice thereof from the assignor. (1939, c. 310, s. 1716; 1945, c. 247, ss. 1, 2; 1971, c. 806, s. 1; c. 931, s. 1.)

Editor's Note. — Session Laws 1971, c. 931, s. 1, substituted "nine percent (9%)" for "twelve percent (12%)" in the first sentence in subsection (a).

§ 105-372. Assignment of tax liens by taxing unit after lien sale.—(a) Procedures.—At any time after the sale of tax liens, a taxing unit may assign any lien that it purchases to any person who pays an amount which, if paid by the taxpayer, would be sufficient to discharge the lien. The assignment shall be

made in accordance with one of the following two procedures, whichever is appropriate.

(1) If the tax sale certificate was issued to the taxing unit following the tax lien sale, the tax collector shall assign it to the person making the payment, and the tax collector shall file the copy of the certificate showing the assignment in the manner provided by G.S. 105-370(b) for certificates originally issued to private purchasers.

(2) If no tax sale certificate was issued to the taxing unit following the tax lien sale and if the person making payment is one other than the taxpayer, the tax collector shall immediately issue a tax sale certificate to the taxing unit, dating it as of the day of the lien sale, and assign it to the person making payment as prescribed in subdivision (a)(1), above. However, if in such a case the person making payment is the taxpayer, no tax sale certificate need be issued, but the tax collector shall deliver to the taxpayer both the original tax receipt (stamped or marked paid) and the tax collector's receipt showing the amount actually paid to release the tax lien.

(b) Release of Lien on Separate Parcels.—If the tax lien on more than one parcel of the taxpayer's real property has been sold to the taxing unit, a person making payment after the lien sale shall have the right to pay the entire amount due plus the costs of advertising and selling the liens, with interest on the total at the rate of nine percent (9%) per annum from the date of the lien sale. Should a person desire to obtain the release of the lien from fewer than all of the taxpayer's parcels of real property after the lien sale, he shall have the right to pay an amount sufficient under the provisions of G.S. 105-362 to release one or more specified parcels plus the costs of advertising and selling the lien or liens to be released, with interest on the total at the rate of nine percent (9%) per annum from the date of the lien sale. To effect the release of a single parcel in such an instance:

(1) If a separate tax sale certificate for the parcel to be released was issued to the taxing unit at the tax lien sale, the tax collector shall proceed as provided in subdivision (a)(1), above.

(2) If a single tax sale certificate covering more than one parcel of real property was issued to the taxing unit at the lien sale, the tax collector shall prepare two new certificates, one for the parcel to be released (which he shall then assign to the person making payment) and one for the parcels not to be released; he shall then cancel the original certificate.

(3) If no tax sale certificate was issued to the taxing unit at the tax lien sale, the tax collector shall proceed as provided in subdivision (a)(2), above. (1939, c. 310, s. 1717; 1971, c. 806, s. 1; c. 931, s. 1.)

Editor's Note.—Session Laws 1971, c. 931, s. 1, substituted "nine percent (9%)" for "twelve percent (12%)" in the first and second sentences in subsection (b).

§ 105-373. Settlements.—(a) Annual Settlement of Tax Collector.—

(1) Preliminary Report.—On the second Monday following the tax lien sale, the tax collector shall make a sworn report to the governing body of the taxing unit showing:

a. Action taken with respect to the lien sale; and

b. A list of the persons not owning real property whose personal property taxes remain unpaid. (To this list the tax collector shall append his statement under oath that he has made diligent efforts to collect the taxes due from the persons listed out of their personal property and by other means available to him for collection, and he shall report such other information concerning these taxpayers as may be of interest to or required by the governing body, including a report of his efforts to make

collection outside the taxing unit under the provisions of G.S. 105-364.

(2) Insolvents.—Upon receiving the report required by subdivision (a)(1), above, the governing body of the taxing unit shall enter upon its minutes the names of persons owing taxes (but who listed no real property) whom it finds to be insolvent, and it shall by resolution designate the list entered in its minutes as the insolvent list to be credited to the tax collector in his settlement.

(3) Settlement for Current Taxes.—On the first Monday of July the tax collector shall make full settlement with the governing body of the taxing unit for all taxes in his hands for collection for the preceding fiscal year. In the settlement the tax collector shall be charged with:

a. The total amount of all taxes in his hands for collection for the year, including amounts originally charged to him and all amounts subsequently charged on account of discoveries;

b. All penalties, interest, and costs collected by him in connection with taxes for the current year; and

c. All other sums collected by him.

The tax collector shall be credited with:

a. All sums representing taxes for the year deposited by him to the credit of the taxing unit or receipted for by a proper official of the unit;

b. Releases duly allowed by the govering body;

c. The principal amount of taxes included in liens sold to the taxing unit, for which amount the collector shall produce tax lien sale certificates or tax receipts duly marked or stamped in accordance with G.S. 105-370;

d. The principal amount of taxes included in the insolvent list determined in accordance with subdivision (a)(2), above;

e. Discounts allowed by law; and

f. Commissions (if any) lawfully payable to the tax collector as compensation.

The tax collector shall be liable on his bond for both honesty and faithful performance of duty; for any deficiencies; and, in addition, for all criminal penalties provided by law.

The settlement, together with the action of the governing body with respect thereto, shall be entered in full upon the minutes of the governing body.

(4) Disposition of Tax Receipts after Settlement.—Uncollected taxes allowed as credits in the settlement prescribed in subdivision (a)(3), above, whether represented by tax liens sold to the taxing unit or included in the list of insolvents, shall, for purposes of collection, be recharged to the tax collector or charged to some other person designated by the governing body of the taxing unit under statutory authority.

The person charged with uncollected taxes shall:

a. Give bond satisfactory to the governing body;

b. Receive the tax receipts, tax sale certificates, and tax records representing the uncollected taxes;

c. Have and exercise all powers and duties conferred or imposed by law upon tax collectors; and

d. Receive compensation as determined by the governing body.

(b) Settlements for Delinquent Taxes.—Annually, at the time prescribed for the settlement provided in subdivision (a)(3), above, all persons having in their hands for collection any taxes for years prior to the year involved in the settlement shall settle with the governing body of the taxing unit for collections made on each such year's taxes. The settlement for the taxes for

prior years shall be made in whatever form is satisfactory to the chief accounting officer and the governing body of the taxing unit, and it shall be entered in full upon the minutes of the governing body.

(c) Settlement at End of Term.—Whenever any tax collector fails to succeed himself at the end of his term of office, he shall, on the last business day of his term, make full and complete settlement for all taxes (current or delinquent) in his hands and deliver the tax records, tax receipts, tax sale certificates, and accounts to his successor in office. The settlement shall be made in whatever form is satisfactory to the chief accounting officer and the governing body of the taxing unit, and it shall be entered in full upon the minutes of the governing body.

(d) Settlement upon Vacancy during Term.—When a tax collector voluntarily resigns, he shall, upon his last day in office, make full settlement (in the manner provided in subsection (c), above,) for all taxes in his hands for collection. In default of such a settlement, or in case of a vacancy occurring during a term for any reason, it shall be the duty of the chief accounting officer or, in the discretion of the governing body, of some other qualified person appointed by it immediately to prepare and submit to the governing body a report in the nature of a settlement made on behalf of the former tax collector. The report, together with the governing body's action with respect thereto, shall be entered in full upon the minutes of the governing body. Whenever a settlement must be made in behalf of a former tax collector, as provided in this subsection (d), the governing body may deliver the tax receipts, tax records, and tax sale certificates to a successor collector immediately upon the occurrence of the vacancy, or it may make whatever temporary arrangements for the collection of taxes as may be expedient, but in no event shall any person be permitted to collect taxes until he has given bond satisfactory to the governing body.

(e) Effect of Approval of Settlement.—Approval of any settlement by the governing body does not relieve the tax collector or his bondsmen of liability for any shortage actually existing at the time of the settlement and thereafter discovered; nor does it relieve the collector of any criminal liability.

(f) Penalties.—In addition to any other civil or criminal penalties provided by law, any member of a governing body of a taxing unit, tax collector, or chief accounting officer who fails to perform any duty imposed upon him by this section shall be guilty of a misdemeanor punishable by fine or imprisonment, or both, in the discretion of the court.

(g) Relief from Collecting Insolvents.—The governing body of any taxing unit may, in its discretion, relieve the tax collector of the charge of taxes owed by persons on the insolvent list that are five or more years past due when it appears to the governing body that such taxes are uncollectible. (1939, c. 310, s. 1719; 1945, c. 635; 1947, c. 484, ss. 3, 4; 1951, c. 300, s. 1; c. 1036, s. 1; 1953, c. 176, s. 2; 1955, c. 908; 1967, c. 705, s. 1; 1971, c. 806, s. 1.)

Legislative Power to Penalize. — The legislature has the power to impose penalties on the tax collector for his delay or failure to make settlement with the proper county authorities within a stated time. State ex rel. Lovingood v. Gentry, 183 N.C. 825, 112 S.E. 427 (1922), wherein the court said: "The power to coerce prompt collection and settlement of taxes is no less necessary than the power to levy and assess them, and both are essential to the maintenance of the government."

An extension of time, within which a sheriff may settle State taxes, does not exonerate the sureties upon his bond. Worth v. Cox, 89 N.C. 44 (1883) (decided under former statute).

§ 105-374. Foreclosure of tax lien by action in nature of action to foreclose a mortgage.—(a) General Nature of Action.—The foreclosure action authorized by this section shall be instituted in the appropriate division of the General Court of Justice in the county in which the real property is situated and shall be an action in the nature of an action to foreclose a mortgage.

(b) Availability of Procedure.—

(1) Taxing Units.—Taxing units may proceed under this section, either on the original tax lien created by G.S. 105-355(a) or on the lien acquired at the tax lien sale held under G.S. 105-369, with or without a lien sale certificate; and the amount of recovery in either case shall be the same. To this end, it is hereby declared that the original attachment of the tax lien under G.S. 105-355(a) is sufficient to support a tax foreclosure action by a taxing unit, that the issuance of tax lien sale certificates to a taxing unit is a matter of convenience in record keeping within the discretion of the governing body of the taxing unit, and that issuance of such certificates is not a prerequisite to perfection of the tax lien.

(2) Private Purchasers.—Foreclosure under this section shall be the sole remedy of holders of tax lien certificates other than taxing units, and actions for the foreclosure of tax liens under this section by such persons shall be brought no earlier than six months after the lien sale provided for in G.S. 105-369.

(c) Parties; Summonses.—The listing taxpayer and spouse (if any), the current owner, all other taxing units having tax liens, all other lienholders of record, and all persons who would be entitled to be made parties to a court action (in which no deficiency judgment is sought) to foreclose a mortgage on such property, shall be made parties and served with summonses in the manner provided by G.S. 1A-1, Rule 4.

The fact that the listing taxpayer or any other defendant is a minor, is incompetent, or is under any other disability shall not prevent or delay the tax lien sale or the foreclosure of the tax lien; and all such persons shall be made parties and served with summons in the same manner as in other civil actions.

Persons who have disappeared or who cannot be located and persons whose names and whereabouts are unknown, and all possible heirs or assignees of such persons, may be served by publication; and such persons, their heirs, and assignees may be designated by general description or by fictitious names in such an action.

(d) Complaint as Lis Pendens.—The complaint in an action brought under this section shall, from the time it is filed in the office of the clerk of superior court, serve as notice of the pendency of the foreclosure action, and every person whose interest in the real property is subsequently acquired or whose interest therein is subsequently registered or recorded shall be bound by all proceedings taken in the foreclosure action after the filing of the complaint in the same manner as if those persons had been made parties to the action. It shall not be necessary to have the complaint cross-indexed as a notice of action pending to have the effect prescribed by this subsection (d).

(e) Subsequent Taxes.—The complaint in a tax foreclosure action brought under this section by a taxing unit shall, in addition to alleging the tax lien on which the action is based, include a general allegation of subsequent taxes which are or may become a lien on the same real property in favor of the plaintiff unit. Thereafter it shall not be necessary to amend the complaint to incorporate the subsequent taxes by specific allegation. In case of redemption before confirmation of the foreclosure sale, the person redeeming shall be required to pay, before the foreclosure action is discontinued, at least all taxes on the real property which have at the time of discontinuance become due to the plaintiff unit, plus penalties, interest, and costs thereon. Immediately prior to judgment ordering sale in a foreclosure action (if there has been no redemption prior to that time), the tax collector or the attorney for the plaintiff unit shall file in the action a certificate setting forth all taxes which are a lien on the real property in favor of the plaintiff unit (other than taxes the amount of which has not been definitely determined).

Any plaintiff in a tax foreclosure action (other than a taxing unit) may

include in his complaint, originally or by amendment, all other taxes and special assessments paid by him which were liens on the same real property.

(f) Joinder of Parcels.—All real property within the taxing unit subject to liens for taxes levied against the same taxpayer for the first year involved in the foreclosure action may be joined in one action. However, if real property is transferred by the listing taxpayer subsequent to the first year involved in the foreclosure action, all subsequent taxes, penalties, interest, and costs (for which the property is ordered sold under the terms of this Subchapter) shall be prorated to such property in the same manner as if payments were being made to release such property from the tax lien under the provisions of G.S. 105-356(b).

(g) Special Benefit Assessments.—A cause of action for the foreclosure of the lien of any special benefit assessments may be included in any complaint filed under this section.

(h) Joint Foreclosure by Two or More Taxing Units.—Liens of different taxing units on the same parcel of real property, representing taxes in the hands of the same tax collector, shall be foreclosed in one action. Liens of different taxing units on the same parcel of real property, representing taxes in the hands of different tax collectors, may be foreclosed in one action in the discretion of the governing bodies of the taxing units.

The lien of any taxing unit made a party defendant in any foreclosure action shall be alleged in an answer filed by the taxing unit, and the tax collector of each answering unit shall, prior to judgment ordering sale, file a certificate of subsequent taxes similar to that filed by the tax collector of the plaintiff unit, and the taxes of each answering unit shall be of equal dignity with the taxes of the plaintiff unit. Any answering unit may, in case of payment of the plaintiff unit's taxes, continue the foreclosure action until all taxes due to it have been paid, and it shall not be necessary for any answering unit to file a separate foreclosure action or to proceed under G.S. 105-375 with respect to any such taxes.

If a taxing unit properly served as a party defendant in a foreclosure action fails to answer and file the certificate provided for in the preceding paragraph, all of its taxes shall be barred by the judgment of sale except to the extent that the purchase price at the foreclosure sale (after payment of costs and of the liens of all taxing units whose liens are properly alleged by complaint or answer and certificates) may be sufficient to pay such taxes. However, if a defendant taxing unit is plaintiff in another foreclosure action pending against the same property, or if it has begun a proceeding under G.S. 105-375, its answer may allege that fact in lieu of alleging its liens, and the court, in its discretion, may order consolidation of such actions or such other disposition thereof (and such disposition of the costs therein) as it may deem advisable. Any such order may be made by the clerk of the superior court subject to appeal in the same manner as appeals are taken from other orders of the clerk.

(i) Costs.—Subject to the provisions of this subsection (i), costs may be taxed in any foreclosure action brought under this section in the same manner as in other civil actions. When costs are collected, either by payment prior to the sale or upon payment of the purchase price at the foreclosure sale, the fees allowed officers shall be paid to those entitled to receive them. In foreclosure actions in which the plaintiff is a taxing unit, no prosecution bond shall be required.

The word "costs," as used in this subsection (i), shall be construed to include one reasonable attorney's fee for the plaintiff in such amount as the court shall, in its discretion, determine and allow. When a taxing unit is made a party defendant in a tax foreclosure action and files answer therein, there may be included in the costs an attorney's fee for the defendant unit in such amount as the court shall, in its discretion, determine and allow. The governing body of any taxing unit may, in its discretion, pay a smaller or greater sum than that allowed as costs to its attorney as a suit fee, and the governing body may allow

a reasonable commission to its attorney on taxes collected by him after they have been placed in his hands; or the governing body may arrange with its attorney for the handling of tax foreclosure suits on a salary basis or may make any other reasonable agreement with its attorney or attorneys. Any arrangement made between a taxing unit and its attorney may provide that attorneys' fees collected as costs in foreclosure actions be collected for the use of the taxing unit.

In any foreclosure action in which real property is actually sold after judgment, costs shall include a commissioner's fee to be fixed by the court, not exceeding five percent (5%) of the purchase price; and in case of redemption between the date of sale and the order of confirmation, the fee shall be added to the amount otherwise necessary for redemption. In case more than one sale is made of the same property in any action, the commissioner's fee may be based on the highest amount bid, but the commissioner shall not be allowed a separate fee for each such sale. The governing body of any plaintiff unit may request the court to appoint as commissioner a salaried official, attorney, or employee of the unit and, when the requested appointment is made, may require that the commissioner's fees, when collected, be paid to the plaintiff unit for its use.

(j) Contested Actions.—Any action brought under this section in which an answer raising an issue requiring trial is filed within the time allowed by law shall be entitled to a preference as to time of trial over all other civil actions.

(k) Judgment of Sale.—Any judgment in favor of the plaintiff or any defendant taxing unit in an action brought under this section shall order the sale of the real property or so much thereof as may be necessary for the satisfaction of:

(1) Taxes adjudged to be liens in favor of the plaintiff (other than taxes the amount of which has not been definitely determined) together with penalties, interest, and costs thereon; and

(2) Taxes adjudged to be liens in favor of other taxing units (other than taxes the amount of which has not yet been definitely determined) if those taxes have been alleged in answers filed by the other taxing units, together with penalties, interest, and costs thereon.

The judgment shall appoint a commissioner to conduct the sale and shall order that the property be sold in fee simple, free and clear of all interests, rights, claims, and liens whatever except that the sale shall be subject to taxes the amount of which cannot be definitely determined at the time of the judgment, taxes and special assessments of taxing units which are not parties to the action, and, in the discretion of the court, taxes alleged in other tax foreclosure actions or proceedings pending against the same real property.

In all cases in which no answer is filed within the time allowed by law, the clerk of the superior court may render the judgment subject to appeal in the same manner as appeals are taken from other judgments of the clerk.

(l) Advertisement of Sale.—The sale shall be advertised, and all necessary resales shall be advertised, in the manner provided by Article 29A of Chapter 1 of the General Statutes or by any statute enacted in substitution therefor.

(m) Sale.—The sale shall be by public auction to the highest bidder and shall, in accordance with the judgment, be held at the courthouse door on any day of the week except a Sunday or legal holiday. (In actions brought by a municipality that is not a county seat, the court may, in its discretion, direct that the sale be held at the city or town hall door.) The commissioner conducting the sale may, in his discretion, require from any successful bidder a deposit equal to not more than twenty percent (20%) of his bid, which deposit, in the event that the bidder refuses to take title and a resale becomes necessary, shall be applied to pay the costs of sale and any loss resulting. (However, this provision shall not deprive the commissioner of his right to sue for specific performance of the contract.) No deposit shall be required of a taxing unit that has made the highest bid at the foreclosure sale.

(n) Report of Sale.—Within three days following the foreclosure sale the commissioner shall report the sale to the court giving full particulars thereof.

(o) Exceptions and Increased Bids.—At any time within 10 days after the commissioner files his report of the foreclosure sale, any person having an interest in the real property may file exceptions to the report, and at any time within that 10-day period an increased bid may be filed in the amount specified by and subject to the provisions (other than provisions in conflict herewith) of Article 29A of Chapter 1 of the General Statutes or the provisions (other than provisions in conflict herewith) of any law enacted in substitution therefor. In the absence of exceptions or increased bids, the court may, whenever it deems such action necessary for the best interests of the parties, order resale of the property.

(p) Judgment of Confirmation.—At any time after the expiration of 10 days from the time the commissioner files his report, if no exception or increased bid has been filed, the commissioner may apply for judgment of confirmation, and in like manner he may apply for such a judgment after the court has passed upon exceptions filed, or after any necessary resales have been held and reported and 10 days have elapsed. The judgment of confirmation shall direct the commissioner to deliver the deed upon payment of the purchase price. This judgment may be rendered by the clerk of superior court subject to appeal in the same manner as appeals are taken from other judgments of the clerk.

(q) Application of Proceeds; Commissioner's Final Report.—After delivery of the deed and collection of the purchase price, the commissioner shall apply the proceeds as follows:

(1) First, to payment of all costs of the action, including the commissioner's fee and the attorney's fee, which costs shall be paid to the officials or funds entitled thereto;

(2) Then to the payment of taxes, penalties, and interest for which the real property was ordered to be sold, and in case the funds remaining are insufficient for this purpose, they shall be distributed pro rata to the various taxing units for whose taxes the property was ordered sold;

(3) Then pro rata to the payment of any special benefit assessments for which the property was ordered sold, together with interest and costs thereon;

(4) Then pro rata to payment of taxes, penalties, interest, and costs of taxing units that were parties to the foreclosure action but which filed no answers therein;

(5) Then pro rata to payment of special benefit assessments of taxing units that were parties to the foreclosure action but which filed no answers therein, together with interest and costs thereon;

(6) And any balance then remaining shall be paid in accordance with any directions given by the court and, in the absence of such directions, shall be paid into court for the benefit of the persons entitled thereto. (If the clerk is in doubt as to who is entitled to the surplus or if any adverse claims are asserted thereto, the clerk shall hold the surplus until rights thereto are established in a special proceeding pursuant to G.S. 1-339.71.)

Within five days after delivering the deed, the commissioner shall make a full report to the court showing delivery of the deed, receipt of the purchase price, and the disbursement of the proceeds, accompanied by receipts evidencing all such disbursements.

(r) Purchase and Resale by Taxing Unit.—The rights of a taxing unit to purchase real property at a foreclosure sale and resell it are governed by G.S. 105-376. (1939, c. 310, s. 1719; 1945, c. 635; 1947, c. 484, ss. 3, 4; 1951, c. 300, s. 1; c. 1036, s. 1; 1953, c. 176, s. 2; 1955, c. 908; 1967, c. 705, s. 1; 1971, c. 806, s. 1.)

Editor's Note.—The cases and opinions of the Attorney General cited in the following note were decided or issued under former similar provisions.

There are two distinct alternate methods provided by statute for the foreclosure of a tax sale certificate or the lien evidenced thereby: 1. After the land has been sold by the tax collector and a certificate of sale has been issued, the purchaser may institute an action to foreclose the lien evidenced by the certificate. This section provides the regulations and procedure respecting an action instituted pursuant to this method. 2. Under § 105-375 the taxing unit may file in the office of the clerk of the superior court a certificate of sale of land to satisfy taxes. Thereupon, the clerk must docket the certificate upon his judgment docket. It then has the full force and effect of a judgment, and execution may issue thereon against the property of the tax debtor. Boone v. Sparrow, 235 N.C. 396, 70 S.E.2d 204 (1952).

Tax Sale of Land Owned by Minors.—A judgment decreeing foreclosure and ordering sale of land for taxes was not void on the ground that three of the defendants were minors where the court upon learning of such fact appointed a guardian ad litem for the minors who filed an answer prior to the date of the tax sale. County of Franklin v. Jones, 245 N.C. 272, 95 S.E.2d 863 (1957).

A suit for the foreclosure of tax liens is a civil action, and not a special proceeding. This is made plain by the specific declaration of this section that "the foreclosure action . . . shall be an action in the nature of an action to foreclose a mortgage." Chappell v. Stallings, 237 N.C. 213, 74 S.E.2d 624 (1953).

Prescribed Remedy Optional with State.—The fact that the Revenue Act prescribes a specific remedy for the collection of taxes does not restrict the State to pursue that method, nor preclude it from seeking the aid of the superior court through a creditor's suit. The specific remedy pointed out restricts only the officers who collect only the revenue and not the sovereign. State v. Georgia Co., 112 N.C. 34, 17 S.E. 10 (1893).

Summary Proceeding Unnecessary. — Where the legislature has authorized a municipality to collect back taxes, and in an action for that purpose it appears that the taxes of the defendant are due, and were properly assessed against lots of land within the limits of the municipality subject to the lien therefor it is not necessary that the plaintiff should first have resorted to the summary method of levy and sale, for recourse may be had directly by suit to foreclose the lien, under this section. City of Wilmington v. Moore, 170 N.C. 52, 86 S.E. 775 (1915); Drainage Comm'n v. Epley, 190 N.C. 672, 130 S.E. 497 (1925).

Proper Court for Tax Foreclosure Suit.—See opinion of Attorney General to Mr. James R. Sugg, Craven County Attorney, 40 N.C.A.G. 808 (1970).

Foreclosure of Liens on Same Parcel by Different Taxing Units; Mandatory Procedure. — See opinion of Attorney General to Mr. Michael D. Lea, 41 N.C.A.G. 337 (1971).

Consolidation of Actions. — Where actions are pending in the same court, at the same time, between the same parties and involving substantially the same facts, they may be consolidated. The principle applies to tax foreclosure suits. McIver Park, Inc. v. Brinn, 223 N.C. 502, 27 S.E.2d 548 (1943).

Effect of Failure of Owners to List Property for Taxes.—The jurisdiction of the superior court to determine the liability of the land for taxes was not defeated by a finding that the owners—defendants in the action—had not listed the property for taxes. County of Franklin v. Jones, 245 N.C. 272, 95 S.E.2d 863 (1957).

Taxes Due after Commencement of Action.—Where a county brings suit to foreclose a tax lien on the lands of the taxpayer and draws its complaint according to the provisions of this section, other taxes due after the commencement of the action are properly included in the judgment therein rendered in its favor. New Hanover County v. Whiteman, 190 N.C. 332, 129 S.E. 808 (1925).

Tax Collector Has No Lien Where Check Returned Unpaid.—The fact that a county tax collector accepted a check in payment for taxes, and the check was returned unpaid, and the collector in his settlement with the county paid the taxes in question, does not give him a lien which may be enforced under this section. The collector having failed to correct the tax record so as to show the check returned and the taxes unpaid, the tax lien was not reinstated. Miller v. Neal, 222 N.C. 540, 23 S.E.2d 852 (1943).

The receiver of a drainage district may proceed in an action in the nature of an action to foreclose a mortgage under this section for the collection of such drainage assessments. Nesbit v. Kafer, 222 N.C. 48, 21 S.E.2d 903 (1942).

Necessary Parties.—In an action to foreclose a tax lien all persons having an interest in the equity of redemption must be made parties by name, and judgment rendered in such proceeding is void as to persons having such interest who are not made parties. City of Wilmington v. Merrick, 231 N.C. 297, 56 S.E.2d 643 (1949),

The owner of the remainder subject to a life estate is a necessary party in an action to foreclose a tax lien. Board of Comm'rs v. Bumpass, 233 N.C. 190, 63 S.E.2d 144 (1951).

In an action to enforce the lien for taxes, each person having an estate in the land is a necessary party if his equity of redemption is to be barred, and where at the time of the institution of the proceeding the persons named

in the summons and complaint as owners of the land are dead, and their heirs or devisees are not made parties, judgment of foreclosure and sale of the land thereunder cannot divest the title of the heirs or devisees. Page v. Miller, 252 N.C. 23, 113 S.E.2d 52 (1960).

Class Representation of Contingent Remaindermen.—In an action to enforce the lien for taxes against lands affected by a contingent limitation over, in which each class of contingent remaindermen is represented by defendants actually served and answering, the judgment is binding upon all contingent remaindermen by class representation. Rodman v. Norman, 221 N.C. 320, 20 S.E.2d 294 (1942).

Statute of Limitations.—The cases under this catchline were decided prior to the 1947 amendment to § 105-422 and the enactment in 1971 of § 105-378.

The action provided by this section is as one upon a judgment to foreclose a lien and is not barred within 10 years. The statute providing that an action on a liability created by statute shall be brought within three years has no application. Long Creek Drainage Dist. v. Huffstetler, 173 N.C. 523, 92 S.E. 368 (1917). This is on the well-settled principle that statutes of limitation, even if applicable to a given case, do not apply to the sovereign unless it is expressly named therein. New Hanover County v. Whiteman, 190 N.C. 332, 129 S.E. 808 (1925). See City of Charlotte v. Kavanaugh, 221 N.C. 259, 20 S.E.2d 97 (1942).

Whether the lien be a plain lien arising from the bare purchase at the sale or payment of taxes or such as may be evidenced by a certificate of sale executed by the proper officers, the sovereign may proceed under this section to foreclose the lien, in which event no statute of limitations is applicable. Logan v. Griffith, 205 N.C. 580, 172 S.E. 348 (1934).

In view of the fact that this section contains no limitation of action, the maxim that time does not bar the sovereign still subsists as the law in this State, at least in respect to collection of taxes. Miller v. McConnell, 226 N.C. 28, 36 S.E.2d 722 (1946).

In Action to Foreclose Lien for Public Improvements. — In a suit under this section, to foreclose a statutory lien on abutting property given a city for street improvements, all installments of the amounts assessed therefor which are 10 years overdue when action is brought are barred by the statute of limitations under § 160-93 (now § 160A-233) and no part of the proceeds of sale can be applied to the payment of such installments. City of Raleigh v. Mechanics & Farmers Bank, 223 N.C. 286, 26 S.E.2d 573 (1943). See §§ 105-378 and 105-422.

An action to enforce the lien for public improvements, even though instituted under this section, is barred after 10 years from default in the payment of the assessments, or, if the assessments are payable in installments, each installment is barred after 10 years from default in payment of same unless the time for payment has been extended as provided by law. City of Charlotte v. Kavanaugh, 221 N.C. 259, 20 S.E.2d 97 (1942), distinguishing Town of Asheboro v. Morris, 212 N.C. 331, 193 S.E. 424 (1937).

Where a municipality elects to enforce a lien against land for paying assessments by action under this section, no statute of limitations is applicable. Town of Asheboro v. Morris, 212 N.C. 331, 193 S.E. 424 (1937). See City of Charlotte v. Kavanaugh, 221 N.C. 259, 20 S.E.2d 97 (1942); City of Raleigh v. Mechanics & Farmers Bank, 223 N.C. 286, 26 S.E.2d 573 (1943).

Where tax liens for certain years have been barred by another statute, this section does not afford a remedy. City of Raleigh v. Jordan, 218 N.C. 55, 9 S.E.2d 507 (1940), decided under the former wording of § 105-422, which destroyed tax liens for 1926 and prior years.

Taxes Not Subject to Setoff or Counterclaim.—Taxes are not debts in the ordinary sense of the word and they do not rest upon contract or consent of the taxpayer. Pleas of setoff and counterclaim are not allowed because to do so would delay the collection and payment of taxes, and would deprive the government of means of performing its functions. State ex rel. Graded School v. McDowell, 157 N.C. 316, 72 S.E. 1083 (1911); Commissioners of Yancey County v. Hall, 177 N.C. 490, 99 S.E. 372 (1919).

In a suit by a town against defendants to foreclose a tax lien where defendants set up defense by answer and also a counterclaim, motion to strike the counterclaim and order thereon was proper, but the other defenses were unaffected thereby. Town of Apex v. Templeton, 223 N.C. 645, 27 S.E.2d 617 (1943).

Amount of Interest Recoverable.—Since no rate of interest is fixed by the section, only six percent interest can be recovered. City of Wilmington v. Stolter, 122 N.C. 395, 30 S.E. 12 (1898).

Judgment in Foreclosure Suit Is Lien in Rem.—In an action to foreclose a lien for delinquent taxes or special assessments, the judgment obtained in said action constitutes a lien in rem, and the owner of the property is not personally liable for the payment thereof. Town of Apex v. Templeton, 223 N.C. 645, 27 S.E.2d 617 (1943).

Order of Foreclosure Restricted to Land Described in Complaint.—Where the complaint describes the real estate sought to be foreclosed to enforce the tax lien, the order of foreclosure is restricted to the described parcels, and so much of the judgment as authorizes the sale of other lands is in excess of

the jurisdiction of the court. Miller v. McConnell, 226 N.C. 28, 36 S.E.2d 722 (1946).

The court has authority to reject the bid made at the foreclosure sale of a tax sale certificate and order a resale, even in the absence of exceptions of an increased bid, under the provisions of subsection (o). Bladen County v. Squires, 219 N.C. 649, 14 S.E.2d 665 (1941).

Inadequacy of Purchase Price. — A tax sale confirmed by the court was not rendered void by a finding five years later that the purchase price was unjust and inadequate. County of Franklin v. Jones, 245 N.C. 272, 95 S.E.2d 863 (1957).

In an action to foreclose a tax lien on land, the mere inadequacy of the price bid therefor is not sufficient to avoid the sale and cancel the deed to the purchaser, unless some element of fraud, suppression of bidding, or other unfairness in the sale appears. Duplin County v. Ezzell, 223 N.C. 531, 27 S.E.2d 448 (1943).

When Exceptions Must Be Filed.—It is manifest that subsections (n), (o) and (p) require a person having an interest in the property involved in a tax foreclosure action to file exceptions to the report of a particular sale and to appeal from an adverse ruling on such exceptions when, and only when, his exceptions challenge the validity of the steps taken by the commissioner in conducting the particular sale, or the fairness of the particular sale in respect to price or other factors to the parties concerned. Chappell v. Stallings, 237 N.C. 213, 74 S.E.2d 624 (1953).

Subsections (n), (o) and (p) do not apply to objections which are addressed to the validity of the judgment of sale itself. In consequence, a person having an interest in the property involved in a tax foreclosure action does not lose the benefit of an aptly taken objection to the validity of the judgment of sale by failing to file exceptions to the report of a particular sale made under it, or by failing to take a specific appeal from an order confirming such particular sale. A proper legal objection to the validity of a judgment of sale in and of itself puts in issue the validity of all proceedings under it. Chappell v. Stallings, 237 N.C. 213, 74 S.E.2d 624 (1953).

The owner's right of redemption is recognized in express terms in this section. The owner has the right to redeem his land from the lien of unpaid taxes by paying the taxes with accrued interest, penalties and costs, and the court costs at any time before the entry of a valid judgment in a tax foreclosure action confirming the judicial sale of the land for the satisfaction of the lien. Chappell v. Stallings, 237 N.C. 213, 74 S.E.2d 624 (1953).

Ample Opportunity Given to Redeem. — Where the judgment of foreclosure in a tax suit authorized a sale, in default of payment of all taxes, etc., on or before 60 days from the date of the judgment, and the original sale was held within 60 days of such date, and after two resales, the last of which was held more than three months after the date of the judgment, the sale was finally consummated, there was ample opportunity to redeem, and sale and confirmation were valid. McIver Park, Inc. v. Brinn, 223 N.C. 502, 27 S.E.2d 548 (1943).

Effect of Failure to Allege Collection of Costs and Fees.—In an action by an ex clerk of the superior court against a county for the recovery of fees allegedly due such clerk in tax foreclosure suits by the county, the complaint, alleging that all of the tax suits in question were prosecuted to judgment against the various defendants, without any allegation or admission that in any of the suits the costs or fees were collected and turned over to the county, is demurrable as not stating a cause of action, the county being under no obligation to pay costs and officer's fees in advance, or ever unless collected. Watson v. Lee County, 224 N.C. 508, 31 S.E.2d 535 (1944).

§ 105-375. In rem method of foreclosure.—(a) Intent of Section.—It is hereby declared to be the intention of this section that proceedings brought under it shall be strictly in rem. It is further declared to be the intention of this section to provide, as an alternative to G.S. 105-374, a simple and inexpensive method of enforcing payment of taxes necessarily levied, to the knowledge of all persons, for the requirements of local governments in this State; and to recognize, in authorizing this proceeding, that all persons owning interests in real property know or should know, without special notice thereof, that the tax lien on their real property may be foreclosed and the property sold for failure to pay taxes.

(b) Docketing Certificate of Taxes as Judgment.—In lieu of following the procedure set forth in G.S. 105-374, the governing body of any taxing unit may direct the tax collector to file, no earlier than six months following the sale of tax liens, with the clerk of superior court a certificate showing the following: The name of the taxpayer listing real property on which the taxes are a lien, together with the amount of taxes, penalties, interest, and costs that are a lien thereon; the year or years for which the taxes are due; and a description of the

property sufficient to permit its identification by parol testimony. The clerk of superior court shall enter the certificate either in a special book entitled "Tax Judgment Docket for Taxes for the Year . . ." (and index it therein in the name of the listing taxpayer) or in a special continuing book or books entitled "Tax Judgment Docket for Taxes for the Years Beginning . . ." (and index it in the general judgment index in the name of the listing taxpayer). The fees for docketing and indexing the certificate shall be payable to the clerk of superior court at the time the taxes are collected or the property is sold.

(c) Notice to Listing Taxpayer.—The tax collector filing the certificate provided for in subsection (b), above, shall, at least two weeks prior to docketing the judgment, send a registered or certified letter to the listing taxpayer at his last known address, stating that the judgment will be docketed and that execution will issue thereon in the manner provided by law. Receipt of the letter by the listing taxpayer, or receipt of actual notice of the proceeding by the taxpayer or other interested persons, shall not be required for the validity or priority of the judgment or for the validity of the title acquired by the purchaser at the execution sale.

(d) Effect of Docketing Certificate of Taxes Due. — Immediately upon the docketing and indexing of a certificate as provided in subsection (b), above, the taxes, penalties, interest, and costs shall constitute a valid judgment against the real property described therein, with the priority provided for tax liens in G.S. 105-356. The judgment, except as expressly provided in this section, shall have the same force and effect as a duly rendered judgment of the superior court directing sale of the property for the satisfaction of the tax lien, and it shall bear interest at the rate of six percent (6%) per annum.

(e) Special Assessments.—Street, sidewalk, and other special assessments may be included in any judgment for taxes taken under this section; or such special assessments may be included in a separate judgment docketed under this section, which is hereby declared to be made available as a method of foreclosing the lien of special assessments. When used to foreclose the lien of special assessments, the procedure may be instituted at any time after the assessment or installment falls due and remains unpaid; the six months' waiting period required by subsection (b), above, shall not apply to the foreclosure of special assessments.

(f) Motion to Set Aside.—At any time prior to the issuance of execution, any person having an interest in the real property to be foreclosed may appear before the clerk of superior court and move to set aside the judgment on the ground that the tax has been paid or that the tax lien on which the judgment is based is invalid.

(g) Cancellation upon Payment. — Upon payment in full of any judgment docketed under this section, together with interest thereon and costs accrued to the date of payment, the tax collector receiving payment shall certify the fact thereof to the clerk of superior court and cancel the judgment.

(h) Relationship between G.S. 105-374 and This Section.—If, before the issuance of execution on the judgment under subsection (i), below, the taxing unit is made a defendant in a foreclosure action brought against the property under G.S. 105-374, it shall file an answer in that proceeding and thereafter all proceedings shall be governed by order of the court in accordance with that section.

(i) Issuance of Execution.—At any time after six months and before two years from the indexing of the judgment as provided in subsection (b), above, execution shall be issued at the request of the tax collector in the same manner as executions are issued upon other judgments of the superior court, and the real property shall be sold by the sheriff in the same manner as other real property is sold under execution with the following exceptions:

(1) No debtor's exemption shall be allowed.

(2) In lieu of personal service of notice on the owner of the property,

registered or certified mail notice shall be mailed to the listing taxpayer at his last known address at least one week prior to the day fixed for the sale.

(3) The sheriff shall add to the amount of the judgment as costs of the sale any postage expenses incurred by the tax collector and the sheriff in foreclosing under this section.

(4) In any advertisement or posted notice of sale under execution, the sheriff may (and at the request of the governing body shall) combine the advertisements or notices for properties to be sold under executions against the properties of different taxpayers in favor of the same taxing unit or group of units; however, the property included in each judgment shall be separately described and the name of the listing taxpayer specified in connection with each.

The purchaser at the execution sale shall acquire title to the property in fee simple free and clear of all claims, rights, interests, and liens except the liens of other taxes or special assessments not paid from the purchase price and not included in the judgment.

(j) Attorney's Fee.—The governing body of the taxing unit may make whatever arrangement it deems satisfactory for compensating an attorney rendering assistance or advice in foreclosure proceedings brought under this section, but the attorney's fee shall not be added to the judgment as part of the costs of the action.

(k) Consolidation of Liens.—By agreement between the governing bodies, two or more taxing units may consolidate their tax liens for the purpose of docketing a judgment, or may have one execution issued for separate judgments, against the same property. In like manner, one execution may issue for separate judgments in favor of one or more taxing units against the same property for different years' taxes.

(l) Purchase and Resale by Taxing Unit.—The rights of a taxing unit to purchase real property at a foreclosure sale and resell it are governed by G.S. 105-376.

(m) Procedure if Section Declared Unconstitutional.—If any provisions of this section are declared invalid or unconstitutional by the Supreme Court of North Carolina, a United States district court of three judges, the United States Circuit Court of Appeals, or the United States Supreme Court, all taxing units that have proceeded under this section shall have five years from the date of the filing of the opinion (or, in the case of appeal, from the date of the filing of the opinion on appeal) in which to institute foreclosure actions under G.S. 105-374 for all taxes included in judgments taken under this section and for subsequent taxes due or which, but for purchase of the property by the taxing unit, would have become due; and such judicial decision shall not have the effect of invalidating the tax lien or disturbing its priority. (1939, c. 310, s. 1720; 1945, c. 646; 1957, cc. 91, 1262; 1971, c. 806, s. 1.)

Tenancy by Entireties.—Where tax foreclosure proceedings under this section are instituted in regard to land held by husband and wife by the entireties, but the proceedings are solely against the husband without notice to the wife, the tax sale on the certificate-judgment is wholly ineffectual, since the wife is not bound thereby and the husband has no divisible interest in the property which is subject to execution. Edwards v. Arnold, 250 N.C. 500, 109 S.E.2d 205 (1959) (decided under former similar provisions).

Circumstances When Clerk Authorized to Issue Execution; Necessity of Description of Property.—See opinion of Attorney General to Mr. Edwin Roland, 41 N.C.A.G. 427 (1971) (issued under former similar provisions).

Surplus Proceeds of Execution Sale May Not Be Paid for Taxes Not Included in the Judgment.—See opinion of Attorney General to Mr. John T. Page, Jr., Richmond County Attorney, 40 N.C.A.G. 778 (1970) (issued under former similar provisions).

§ 105-376. Taxing unit as purchaser at foreclosure sale; payment of purchase price; resale of property acquired by taxing unit.—(a) Taxing

Unit as Purchaser.—Any taxing unit (or two or more taxing units jointly) may bid at a foreclosure sale conducted under G.S. 105-374 or G.S. 105-375, and any taxing unit that becomes the successful bidder may assign its bid at any time by private sale for not less than the amount of the bid.

(b) Payment of Purchase Price by Taxing Units; Status of Property Purchased by Taxing Units.—Any taxing unit that becomes the purchaser at a tax foreclosure sale may, in the discretion of its governing body, pay only that part of the purchase price that would not be distributed to it and other taxing units on account of taxes, penalties, interest, and such costs as accrued prior to the initiation of the foreclosure action under G.S. 105-374 or docketing of a judgment under G.S. 105-375. Thereafter, in such a case, the purchasing taxing unit shall hold the property for the benefit of all taxing units that have an interest in the property as defined in this subsection (b). All net income from real property so acquired and the proceeds thereof, when resold, shall be first used to reimburse the purchasing unit for disbursements actually made by it in connection with the foreclosure action and the purchase of the property, and any balance remaining shall be distributed to the taxing units having an interest therein in proportion to their interests. The total interest of each taxing unit, including the purchasing unit, shall be determined by adding:

(1) The taxes of the unit, with penalties, interest, and costs (other than costs already reimbursed to the purchasing unit) to satisfy which the property was ordered sold;

(2) Other taxes of the unit, with penalties, interest, and costs which would have been paid in full from the purchase price had the purchase price been paid in full;

(3) Taxes of the unit, with penalties, interest, and costs to which the foreclosure sale was made subject; and

(4) The principal amount of all taxes which became liens on the property after purchase at the foreclosure sale or which would have become liens thereon but for the purchase, but no amount shall be included for taxes for years in which (on the day as of which property was to be listed for taxation) the property was being used by the purchasing unit for a public purpose.

If the amount of net income and proceeds of resale distributable exceeds the total interests of all taxing units defined in this subsection (b), the remainder shall be applied to any special benefit assessments to satisfy which the sale was ordered or to which the sale was made subject, and any balance remaining shall accrue to the purchasing unit.

When any real property that has been purchased as provided in this section is permanently dedicated to use for a public purpose, the purchasing unit shall make settlement with other taxing units having an interest in the property (as defined in this subsection) in such manner and in such amount as may be agreed upon by the governing bodies; and if no agreement can be reached, the amount to be paid shall be determined by a resident judge of the superior court in the district in which the property is situated.

Nothing in this section shall be construed as requiring the purchasing unit to secure the approval of other interested taxing units before reselling the property or as requiring the purchasing unit to pay other interested taxing units in full if the net income and resale price are insufficient to make such payments.

Any taxing unit purchasing property at a foreclosure sale may, in the discretion of its governing body, instead of following the foregoing provisions of this section, make full payment of the purchase price, and thereafter it shall hold the property as sole owner in the same manner as it holds other real property, subject only to taxes and special assessments, with penalties, interest, and costs, to which the sale was made subject.

(c) Resale of Real Property Purchased by Taxing Units.—Real property

purchased at a tax foreclosure sale by a taxing unit may be resold at any time (for such price as the governing body of the taxing unit may approve) at a sale conducted in the manner provided by law for sales of other real property of the taxing unit. However, a purchasing taxing unit, in the discretion of its governing body, may resell such property to the former owner or to any other person formerly having an interest in the property at private sale for an amount not less than the taxing unit's interest therein if it holds the property as sole owner or for an amount not less than the total interests of all taxing units (other than special assessments due the taxing unit holding title) if it holds the property for the benefit of all such units. (1939, c. 310, s. 1719; 1945, c. 635; 1947, c. 484, ss. 3, 4; 1951, c. 300, s. 1; c. 1036, s. 1; 1953, c. 176, s. 2; 1955, c. 908; 1967, c. 705, s. 1; 1971, c. 806, s. 1.)

§ **105-377. Time for contesting validity of tax foreclosure title.**—No action or proceeding shall be brought to contest the validity of any title to real property acquired by a taxing unit or by a private purchaser in any tax foreclosure action or proceeding authorized by this Subchapter or by other laws of this State in force at the time the title was acquired, nor shall any motion to reopen or set aside the judgment in any such tax foreclosure action or proceeding be entertained after one year from the date on which the deed is recorded. In cases of deeds recorded prior to April 3, 1939, however, such an action or proceeding may be brought or motion entertained within one year after that date, but this shall not be construed as enlarging the time within which to bring such an action or proceeding or to entertain such a motion. (1939, c. 310, s. 1721; 1971, c. 806, s. 1.)

A remainderman, who has been served only by publication based upon a fatally defective affidavit, may attack the tax foreclosure more than one year afterward, since neither this section nor any statute of limitations can bar the right to attack a judgment for want of jurisdiction. Board of Comm'rs v. Bumpass, 233 N.C. 190, 63 S.E.2d 144 (1951).

§ **105-378. Limitation on use of remedies.** — (a) Use of Remedies Barred.—No county or municipality may maintain an action or procedure to enforce any remedy provided by law for the collection of taxes or the enforcement of any tax liens (whether the taxes or tax liens are evidenced by the original tax receipts, tax sales certificates, or otherwise) unless the action or procedure is instituted within 10 years from the date the taxes became due.

(b) Not Applicable to Special Assessments.—The provisions of subsection (a), above, shall not be construed to apply to the lien of special assessments.

(c) Applicable Date of Section.—This section shall take effect on July 1, 1972. Until that date, the provisions of G.S. 105-422 (as it appears in the 1969 Cumulative Supplement to Volume 2D of the General Statutes) and G.S. 105-423.1 (as it appears in the 1965 Replacement Volume of Volume 2D of the General Statutes) shall continue in effect. (1933, c. 181, s. 7; c. 399; 1945, c. 832; 1947, c. 1065, s. 1; 1949, cc. 60, 269, 735; 1951, cc. 71, 306, 572; 1953, cc. 381, 427, 538, 645, 656, 752, 775, 1008; 1955, c. 1087; 1957, cc. 53, 678, 1123; 1959, cc. 373, 608; 1961, cc. 542, 695, 885; 1965, cc. 129, 294; 1967, c. 242; c. 321, s. 1; c. 422, s. 1; 1969, c. 96; 1971, c. 806, s. 1.)

Article 27.

Refunds and Remedies.

§ **105-379. Restriction on use of injunction and claim and delivery.**—(a) Grounds for Injunction.—No court may enjoin the collection of any tax, the sale of any tax lien, or the sale of any property for nonpayment of any tax imposed under the authority of this Subchapter except upon a showing that the tax (or some part thereof) is illegal or levied for an illegal or unauthorized purpose.

(b) No Order in Claim and Delivery.—No court may issue any order in claim and delivery proceedings or otherwise for the taking of any personal property levied on or attached by the tax collector under the authority of this Subchapter. (1901, c. 558, s. 30; Rev., s. 2855; C. S., s. 7979; 1971, c. 806, s. 1.)

Editor's Note.—The case cited in the following note was decided under former provisions similar to subsection (a) of this section.

A distinction between an erroneous tax and an illegal or invalid tax is recognized by this section and North Carolina case law. Redevelopment Comm'n v. Guilford County, 274 N.C. 585, 164 S.E.2d 476 (1968).

An illegal or invalid tax results when the taxing body seeks to impose a tax without authority, as in cases where it is asserted that the rate is unconstitutional, or that the subject is exempt from taxation. Redevelopment Comm'n v. Guilford County, 274 N.C. 585, 164 S.E.2d 476 (1968).

When Injunction Will Lie.—Injunction will lie when the tax or assessment is itself invalid or illegal. Redevelopment Comm'n v. Guilford County, 274 N.C. 585, 164 S.E.2d 476 (1968).

§ 105-380. No taxes to be released.—The governing body of a taxing unit is prohibited from releasing, discharging, remitting, commuting, or compromising all or any portion of the taxes levied against any property within its jurisdiction except as expressly provided in this Subchapter.

Taxes that have been released, discharged, remitted, commuted, or compromised in violation of this section shall be deemed to be unpaid and shall be collectible by any means provided by this Subchapter, and the existence and priority of any tax lien on property shall not be affected by the unauthorized release, discharge, remission, commutation, or compromise of the tax liability.

Any tax that has been released, discharged, remitted, commuted, or compromised in violation of this section may be recovered from any member or members of the governing body who voted for the release, discharge, remission, commutation, or compromise by civil action instituted by any resident of the taxing unit, and when collected, the recovered tax shall be paid to the treasurer of the taxing unit.

The provisions of this section are not intended to restrict or abrogate the powers of a board of equalization and review or any agency exercising the powers of such a board. (1901, c. 558, s. 31; Rev., s. 2854; C. S., s. 7976; 1971, c. 806, s. 1.)

Duty of Commissioners to Rescind Order Releasing Tax.—It is not only competent, but the duty of county commissioners to rescind an order improvidently granted to release one from the assessment of a legal tax upon property. Lemly v. Commissioners of Forsyth, 85 N.C. 379 (1881) (decided under former similar provisions).

§ 105-381. Taxpayer's remedies.—(a) Payment.—Any person asserting a defense to the payment or enforcement of a tax upon his property shall pay the tax to the collector, and such a payment shall not prejudice any defense or rights he may have. At any time within 30 days after payment, the taxpayer may make a demand for refund of the tax paid by submitting to the governing body of the taxing unit a written statement of his defense to payment or enforcement of the tax and a claim for a refund thereof.

(b) Action of Governing Body.—Upon receiving a taxpayer's written statement of defense and claim for refund, the governing body of the taxing unit shall determine whether the tax, or any part of it, was illegal or levied for an illegal purpose and shall either refund that portion of the amount paid that was in excess of the correct tax liability or notify the taxpayer in writing that no refund will be made. The action of the governing body on each claim for refund shall be recorded in its minutes.

(c) Suit for Recovery of Taxes.—If, within 90 days after the date the taxpayer's claim was submitted under subsection (a), above, the governing body of the taxing unit has failed to refund the full amount claimed by the taxpayer, has notified the taxpayer that no refund will be made, or has taken

no action on the claim, the taxpayer may bring a civil action against the taxing unit for the amount claimed but not refunded. Such a suit shall be brought in the appropriate division of the General Court of Justice of the county in which the taxing unit is located. If, upon the trial, it is determined that the tax or any part of it was illegal or levied for an illegal purpose, judgment shall be rendered therefor, with interest thereon at six percent (6%) per annum, plus costs, and the judgment shall be collected as in other civil actions. (1901, c. 558, s. 30; Rev., s. 2855; C. S., s. 7979; 1971, c. 806, s. 1.)

Editor's Note.—The cases cited in the following note were decided under former similar provisions.

Constitutionality of Provisions. — See Richmond & D.R.R. v. Town of Reidsville, 109 N.C. 494, 13 S.E. 865 (1891); Kirkpatrick v. Currie, 250 N.C. 213, 108 S.E.2d 209 (1959).

Jurisdiction which § 105-290 confers upon State Board of Assessment is not exclusive. The provisions of this section are still open to a taxpayer if he prefers them. In re Freight Carriers, Inc., 263 N.C. 345, 139 S.E.2d 633 (1965).

The administrative decisions of the State Board of Assessment are always subject to review by the superior court. Under both § 105-290 and this section, if either the taxpayer or the taxing authority wants judicial review, it is available. In re Freight Carriers, Inc., 263 N.C. 345, 139 S.E.2d 633 (1965).

Ordinarily, the sovereign may not be denied or delayed in the enforcement of its right to collect revenue upon which its very existence depends. This rule applies to municipalities and other subdivisions of the State government. If a tax is levied against a taxpayer which he deems unauthorized or unlawful, he must pay the same under protest and then sue for its recovery. And if the statute provides an administrative remedy, he must first exhaust that remedy before resorting to the courts for relief. Moreover, as broad and comprehensive as it is, even the Declaratory Judgment Act does not supersede the rule or provide an additional or concurrent remedy. Bragg Dev. Co. v. Braxton, 239 N.C. 427, 79 S.E.2d 918 (1954).

Adequate Remedy at Law.—Under this section the taxpayer has an adequate remedy at law by first paying the tax and then suing to recover it. Henrietta Mills v. Rutherford County, 281 U.S. 121, 50 S. Ct. 270, 74 L. Ed. 737 (1930); Fox v. Board of Comm'rs, 244 N.C. 497, 94 S.E.2d 482 (1956).

Exclusiveness of Statutory Remedy. — The taxpayer is restricted to the remedy provided by the statute, and, in order to avail himself of it, he must comply with all the requirements thereof. Richmond & D.R.R. v. Town of Reidsville, 109 N.C. 494, 13 S.E. 865 (1891); Wilson v. Green, 135 N.C. 343, 47 S.E. 469 (1904). Assumpsit for money had and received does not lie to recover improperly listed taxables. Huggins v. Hinson, 61 N.C. 126 (1867).

Quo warranto is the sole remedy to test the validity of an election to public office, but not to test the validity of a tax even though it is levied under the authority of a popular election. Barbee v. Board of Comm'rs, 210 N.C. 717, 188 S.E. 314 (1936).

Where a corporation, under Session Laws 1925, c. 102, submitted its report to the State Board of Assessment, and the Board in accordance with the statute certified to the register of deeds of the county where the property was situated the corporate excess liable for local taxation, the exclusive remedy of the corporation if dissatisfied with the report of the Board was to file exceptions with the Board in accordance with the statute, with the right of appeal from the Board upon a hearing by it, and the corporation could not pay the tax under protest and seek to recover it under the provisions of this section. Garysburg Mfg. Co. v. Board of Comm'rs, 196 N.C. 744, 147 S.E. 284 (1929).

Where a town ordinance imposes a license tax upon those selling at wholesale or peddling therein, and provides that its violation is punishable as a misdemeanor, the remedy to test the validity of the ordinance is to pay the tax under protest and bring action to recover it back, in accordance with this section, and equity will not enjoin the town from executing its threat to arrest for violations of the ordinance, it not appearing that the plaintiff would be irreparably damaged by the payment of the tax, and the legal remedy to recover the tax affording adequate relief. Loose-Wiles Biscuit Co. v. Town of Sanford, 200 N.C. 467, 157 S.E. 432 (1931).

A compliance with this section is a prerequisite to a right of action for the recovery of taxes or any part thereof. Taxes paid voluntarily and without objection or compulsion cannot be recovered, even though the tax be levied unlawfully. Middleton v. Wilmington, B. & S.R.R., 224 N.C. 309, 30 S.E.2d 42 (1944).

Payment under Protest. — Where the owner resists the payment of taxes as unlawful, he is required to pay them under his protest and sue to recover them. Carstarphen v. Town of Plymouth, 186 N.C. 90, 118 S.E. 905 (1923); Galloway v. Board of Educ., 184 N.C. 245, 114 S.E. 165 (1922). See also State v. Snipes, 161 N.C. 242, 76 S.E. 243 (1912).

To test the legality of a tax imposed, the taxpayer should pay the same and sue to recover it in accordance with the provisions of this section. Southeastern Express Co. v. City

of Charlotte, 186 N.C. 668, 120 S.E. 475 (1923).

Written Demand for Refund.—The General Assembly, as far back as 1887, enacted that demand for the return of taxes must be made within 30 days after payment, and it was held in Richmond & D.R.R. v. Town of Reidsville, 109 N.C. 494, 13 S.E. 865 (1891), and Teeter v. Wallace, 138 N.C. 264, 50 S.E. 701 (1905), that the statute applied to all taxes, that the remedy provided was exclusive, and that a failure to make demand within the time prescribed was fatal to the right to maintain an action to recover the tax. Blackwell v. City of Gastonia, 181 N.C. 378, 107 S.E. 218 (1921).

The requirement of making a demand within the prescribed time is mandatory. Richmond & D.R.R. v. Town of Reidsville, 109 N.C. 494, 13 S.E. 865 (1891). It must also be made in writing. Bristol v. Commissioners of Morganton, 125 N.C. 365, 34 S.E. 512 (1899).

The requirement of demand is not confined to claim for refunding any particular tax or taxes alleged to be invalid on any particular account. Richmond & D.R.R. v. Town of Reidsville, 109 N.C. 494, 12 S.E. 865 (1891).

Same; Right to Sue. — Upon the failure of the county treasurer to refund within 90 days, the person so paying the tax may maintain an action against the county, including in his demand both the State and county taxes. Brunswick-Balke-Collender Co. v. County of Mecklenburg, 181 N.C. 386, 107 S.E. 317 (1921).

Same; Further Demand under § 153-64 Unnecessary. — When the party has complied with the condition of this section he has a present right of action for the recovery of the tax without the necessity of having made the presentation and demands to the proper municipal authorities referred to in § 153-64. Southern Ry. v. Cherokee County, 177 N.C. 86, 97 S.E. 758 (1919); Atlantic Coast Line R.R. v. Brunswick County, 178 N.C. 254, 100 S.E. 428 (1919).

Same; Alleging Demand. — A complaint which fails to allege that the demand was made within 30 days is insufficient on demurrer. Richmond & D.R.R. v. Town of Reidsville, 109 N.C. 494, 13 S.E. 865 (1891). See Hunt v. Cooper, 194 N.C. 265, 139 S.E. 446 (1927).

A distinction between an erroneous tax and an illegal or invalid tax is recognized by this section and North Carolina case law. Redevelopment Comm'n v. Guilford County, 274 N.C. 585, 164 S.E.2d 476 (1968).

An illegal or invalid tax results when the taxing body seeks to impose a tax without authority, as in cases where it is asserted that the rate is unconstitutional, or that the subject is exempt from taxation. Redevelopment Comm'n v. Guilford County, 274 N.C. 585, 164 S.E.2d 476 (1968).

When Injunction Will Lie. — Injunction will lie when the tax or assessment is itself invalid or illegal. Redevelopment Comm'n v. Guilford County, 274 N.C. 585, 164 S.E.2d 476 (1968).

Injunction is the appropriate relief to prevent the collection of an illegal and invalid tax. This constitutes the exception in the statute and gives the taxpayer an additional remedy (see Purnell v. Page, 133 N.C. 125, 45 S.E. 534 (1903)) to test the validity of a tax, Wrought Iron Range Co. v. Carver, 118 N.C. 328, 24 S.E. 352 (1896), but only the collection of the tax will be enjoined, until the merits of the controversy can be determined. North Carolina R.R. v. Commissioners of Alamance, 82 N.C. 259 (1880).

An injunction will lie to restrain the collection of taxes and to restrain the sale of property under distraint, for three reasons, to wit: (1) If the taxes or any part thereof be assessed for an illegal or unauthorized purpose. (2) If the tax itself be illegal or invalid. (3) If the assessment of the tax be illegal or invalid. Purnell v. Page, 133 N.C. 125, 45 S.E. 534 (1903); Sherrod v. Dawson, 154 N.C. 525, 70 S.E. 739 (1911).

The remedy of injunction is available to a taxpayer when a tax levy or assessment, or some part thereof, is challenged on the ground (1) the tax or assessment is itself illegal or invalid, or (2) for an illegal or unauthorized purpose. Wynn v. Trustees of Charlotte Community College Sys., 255 N.C. 594, 122 S.E.2d 404 (1961).

Same; Failure to Give Taxpayer Notice. — An injunction will be granted to the hearing against the sheriff for collecting back taxes on a solvent credit, upon the ground that the plaintiff was not given notice of the assessment or opportunity to be heard before the board of assessors or the tribunal having the power to list or assess such property. Caldwell Land & Lumber Co. v. Smith, 146 N.C. 199, 59 S.E. 653 (1907).

Same; Special Assessment for Improvements.—Where an owner of a town lot resists payment of an assessment of his property for the cost of paving or laying down a sidewalk on the ground of excessive cost, discrimination, or for other causes, the remedy of injunction is an improper one, for the owner should pay, under protest, the assessment levied and bring his action to recover it or the excess over a proper charge. Marion v. Town of Pilot Mountain, 170 N.C. 118, 87 S.E. 53 (1915).

Same; Levy for School Purposes. — Injunctive relief is not available to the taxpayers of a county, where a tax levy for school purposes has been made, when it appears that under the levy complained of the moneys have been raised and distributed to the branches of government entitled thereto, some of which are not parties to the suit. Semble, the only remedy for the injured taxpayers is to pay the illegal tax under protest and sue to recover the same, as provided by statute. Galloway v. Board of Educ., 184 N.C. 245, 114 S.E. 165 (1922).

Parties to Suit for Injunction. — The

sheriff (tax collector) is the proper party defendant to a suit to enjoin the collection of taxes, but the commissioners may make themselves parties if they think the rights of the county require it. Caldwell Land & Lumber Co. v. Smith, 146 N.C. 199, 59 S.E. 653 (1907).

Necessary Allegations.—In order to enjoin the collection of taxes on land, it is necessary to allege that the taxes sought to be recovered were illegally imposed or unlawfully collected. Hunt v. Cooper, 194 N.C. 265, 139 S.E. 446 (1927).

Burden on Taxpayer. — Where a taxpayer seeks equitable relief against the alleged unlawful assessment of taxes against its property by the county authorities, it must allege and show that the amount claimed as excessive was in fact an excessive valuation. Norfolk-Southern R.R. v. Board of Comm'rs, 188 N.C. 265, 124 S.E. 560 (1924).

Injunction Granted. — For a case in which injunctive relief against the collection of taxes was granted, see Barber v. Town of Benson, 200 N.C. 683, 158 S.E. 245 (1931).

Portion of Levy Enjoined.—The courts will not enjoin the collection of an entire levy of taxes if the portion conceded to be valid can be separated from the portion alleged to be unconstitutional. Southern Ry. v. Board of Comm'rs, 148 N.C. 220, 61 S.E. 690 (1908).

§ 105-382. Discretionary authority to refund taxes illegally collected.—(a) If the procedures specified in subsection (b), below, are complied with, the governing body of a taxing unit may refund a tax or any portion of a tax that should not have been imposed but which was imposed through clerical error or which was illegal or levied for an illegal purpose. The exercise of the authority granted by this section is entirely within the discretion of the governing body, and no taxpayer may enforce a demand for refund under the provisions of this section.

(b) The discretionary authority granted by subsection (a), above, shall not be exercised unless:

(1) Within three years from the date on which a tax was due to be paid, the taxpayer makes a written demand for refund upon the governing body of the taxing unit to which the tax was paid on the ground that the taxing unit required its payment through clerical error or that it was illegal or levied for an illegal purpose.

(2) After receipt of such a written demand, the governing body adopts and records in its minutes a resolution finding the asserted clerical error or illegality to be a fact. (1943, c. 709; 1967, c. 1138; 1971, c. 806, s. 1.)

Article 28.

Special Duties to Pay Taxes.

§ 105-383. Fiduciaries to pay taxes.—(a) Duty to Pay.—It shall be the duty of every guardian, executor, administrator, agent, trustee, receiver, or other fiduciary having care or control of any real or personal property to pay the taxes thereon out of the trust funds in his hands.

(b) Liability for Failure to Pay.—Any fiduciary who fails to pay the taxes on property in his care or control when trust funds are available to him for that purpose shall be personally liable for the taxes. This liability may be enforced by a civil action brought in the name of the tax collector of the taxing unit to which the taxes are owed against the fiduciary in an appropriate division of the General Court of Justice of the county in which the taxing unit is located.

(c) Liability for Sale of Property.—Any fiduciary who suffers property in his care or control to be sold by reason of his negligence in failing to pay the taxes thereon when available funds were in his hands shall be liable to his ward, principal, or cestui que trust for all actual damages incurred as a result of his neglect.

(d) Effect of Section.—This section shall not have the effect of relieving property and estates held in trust or under the control of fiduciaries from the lien of property taxes. (1762, c. 69, s. 14; R. C., c. 54, s. 27; 1868-9, c. 201, s. 32; 1879, c. 71, s. 53; Code, ss. 1595, 3698; Rev., s. 2862; C. S., s. 7985; 1971, c. 806, s. 1.)

§ 105-384. Duties and liabilities of life tenant.—(a) If real or personal property is held by a tenant for life or by a tenant for the life of another, it shall be the duty of the life tenant to pay the taxes imposed on the property.

(b) Any remainderman or reversioner of real or personal property who pays the taxes thereon may recover the money so paid in an action against the life tenant of the property; in the case of real property, the action may be brought only in the appropriate division of the General Court of Justice of the county in which the real property is located.

(c) Any tenant for life of real or personal property who suffers the property to be foreclosed and sold or sold under levy for failure to pay the taxes thereon shall be liable to the remainderman or to the reversioner for any damages incurred. (1879, c. 71, ss. 53, 54; Code, ss. 3698, 3699; 1901, c. 558, s. 45; Rev., s. 2859; C. S., s. 7982; 1971, c. 806, s. 1.)

§ 105-385. Duty to pay taxes on real property; judicial sales; sales under powers; governmental purchasers.—(a) Judicial Sales.—In all civil actions and special proceedings in which the sale of any real property is ordered, the judgment shall provide for the payment of all taxes then constituting a lien upon the property and all special assessments or installments thereof then due, and the tax liens and special assessments shall be satisfied from the proceeds of the sale before the proceeds are disbursed. The judgment in such a civil action or special proceeding shall adjust the disbursements for taxes and special assessments between the parties to the action or special proceeding in accordance with their respective rights.

(b) Sales under Powers.—Any person who sells real property under a power of sale conferred upon him by a deed, will, power of attorney, mortgage, deed of trust, or assignment for the benefit of creditors shall from the proceeds of the sale first satisfy all taxes constituting a lien upon the real property and all special assessments or installments thereof then due unless the notice of sale provided that the property would be sold subject to tax liens and special assessments, and it was so sold.

(c) Governmental Purchasers.—Any agency, department, or institution of the State of North Carolina and any county or municipal corporation that purchases real property shall satisfy all taxes constituting a lien upon the property purchased and all special assessments or installments thereof then due by deducting the amount of the taxes and special assessments from the purchase price and paying it to the proper taxing unit or units. Any agency, department, or institution of the State and any county or municipal corporation that fails to make the deductions and payments required by this subsection (c) shall be liable to the taxing unit or units to which the taxes and special assessments are owed for the amount thereof. This liability may be enforced in a civil action brought by the taxing unit or units to which the taxes and special assessments are owed in the appropriate trial division of the General Court of Justice of the county in which the property is located; this remedy shall be in addition to any remedies the taxing unit may have against the grantor of the property. (1901, c. 558, s. 47; Rev., s. 2857; C. S., s. 7980; 1929, c. 231, s. 1; 1951, c. 252, s. 1; 1971, c. 806, s. 1.)

§ 105-386. Tax paid by holder of lien; remedy.—If any person having a lien or encumbrance of any kind upon real property shall pay the taxes that constitute a lien upon the real property:

(1) He shall thereby acquire a lien upon the real property from the time of payment, which lien shall be superior to all other liens and which may be enforced by an action in the appropriate division of the General Court of Justice of the county in which the real property is situated.

(2) He may, by an action for moneys paid to the use of the owner of the real property at the time of payment, recover the amount paid. (1879,

c. 71, s. 55; Code, s. 3700; 1901, c. 558, s. 46; Rev., s. 2858; C.S., s. 7981; 1971, c. 806, s. 1.)

Article 29.

Validations.

§ 105-387. Sales for 1930 on dates other than first Monday in June validated.—All sales of land for failure to pay taxes held or conducted by any sheriff or any tax collector of any county, city, town, or other municipality during the year 1930, on any day subsequent to or other than the first Monday in June of said year, are hereby approved, confirmed, validated, and declared to be proper, valid, and legal sales of such land and legally binding in all respects, and all certificates of sale made and issued upon and in accordance with such sales are hereby approved and validated to all intents and purposes with such full force and legal effect as if said sales had been held and conducted on said first Monday of June, 1930. (1931, c. 160; 1971, c. 806, s. 1.)

§ 105-388. Tax sales for 1931-32 on day other than law provides and certificates validated.—All sales of land for failure to pay taxes held or conducted by any sheriff or any tax collector of any county, city, town, or other municipality during the years 1931 and 1932, on any day subsequent to or other than the first Monday in June of said year, are hereby approved, confirmed, validated, and declared to be proper, valid, and legal sales of such land and legally binding in all respects, and all certificates of sale made and issued upon and in accordance with such sales approved and validated to all intents and purposes with such full force and legal effect as if said sales had been held and conducted on said first Monday of June, 1931 and 1932. (1933, c. 177; 1971, c. 806, s. 1.)

§ 105-389. Tax sales for 1933-34 and certificates validated.—All sales of land for failure to pay taxes held or conducted by any sheriff or any tax collector of any county, city, town, or other municipality during the years 1933 and 1934, or on any date subsequent to or other than the date prescribed by law, and all certificates of sale executed and issued pursuant to and in accordance with such sales be and the same are hereby approved, confirmed, and validated and shall have the same force and legal effect as if said sales had been held and conducted on the date prescribed by law.

The board of county commissioners of any county or the governing board of any city, town, or other municipality may by resolution order the sheriff or tax collecting officer of the said county, city, town, or other municipality to advertise in the manner provided by law and sell all land for the taxes of any year levied by the said county, city, town, or other municipality, which land has not heretofore been legally sold for the failure to pay said taxes. The sale or sales herein authorized shall be held not later than the first Monday in September 1935, and certificates of sale shall be issued in accordance with and pursuant to said sale or sales in the same manner as if said sale or sales had been held and conducted as provided by law. Any sale held and conducted under the provisions of this paragraph and all certificates issued pursuant to such a sale shall be and the same are hereby approved, confirmed, and validated and shall have the same force and legal effect as if said sale had been held and conducted on the date prescribed by law.

All actions instituted in any county, city, town, or other municipality for the foreclosure of certificates of sale issued for the taxes of the years 1927, 1928, 1929, 1930, 1931 and 1932 subsequent to October 1, 1934, and all such actions instituted before October 1, 1935, shall be and the same are hereby approved, validated, and declared to be legally binding and of the same force and effect as if said actions were instituted prior to October 1, 1934: Provided, that this section shall not be construed to repeal any private or local act passed by the General Assembly of 1935. (1935, c. 331; 1971, c. 806, s. 1.)

§ 105-390. Notices of sale for taxes by publication validated.—All sales of real property under tax certificate foreclosures made between January 1, 1927, and March 13, 1937, where the original notice of sale was published for four successive weeks, and any notice of resale was published for two successive weeks, preceding said sales, whether the notice of sale was required to be published in a newspaper or at courthouse door, or both, shall be, and the same are in all respects validated as to publication of said notice: Provided said publication was completed as above set out within 10 days of the date of the sale.

The provisions of this section shall not apply to the Counties of Alleghany, Beaufort, Cabarrus, Camden, Carteret, Caswell, Currituck, Halifax, Harnett, Henderson, Hertford, Hyde, Iredell, Johnston, Jones, Macon, Mitchell, Moore, Nash, New Hanover, Perquimans, Pitt, Polk, Rowan, Rutherford, Scotland, Surry, Wake, Warren, Washington, and Wayne. (1937, c. 128; 1971, c. 806, s. 1.)

§ 105-391. Validation of sales and resales held pursuant to § 105-374.—All sales or resales held prior to April 14, 1951, pursuant to G.S. 105-374, where the advertisement was in accordance with G.S. 1-327 and 1-328 as provided by such sections prior to their repeal, are validated to the same extent as if such advertisement were in accordance with Article 29A of Chapter 1 of the General Statutes; and all such sales, where the provisions of G.S. 45-28 as to resales, as provided by such section prior to its repeal, were followed, are validated to the same extent as if the resale procedure provided for in Article 29A of Chapter 1 of the General Statutes had been followed. (1951, c. 1036, s. 2; 1971, c. 806, s. 1.)

§ 105-392. Validation of reconveyances of tax foreclosed property by county boards of commissioners.—The action of county boards of commissioners taken prior to March 20, 1951, reconveying tax foreclosed property by private sale to the former owners or other interested parties for amounts not less than such counties' interest therein is hereby ratified, confirmed, and validated. (1951, c. 300, s. 2; 1971, c. 806, s. 1.)

§ 105-393. Real property listings validated.—Listings of any real estate not otherwise listed, which have been carried forward on the tax list of any person by the county supervisor of taxation, list taker or assessor, at the same assessed value of said property as it was valued at in the last quadrennial assessment of taxes, unless the value thereof has been changed by the board of county commissioners as provided by law, are hereby validated, and are hereby declared to be legal and valid listings of the same as if listed by the owner or owner's agent or by the chairman of the board of county commissioners or otherwise, as provided by law.

This section shall be retroactive so as to include the period of time from the first day of May, 1927, to and including the eleventh day of May, 1935.

The Counties of Alamance, Ashe, Beaufort, Bertie, Brunswick, Cabarrus, Camden, Carteret, Clay, Currituck, Dare, Durham, Greene, Halifax, Harnett, Henderson, Hertford, Hoke, Hyde, Iredell, Johnston, Macon, Moore, Northampton, Pasquotank, Pitt, Polk, Randolph, Richmond, Robeson, Rowan, Rutherford, Sampson, Surry, Transylvania, Wake, Warren, and Wayne are hereby exempted from the provisions of this section. (1937, c. 259, ss. 1-3; 1971, c. 806, s. 1.)

Article 30.

General Provisions.

§ 105-394. Immaterial irregularities.—Immaterial irregularities in the listing, appraisal, or assessment of property for taxation or in the levy or collection of the property tax or in any other proceeding or requirement of this Subchapter shall not invalidate the tax imposed upon any property or any process of listing, appraisal, assessment, levy, collection, or any other proceeding under this Subchapter.

The following are examples of immaterial irregularities:

(1) The failure of list takers, tax supervisors, or members of boards of equalization and review to take and subscribe the oaths required of them.

(2) The failure to sign the affirmation required on the abstract.

(3) The failure to list, appraise, or assess any property for taxation or to levy any tax within the time prescribed by law.

(4) The failure of the board of equalization and review to meet or to adjourn within the time prescribed by law or to give any required notice of its meetings and adjournment.

(5) Any defect in the description upon any abstract, tax receipt, tax record, notice, advertisement, or other document, of real or personal property, if the description be sufficient to enable the tax collector or any person interested to determine what property is meant by the description. (In such cases the tax supervisor or tax collector may correct the description on the documents bearing the defective description, and the correct description shall be used in any documents later issued in tax foreclosure proceedings authorized by this Subchapter.)

(6) The failure of the collector to offer any tax lien on real property for sale at the time mentioned in the advertisement or notice of sale.

(7) The failure of the collector to adjourn the tax lien sale from day to day or any irregularity or informality in the adjournment.

(8) Any irregularity or informality in the order or manner in which tax liens on real property are offered for sale.

(9) The failure to make or serve any notice mentioned in this Subchapter.

(10) The omission of a dollar mark or other designation descriptive of the value of figures upon any document required by this Subchapter.

(11) Any other immaterial informality, omission, or defect on the part of any person in any proceeding or requirement of this Subchapter. (1939, c. 310, s. 1715; 1965, c. 192, ss. 1, 2; 1971, c. 806, s. 1.)

§ 105-395. Application and effective date of Subchapter.—(a) The provisions of G.S. 105-333 through 105-344 (being Article 23 in this Subchapter) shall first be applicable to public service company property to be listed or reported for taxation as of January 1, 1972. Unless otherwise specifically provided herein, all other provisions of this Machinery Act (being Subchapter II of Chapter 105 of the General Statutes) shall become effective July 1, 1971, and shall apply to all taxes due and uncollected as of that date as well as to those that shall become due thereafter.

(b) Foreclosure actions commenced under either former G.S. 105-391 or former G.S. 105-414 (as codified in 1965 Replacement Volume 2D of the General Statutes and the 1969 Cumulative Supplement thereto) that have not been completed as of July 1, 1971, shall thereafter be prosecuted in accordance with the provisions of G.S. 105-374 herein. Foreclosure actions commenced under former G.S. 105-392 (as codified in 1965 Replacement Volume 2D of the General Statutes) that have not been completed as of July 1, 1971, shall thereafter be prosecuted in accordance with the provisions of G.S. 105-375 herein.

(c) It is the intent of the General Assembly to make the provisions of this Subchapter (being G.S. 105-291 [105-271] through 105-395, inclusive) uniformly applicable throughout the State, and to assure this objective all laws and clauses of laws, including private and local acts (except local acts relating to the selection of tax collectors), in conflict with the provisions of this Subchapter shall, as of July 1, 1971, be and are hereby repealed. As used in this section, the term "local acts" means any acts of the General Assembly that apply to one or more counties by name, to one or more municipalities by name, or to all municipalities within one or more named counties. (1971, c. 806, s. 1.)

§§ 105-396 to 105-398: Repealed by Session Laws 1971, c. 806, s. 1, effective July 1, 1971.

Revision of Subchapter. — See same catchline in note under § 105-271.

SUBCHAPTER III. COLLECTION OF TAXES.

Former Article 30.

General Provisions.

§§ 105-399 to 105-403: Repealed by Session Laws 1971, c. 806, s. 3, effective July 1, 1971.

Cross Reference. — See note catchlined "Revision of Subchapter" under § 105-271.

§ 105-404: Transferred to G.S. 105-32 by Session Laws 1971, c. 806, s. 2, effective July 1, 1971.

§ 105-405: Repealed by Session Laws 1963, c. 548.

§§ 105-405.1, 105-406: Repealed by Session Laws 1971, c. 806, s. 3, effective July 1, 1971.

Cross Reference. — See note catchlined "Revision of Subchapter" under § 105-271.

§ 105-407: Transferred to G.S. 105-267.1 by Session Laws 1971, c. 806, s. 2, effective July 1, 1971.

Article 31.

Rights of Parties Adjusted.

§§ 105-408 to 105-411: Repealed by Session Laws 1971, c. 806, s. 3, effective July 1, 1971.

Cross Reference. — See note catchlined "Revision of Subchapter" under § 105-271.

§ 105-412: Transferred to G.S. 105-207 by Session Laws 1971, c. 806, s. 2, effective July 1, 1971.

Article 32.

Tax Liens.

§§ 105-413, 105-414: Repealed by Session Laws 1971, c. 806, s. 3, effective July 1, 1971.

Cross Reference. — See note catchlined "Revision of Subchapter" under § 105-271.

Article 33.

Time and Manner of Collection.

§§ 105-415 to 105-417: Repealed by Session Laws 1971, c. 806, s. 3, effective July 1, 1971.

Cross Reference. — See note catchlined "Revision of Subchapter" under § 105-271.

Article 33A.

Agreements with United States or Other States.

§ 105-417.1: Transferred to G.S. 105-268.1 by Session Laws 1971, c. 806, s. 2, effective July 1, 1971.

§ 105-417.2: Transferred to G.S. 105-268.2 by Session Laws 1971, c. 806, s. 2, effective July 1, 1971.

§ 105-417.3: Transferred to G.S. 105-268.3 by Session Laws 1971, c. 806, s. 2, effective July 1, 1971.

ARTICLE 34.

Tax Sales.

Part 1. Sale of Realty.

§§ 105-418 to 105-421: Repealed by Session Laws 1971, c. 806, s. 3, effective July 1, 1971.

Cross Reference. — See note catchlined "Revision of Subchapter" under § 105-271.

Part 2. Refund of Tax Sales Certificates.

§ 105-422. Tax liens barred.—No action shall be maintained by any county or municipality to enforce any remedy provided by law for the collection of taxes or the enforcement of any tax liens held by counties and municipalities, whether such taxes or tax liens are evidenced by the original tax books or tax sales certificates or otherwise, unless such action shall be instituted within 10 years from the time such taxes became due: Provided, that as to tax foreclosure actions which under existing laws are not and will not be barred prior to December 31, 1948, foreclosure actions may be instituted thereon at any time prior to December 31, 1948: Provided, further, that this section shall not be construed as applying to the liens for street and/or sidewalk improvements; and provided further, that this section shall not be applicable to any pending tax foreclosure actions. Provided that the provisions of this section shall not apply to Ashe, Buncombe, Camden, Clay, Columbus, Cumberland, Currituck, Dare, Duplin, Edgecombe, Gates, Harnett, Lenoir, McDowell, Macon, Madison, Moore, Nash, New Hanover, Orange, Pender, Rockingham, Sampson, Scotland, Stokes, Vance and Wilkes Counties or any of the political subdivisions thereof. This section shall apply to the City of Morganton on and after October 7, 1968, and to the Town of Glen Alpine, but shall not apply to the other municipalities in Burke County. This section shall apply to the Town of Valdese. (1933, c. 181, s. 7; c. 399; 1947, c. 1065, s. 1; 1949, cc. 60, 735; 1951, cc. 71, 306, 572; 1953, cc. 381, 427, 538, 645, 656, 752, 775, 1008; 1955, c. 1087; 1957, cc. 53, 678, 1123; 1959, cc. 373, 608; 1961, cc. 542, 695, 885; 1965, cc. 129, 294; 1967, c. 242; c. 321, s. 1; c. 422, s. 1; 1969, c. 96.)

Local Modification. — Town of Beaufort: 1963, c. 892.

Cross References. — See note catchlined "Revision of Subchapter" under § 105-271. As to foreclosure of liens for unpaid assessments for local improvements, see § 160A-233.

Editor's Note. — The 1969 amendment inserted "and to the Town of Glen Alpine" in the next-to-last sentence.

For comment on the 1947 amendment which rewrote this section, see 25 N.C.L. Rev. 461.

Repeal of Section. — Section 3, c. 806, Session Laws 1971, provides that this section is repealed, effective July 1, 1972. See § 105-378.

Ten-Year Provision Is Statute of Limitations and Does Not Preclude County from Bringing Action. — See opinion of Attorney General to Mr. J. Bourke Bilisoly, 41 N.C.A.G. 431 (1971).

Defendant Must Plead Statute in His Answer. — A defendant in a tax foreclosure suit cannot avail himself of the 10-year statute of limitations set forth in this section when he does not plead the statute in his answer. Iredell County v. Crawford, 262 N.C. 720, 138 S.E.2d 539 (1964).

Foreclosure of Lien for Municipal Taxes under Former Law. — See City of Raleigh v. Jordan, 218 N.C. 55, 9 S.E.2d 507 (1940).

Cited in Town of Burnsville v. Boone, 231 N.C. 577, 58 S.E.2d 351 (1950).

§ 105-423: Repealed by Session Laws 1947, c. 1065, s. 2.

§ 105-423.1: Repealed by Session Laws 1971, c. 806, s. 3, effective July 1, 1972.

Cross References. — See note catchlined "Revision of Subchapter" under § 105-271. See § 105-378.

ARTICLE 35.

Sheriff's Settlement of Taxes.

§ 105-424: Repealed by Session Laws 1971, c. 806, s. 3, effective July 1, 1971.

Cross Reference. — See note catchlined "Revision of Subchapter" under § 105-271.

SUBCHAPTER IV. LISTING OF AUTOMOBILES.

ARTICLE 35A.

Listing of Automobiles in Certain Counties.

§§ 105-425 to 105-429: Repealed by Session Laws 1971, c. 806, s. 3, effective July 1, 1971.

Cross Reference. — See note catchlined "Revision of Subchapter" under § 105-271.

SUBCHAPTER V. GASOLINE TAX.

ARTICLE 36.

Gasoline Tax.

§ 105-430. Definitions; "motor fuel," "distributor".—The following words, terms, and phrases hereinafter used for the purpose of this Article are defined as follows:

(1) "Motor fuel" shall mean (i) all products commonly or commercially known or sold as gasoline (including casinghead and absorption or natural gasoline) regardless of their classification or uses; and (ii) any liquid prepared, advertised, offered for sale or sold for use as or commonly and commercially used as a fuel in internal combustion engines, which when subjected to distillation in accordance with the standard method of test for distillation of gasoline, naphtha, kerosene and similar petroleum products (American Society for Testing Materials Designation D-86) shows not less than ten per centum (10%) distilled (recovered) below three hundred forty-seven degrees (347°) Fahrenheit (one hundred seventy-five degrees (175°) Centigrade) and not less than ninety-five per centum (95%) distilled (recovered) below four hundred sixty-four degrees (464°) Fahrenheit (two hundred forty degrees (240°) Centigrade); with the exception that the term "motor fuel" shall not include commercial solvents which distill, by American Society for Testing Materials Method D-86, not more than nine per centum (9%) at 176° F. and which have a distillation range of 125° F. or less, of liquefied gases which would not exist as liquids at a temperature of 60° Fahrenheit and a pressure of 14.7 pounds per square inch absolute.

(2) "Distributor" is any person, firm, association of persons, corporation, municipality, county, or other political subdivision or agency that has on hand or in his or its possession in this State, or that produces, refines, manufactures, or compounds such motor fuels in this State for sale, distribution, or use herein. (1927, c. 93, s. 1; 1931, c. 145, s. 24; 1941, c. 376, s. 1.)

Editor's Note. — For comment on the 1941 amendment which changed subdivision (1), see 19 N.C.L. Rev. 516.

Applied in In re Sing Oil Co., 263 N.C. 520, 139 S.E.2d 599 (1965).

Cited in In re Newsom Oil Co., 273 N.C. 383, 160 S.E.2d 98 (1968).

§ 105-431. Purpose of Article; double taxation not intended.—The purpose of this Article is to provide for the payment and collection of a tax on the first sale of motor fuels when sold, or the use, when used, in this State; double taxation is not intended. Motor fuels manufactured, produced, or sold for exportation, and exported are not taxable and should not be included in the reports hereinafter required to be made by distributors. (1927, c. 93, s. 2; 1931, c. 145, s. 24.)

The tax is payable by the first distributor. In re Sing Oil Co., 263 N.C. 520, 139 S.E.2d 599 (1965).

Quoted in In re Newsom Oil Co., 273 N.C. 383, 160 S.E.2d 98 (1968).

§ 105-432. Sales in tank car shipments.—In the administration of this Article the first sale shall not be construed to embrace the sale in tank car shipments from port terminals to licensed distributors within the State, but the tax hereinafter levied on such motor fuel shall be levied against and paid by such licensed distributor. (1927, c. 93, s. 2½; 1931, c. 145, s. 24.)

Quoted in In re Newsom Oil Co., 273 N.C. 383, 160 S.E.2d 98 (1968).

§ 105-433. Application for license as distributor.—Any distributor engaged in business on April 1, 1931, shall, within 30 days thereafter, and any other distributor shall, prior to the commencement of doing business, file a duly acknowledged application for a license with the Commissioner of Revenue on a form prescribed and furnished by him setting forth the name under which such distributor transacts or intends to transact business within this State, the address of each place of business and a designation of the principal place of business. If such distributor is a firm or association, the application shall set forth the name and address of each person constituting the firm or association, and if a corporation, the names and addresses of the principal officers and such other information as the Commissioner of Revenue may require. Each distributor shall at the same time file a bond in such amount, not exceeding twenty thousand dollars ($20,000) in such form and with such surety or sureties as may be required by the Commissioner of Revenue, conditioned upon the rendition of the reports and the payment of the tax hereinafter provided for. Upon approval of the application and bond, the Commissioner of Revenue shall issue to the distributor a nonassignable license with a duplicate copy for each place of business of said distributor in this State, which shall be displayed in a conspicuous place at each such place of business and shall continue in force until surrendered or canceled. No distributor shall sell, offer for sale, or use any motor fuels within this State until such license has been issued. Any distributor failing to comply with or violating any of the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than one hundred dollars ($100.00), nor more than five thousand dollars ($5,000), or imprisonment for not more than 24 months, or both. (1927, c. 93, s. 3; 1931, c. 145, s. 24.)

Cited in In re Newsom Oil Co., 273 N.C. 383, 160 S.E.2d 98 (1968).

§ 105-434. Gallon tax.—There is hereby levied and imposed a tax of nine cents (9¢) per gallon on all motor fuels sold, distributed, or used within this State. The tax hereby imposed and levied shall be collected and paid by the distributor producing, refining, manufacturing, or compounding within this State, or holding in possession within this State motor fuels for the purpose of

sale, distribution, or use within the State, and shall be paid by such distributor to the Commissioner of Revenue in the manner and at the times hereinafter specified. No county, city, or town, or political subdivision shall levy or collect any tax upon the sale or distribution of motor fuels herein defined. For the purpose of determining the amount of the tax, it shall be the duty of every distributor to transmit to the Commissioner of Revenue not later than the twentieth day of each month, upon forms prescribed and furnished by such Commissioner, a report under oath or affirmation showing the quantity of motor fuel sold, distributed, or used by such distributor within this State during the preceding calendar month, and such other information as the said Commissioner may require: Provided, that any distributor may, if he elects to do so, use as the measure of the tax levied and assessed against him by this section the gross quantity of motor fuel purchased, produced, refined, manufactured, and/or compounded by such distributor, plus the amount of motor fuel on hand at the beginning of the period when such method of computation is used, less a tare of two percent (2%) on gross monthly receipts of motor fuels not exceeding 150,000 gallons, and less a tare of one and one half percent (1½%) on gross monthly receipts of such fuel in excess of 150,000 gallons and not exceeding 250,000 gallons, and less a tare of one percent (1%) on gross monthly receipts of such fuels in excess of 250,000 gallons. Provided, that if any licensed distributor who has elected to pay the tax levied herein on the amount of motor fuel purchased, produced, refined, manufactured, or compounded, in lieu of the amount sold, distributed, or used, shall lose any such fuel by reason of fire, lightning, flood, windstorm, wrecking of transportation conveyance, acts of war, or any accidental or providential cause, and such loss is clearly proved to the satisfaction of the Commissioner of Revenue, the amount of motor fuel lost shall be excluded from the measure of his tax. Provided, further, that the Commissioner of Revenue shall have power under such rules and regulations as he may adopt for the purpose to refund to any nonlicensed distributor the tax on any motor fuel purchased by and delivered to him tax paid that is lost by fire, lightning, flood, windstorm, acts of war, or any accidental or providential cause, after it is delivered to him and before it is sold, but such loss must be clearly proved to the satisfaction of the Commissioner. (1927, c. 93, s. 4; 1929, c. 40, s. 1; 1931, c. 145, s. 24; 1941, cc. 16, 146; 1943, c. 113; 1949, c. 1250, s. 13; 1969, c. 600, s. 20.)

Editor's Note. — The 1969 amendment substituted "nine" for "seven" in the first sentence.

Excise and Not Property Tax. — The State gasoline tax is an excise and not a property tax. Stedman v. City of Winston-Salem, 204 N.C. 203, 167 S.E. 813 (1933).

The tax imposed by this section is a privilege tax. In re Sing Oil Co., 263 N.C. 520, 139 S.E.2d 599 (1965); In re Newsom Oil Co., 273 N.C. 383, 160 S.E.2d 98 (1968).

The word "receipt" means gasoline purchased for resale or for use by the purchasing distributor. In re Sing Oil Co., 263 N.C. 520, 139 S.E.2d 599 (1965).

This section places the burden on the distributor to pay the tax to the Commissioner of Revenue. In re Newsom Oil Co., 273 N.C. 383, 160 S.E.2d 98 (1968).

The distributor may determine his tax liability by either of two methods. He may compute his liability on his monthly sales, or on his monthly purchases. If he elects to use purchases to determine his tax liability, he is entitled to a tare on his receipts. In re Newsom Oil Co., 273 N.C. 383, 160 S.E.2d 98 (1968).

Delivery of gasoline to one oil company on a second's order constitutes technical possession and receipt by the second. In re Sing Oil Co., 263 N.C. 520, 139 S.E.2d 599 (1965).

Where an oil company had oil delivered to another oil company on its order, it was held to be a distributor under this section and entitled to the tare allowed therein. In re Sing Oil Co., 263 N.C. 520, 139 S.E.2d 599 (1965).

Tax May Be Levied on Political Subdivision. — Under the provisions of the N.C. Const., Art. V, § 5, the General Assembly is prohibited from levying a property tax on property owned by municipal corporations, but the prohibition does not extend to excise taxes, and under the provisions of this section, a municipality is liable for the gasoline tax on gasoline bought by it in bulk and distributed by it to its various departments for use in its governmental functions. Stedman v. City of Winston-Salem, 204 N.C. 203, 167 S.E. 813 (1933).

Prior to the 1931 amendment the statute did

not expressly include a municipality or political subdivision of the State within the definition of distributor, as it does now. See § 105-430. Consequently, in O'Berry v. Mecklenburg County, 198 N.C. 357, 151 S.E. 880 (1930), it was held that a county was not a distributor and was not liable for the tax on motor fuel used by such county in the discharge of its governmental functions. Perhaps, as a result of that decision, the General Assembly in 1931 expressly included a municipality and county within the definition of a distributor. Stedman v. City of Winston-Salem, 204 N.C. 203, 167 S.E. 813 (1933).

§ 105-435. Tax on fuels not within definition; manner of collection; from whom collected.—(a) Every person who owns or operates over the highways of this State, any motor vehicle propelled by a motor which uses any product not included within the definition of "motor fuels" hereinbefore set out to generate power for the propulsion of said vehicle, shall pay to the Commissioner of Revenue, for the use of the highways of this State, a tax of nine cents (9¢) per gallon on the fuel used in such vehicle upon the highways of this State.

(b) Notwithstanding any provisions of subsection (a) to the contrary, the tax levied with respect to the special fuels therein described shall be collected in the manner and from the persons as set out in Article 36A of Chapter 105 of the General Statutes. (1941, c. 376, s. 2; 1949, c. 1250, s. 13; 1951, c. 838; 1955, c. 822, s. 2; 1969, c. 600, s. 20.)

Editor's Note. — The 1969 amendment increased the tax in subsection (a) from seven to nine cents per gallon.

Session Laws 1969, c. 600, s. 23 provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

§ 105-436. Payment of tax.—Every distributor, at the time of making the report required by G.S. 105-434, shall pay to the Commissioner of Revenue, the amount of tax due for the month covered by such report. The tax so paid shall be transferred promptly by the said Commissioner to the State Treasurer as other receipts of his office and the State Treasurer shall place the same to the credit of the "State Highway Fund." (1927, c. 93, s. 5; 1931, c. 145, s. 24.)

Quoted in In re Newsom Oil Co., 273 N.C. 333, 160 S.E.2d 98 (1968).

§ 105-437: Repealed by Session Laws 1963, c. 1169, s. 6, effective July 1, 1963.

§ 105-438. Record of transactions.—Every distributor of motor fuels shall keep a record of all such fuels purchased, received, sold, delivered or used by him, which shall include the number of gallons so purchased, received, sold, delivered, or used, and the dates of such purchases and sales, which records shall be preserved for a period of two years and shall at all times during the business hours of the day be subject to inspection by the Commissioner of Revenue or his deputies, or such other officers as may be duly authorized by said Commissioner. (1927, c. 93, s. 8; 1931, c. 145, s. 24.)

§ 105-439. Rebates for fuels sold to United States government or for use in aircraft.—The Commissioner of Revenue is authorized under such rules and regulations as he may adopt for that purpose, to relieve any distributor from the payment of the tax herein levied for any motor fuels sold to the United States government, and/or gasoline of such quality that it is not adapted for use in ordinary automotive vehicles, but is designed for and sold and used exclusively in aircraft motors, when it appears to the satisfaction of the Commissioner of Revenue that the tax herein imposed has not been added to the sale price of such motor fuel, and the Commissioner of Revenue is likewise authorized to refund by warrant drawn upon the State Treasurer to the person paying the same, any tax paid under the provisions of this Article which constitutes an unlawful burden upon interstate commerce, in conflict with the provisions of the Constitution of the United States: Provided, that any claims for rebate which are not made upon forms provided by the Commissioner of Revenue and filed within 60 days after payment of the tax shall be subject to

the following late filing penalties; claims filed after 60 days but within 90 days, twenty-five percent (25%); claims filed after 90 days but within 240 days, fifty percent (50%); claims filed after 240 days shall be barred. (1931, c. 145, s. 24; 1969, c. 1298, s. 2.)

Editor's Note. — The 1969 amendment, rewrote the proviso at the end of the section. Session Laws 1969, c. 1298, s. 6, provides that the act shall not have the effect of reviving any claims or applications for tax refunds previously barred.

§ 105-440. Penalty for making false claim for rebate.—Any person who shall willfully make any false or fraudulent report as the basis for claim for rebate or deduction under the provisions of this Article, shall be guilty of a misdemeanor, and upon conviction shall be fined and imprisoned in the discretion of the court. (1927, c. 93, s. 10; 1931, c. 145, s. 24.)

§ 105-441. Enumeration of acts constituting misdemeanor; cancellation of license and bond.—Any distributor who shall fail, neglect, or refuse to make the reports herein required or pay the taxes herein imposed, or who shall refuse to permit the Commissioner of Revenue or any agent appointed by him, to examine the books and records of such distributor pertaining to the motor fuels made taxable by this Article or who shall make any false, or fraudulent report or statement hereunder, or who does, or attempts to do, anything whatsoever to avoid a full disclosure of the quantity of motor fuels sold, distributed or used within this State shall be guilty of a misdemeanor, and, on conviction, shall be fined not less than one hundred dollars ($100.00) and not more than five thousand dollars ($5,000) or, in the case of an individual or the officer or employee charged with the duty of making such report for a corporation, to be imprisoned not exceeding 24 months, or both; and the Commissioner of Revenue may forthwith cancel the license of such distributor and notify him in writing of such cancellation by registered mail to be sent to his last known address. In the event that the license of any distributor is cancelled as above provided, and in the event such distributor shall have paid to the State of North Carolina all the taxes due and payable by him under this Article, together with any and all penalties accruing under the provisions of this Article, then the Commissioner of Revenue shall cancel and surrender the bond theretofore filed by said distributor. (1927, c. 93, s. 11; 1931, c. 145, s. 24; 1933, c. 544, s. 10.)

§ 105-442. Actions for tax; double liability.—If any person, firm or corporation shall fail to pay the amount of tax levied in G.S. 105-434 within the time specified in G.S. 105-436 it shall be the duty of the Commissioner of Revenue to proceed at once to enforce the payment of said tax, and to this end the Commissioner of Revenue shall have and may exercise all the remedies provided in the revenue laws of the State for enforcing payment of other taxes, including the right of execution through the sheriffs of the several counties of the State upon any property of the delinquent taxpayer, and shall, with the assistance of the Attorney General whenever necessary, bring appropriate action in the courts of the State for the recovery of such tax. If it shall be found as a fact that such failure to pay was willful on the part of such person, firm or corporation, judgment shall be rendered against such person, firm or corporation for double the amount of tax found to be due, together with interest, and the amount of taxes and penalties shall be paid into the State treasury to the credit of the State Highway Fund. All remedies which now or may hereafter be given by the laws of the State of North Carolina for the collection of taxes are expressly given herein for the collection of taxes levied in this Article or of judgment recovered under authority of this Article. It shall also be the duty of the Commissioner of Revenue to revoke the license of any licensed distributor who shall refuse, fail or neglect to pay the taxes levied in G.S. 105-434 within the time specified in G.S. 105-436, and whose account shall

remain delinquent for any part of said tax for 10 days thereafter. (1927, c. 93, s. 12; 1931, c. 145, s. 24; 1933, c. 137, s. 1.)

§ **105-443:** Repealed by Session Laws 1963, c. 1169, s. 5, effective July 1, 1963.

§ **105-444. License constitutes distributor trust officer of State for collection of tax.**—The licensing of any person, firm or corporation as a wholesale distributor of gasoline shall constitute such distributor an agent or trust officer of the State for the purpose of collecting the tax on the sale of gasoline imposed in this Article. If any person, firm or corporation who or which adds the amount of the tax levied in this Article to the customary market price for gasoline and/or special fuels and collects the same, shall fail to remit the gasoline and/or special fuels tax to the Commissioner of Revenue as provided herein, such failure shall be a misdemeanor, and any individual, partner or officer or agent of any association, partnership or corporation who shall fail to remit the tax so collected as herein provided when it is his duty to do so shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned in the discretion of the court. (1933, c. 137, s. 1; 1951, c. 838.)

Quoted in In re Newsom Oil Co., 273 N.C. 383, 160 S.E.2d 98 (1968).

§ **105-445. Application of proceeds of gasoline tax.**—Except as provided in G.S. 105-446.2 and 136-41.1, the fund derived from the tax herein levied shall be for the exclusive uses of the purposes set out in this Article, and disbursed on vouchers drawn by the State Highway Commission in accordance with the acts of the General Assembly dealing with the subject matter herein referred to. (1931, c. 145, s. 24; 1933, c. 172, s. 17; 1957, c. 65, s. 11; 1967, c. 1161, s. 2.)

Cross Reference. — See Editor's note to § 105-446.2.

§ **105-446. Tax rebate on fuels not used in motor vehicles on highways.**—Any person, association, firm or corporation, who shall buy any motor fuels, as defined in this Article, for the purpose of use, and the same is actually used, for other than the operation of a motor vehicle designed and licensed for use upon the highways shall be reimbursed at the rate of seven cents (7¢) per gallon for the year ending December 31, 1969, and at the rate of eight cents (8¢) per gallon for subsequent years ending December 31 of the amount of such tax or taxes paid under this Article upon the following conditions and in the following manner:

(1) On or before April 15, 1968, application for reimbursement as provided in this section on taxes paid under this Article for the period from July 1, 1967, through December 31, 1967, and thereafter on or before April 15 of any subsequent year ending the preceding December 31, application for reimbursement as provided in this section on taxes paid under this Article for the preceding year shall be filed with the Commissioner of Revenue. Such application shall be made upon such forms as the Commissioner of Revenue shall prescribe and the Commissioner of Revenue is hereby authorized to prescribe different forms of application for the several classes of uses for which said fuels may have been purchased, provided that as to all such applications for reimbursement the applicant shall be required to state whether or not such applicant has filed a North Carolina income tax return with the Commissioner of Revenue, and all such applications shall be sworn before an officer authorized to administer oaths; provided, however, that said application shall show on its face that the purchase price of the motor fuel therein referred to has been paid by applicant or that the payment of said purchase price has been

secured to the seller's satisfaction. Refunds made pursuant to applications filed after April 15th of the year following the year in which the tax was paid shall be subject to the following late filing penalties: Applications filed within 30 days after said date, twenty-five percent (25%); applications filed after 30 days but within six months after said date, fifty percent (50%); but refunds applied for after six months following said date shall be barred.

(2) The Commissioner of Revenue shall have authority to issue rules and regulations as to how claims shall be filed and the information that shall be submitted with said claims and the records required to support said claims.

(3) If, upon the filing of such application, the Commissioner of Revenue shall be satisfied that the same is made in good faith and that the motor fuels upon which said tax refund is requested have been or are to be used exclusively for purposes as set forth in said application and for purposes other than the operation of a motor vehicle designed and licensed for use upon the highway, he shall issue to such applicant a warrant upon the State Treasurer for the tax refund.

(4) If the Commissioner of Revenue shall be satisfied that the applicant for any refund authorized by this section has collected or sought to collect any refund of tax or taxes on fuels used in a motor vehicle designed and licensed for use on the highways, he shall issue to such applicant notice to show cause why such application should not be disallowed, which notice shall state a time and place of hearing upon said notice. If upon such hearing the Commissioner shall find as a fact that such applicant has collected or sought to collect any refund on fuels which have been used in a motor vehicle designed and licensed for use on the highways, he shall disallow the application in its entirety and the applicant shall be required to repay all tax or taxes which have been refunded to him on said application.

(5) Any applicant for a refund may seek administrative review or appeal from the decision of the Commissioner of Revenue under the provisions of G.S. 105-241.2, 105-241.3 and 105-241.4.

(6) The Commissioner of Revenue is hereby authorized and directed, if at any time in his opinion there is reason to doubt the accuracy of the facts set forth in any application for tax refund to refer the matter to any agent of the Department of Revenue, and such person so designated shall make a careful investigation of all the facts and circumstances relating to said application in the use of the motor fuels therein referred to, and shall have a right to have access to the books and records of any retailer or distributor of motor fuel products for the purpose of obtaining the necessary information concerning such matters, and shall make due report thereof to the Commissioner of Revenue.

(7) If any court of last resort shall hold that the provisions for refund herein set out shall render the levying and collecting of the tax hereinbefore provided invalid, it is the intention of the General Assembly that such provisions for refund shall be annulled and the tax shall be levied without any provisions for such refund and that this Article shall be so construed.

Any person making a false application or affidavit for the purpose of securing a refund to which he is not entitled under the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be fined not exceeding five hundred dollars ($500.00) or imprisoned not exceeding two years, in the discretion of the court. (1931, c. 145, s. 24; c. 304; 1933, c. 211; 1937, c. 111; 1941, c. 15; 1943, c. 123; 1955, c. 1350, s. 24; 1957, c. 1236, s. 1; 1961, cc. 480, 668; 1967, c. 699; 1969, c. 600, s. 20; c. 1298, s. 3.)

Editor's Note. — Session Laws 1969, c. 600, s. 20, effective July 1, 1969, substituted "seven cents per gallon for the year ending December 31, 1969, and at the rate of eight cents per gallon for subsequent years ending December 31" for "six cents per gallon" in the opening paragraph. Session Laws 1969, c. 600, s. 23, provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

§ 105-446.1. Refunds of taxes paid by counties and municipalities.—The State Highway Commission, counties, municipal corporations and volunteer or county fire departments shall be entitled to be reimbursed at the rate of eight cents (8¢) per gallon of the tax levied by G.S. 105-434 of the General Statutes upon the filing of a statement with the Commissioner of Revenue, sworn to by the Director of Highways or the mayor, city manager or other municipal officer designated by the governing body of the municipality, or the chairman of the board of county commissioners, or other county officer designated by the board of county commissioners or the president or other duly designated officer or agent of the volunteer or county fire departments, showing the number of gallons of fuel purchased and used by the Highway Commission, the municipality, the county or the volunteer or county fire departments on which the tax levied by G.S. 105-434 of the General Statutes has been paid. All claims for refunds for tax or taxes for motor fuels under the provisions of this section shall be filed with the Commissioner of Revenue on forms to be prescribed by him, on or before the last day of January, April, July and October of each year, and shall cover only the motor fuels so used during the quarterly period immediately preceding the month in which such application is filed. Refunds made pursuant to claims filed after the dates above specified shall be subject to the following late filing penalties: claims filed within 30 days after said dates, twenty-five percent (25%); claims filed after 30 days but within six months after said dates, fifty percent (50%); but refunds claimed after six months following said dates shall be barred. (1957, c. 1226; 1969, c. 600, s. 20; c. 1298, s. 4; 1971, c. 1160.)

Editor's Note. — Session Laws 1969, c. 600, s. 20, effective July 1, 1969, substituted "eight cents (8¢)" for "six cents (6¢)" near the beginning of the section. Session Laws 1969, c. 600, s. 23 provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

Session Laws 1969, c. 1298, s. 4, effective Jan. 1, 1970, deleted "and at such periods only" following "year" in the second sentence and added the third sentence. Session Laws 1969, c. 1298, s. 6, provides that the act shall not have the effect of reviving any claims or applications for tax refunds previously barred.

The 1971 amendment, effective Oct. 1, 1971, in the first sentence, deleted "and" following "counties," inserted "and volunteer or county fire departments," inserted "or the president or other duly designated officer or agent of the volunteer or county fire departments," deleted "or" following "municipality," and inserted "or the volunteer or county fire departments."

Gasoline Tax Refunds to County Hospital. — See opinion of Attorney General to Mr. Leon M. Killian, III, 41 N.C.A.G. 306 (1971).

§ 105-446.2. Wildlife Resources Commission entitled to partial net proceeds of gasoline taxes.—(a) The North Carolina Wildlife Resources Commission shall receive one eighth of one percent (1/8 of 1%) of the net proceeds of the taxes on motor fuels levied under G.S. 105-434 and the same shall be paid in accordance with the accounting periods as set forth under G.S. 105-446(1). As used in this section "net proceeds" shall mean the entire tax collected less one cent (1¢) per gallon nonrebatable tax required to be segregated by Chapter 1250 of the Session Laws of 1949, as amended by Chapter 46 of the Session Laws of 1965.

(b) Payments made to the North Carolina Wildlife Resources Commission under the provisions of this section shall be placed in the special account within the Wildlife Resources Fund, to be held as provided by G.S. 75A-3(c) and subject to the provisions thereof. (1967, c. 1161, s. 1; 1969, c. 1201.)

Editor's Note. — The 1969 amendment deleted "for the periods including July 1, 1967, to July 1, 1969 only" at the end of the first sentence of subsection (a) and deleted the former second sentence, requiring the Commission to submit to the General Assembly requests for additional funds.

§ 105-446.3. Refund of taxes paid on motor fuels used in operation of motor buses transporting fare-paying passengers in a city transit system.—(a) Any person, association, firm or corporation, who shall purchase any motor fuels, as defined in this Article, for the purpose of use, and the same is actually used, in the operation of motor buses transporting fare-paying passengers in connection with a city transit system as hereinafter defined in subsection (b) of this section shall be entitled to be reimbursed at the rate of eight cents (8¢) per gallon of tax levied by this Article upon the filing of an application sworn to by the applicant or his agent with the Commissioner of Revenue showing the number of gallons of motor fuel so purchased and used. All claims for refunds of taxes under the provisions of this section shall be filed with the Commissioner of Revenue on forms to be prescribed by him, on or before the last day of January, April, July and October of each year, and shall cover only the motor fuels so used during the quarterly period immediately preceding the month in which such application is filed. Refunds made pursuant to claims filed after the dates above specified shall be subject to the following late filing penalties: claims filed within 30 days after said dates, twenty-five percent (25%); claims filed after 30 days but within six months after said dates, fifty percent (50%); but refunds claimed after six months following said dates shall be barred.

(b) For the purposes of this section the term "city transit system" means a system of mass public transportation authorized to operate within any municipality or within contiguous municipalities and within a zone adjacent to and commercially a part of such municipality or contiguous municipalities as defined by the North Carolina Utilities Commission under the provisions of G.S. 62-260. Any person, association, firm or corporation, who, in addition to the operation of a city transit system as herein defined, holds a certificate from the North Carolina Utilities Commission for operations outside of the municipal limits and adjacent commercial zones or who conducts exempt operations outside of the municipal limits or adjacent commercial zones shall be entitled to the refund provided by this section only on taxes levied upon motor fuels actually used in the operation of the city transit system. Provided, however, that a city transit system as defined herein shall not include taxicab or limousine operations.

(c) The Commissioner of Revenue shall have authority to issue rules and regulations as to how claims shall be filed and the information that shall be submitted with said claims and the records required to support said claims.

(d) If, upon the filing of such application, the Commissioner of Revenue shall be satisfied that the same is made in good faith and that the motor fuels upon which said tax refund is requested have been or are to be used exclusively for purposes as set forth in said application and for the operation of a city transit system, he shall issue to such applicant a warrant upon the State Treasurer for the tax refund.

(e) If the Commissioner of Revenue shall be satisfied that the applicant for any refund authorized by this section has collected or sought to collect any refund of tax or taxes on fuels not used in the operation of a city transit system, he shall issue to such applicant notice to show cause why such application should not be disallowed, which notice shall state a time and place of hearing upon said notice. If upon such hearing the Commissioner shall find as a fact that such applicant has collected or sought to collect any refund on fuels which have not been used in the operation of a city transit system, he shall disallow the application in its entirety and the applicant shall be required to repay all tax or taxes which have been refunded to him on said application.

(f) Any applicant for a refund may seek administrative review or appeal from the decision of the Commissioner of Revenue under the provisions of G.S. 105-241.2, G.S. 105-241.3 and G.S. 105-241.4.

(g) The Commissioner of Revenue is hereby authorized and directed, if at any time in his opinion there is reason to doubt the accuracy of the facts set forth in any application for tax refund to refer the matter to any agent of the Department of Revenue, and such person so designated shall make a careful investigation of all the facts and circumstances relating to said application in the use of the motor fuels therein referred to, and shall have a right to have access to the books and records of any retailer or distributor of motor fuel products for the purpose of obtaining the necessary information concerning such matters, and shall make due report thereof to the Commissioner of Revenue.

(h) If any court of last resort shall hold that the provisions for refund herein set out shall render the levying and collecting of the tax hereinbefore provided invalid, it is the intention of the General Assembly that such provisions for refund shall be annulled and the tax shall be levied without any provisions for such refund and that this Article shall be so construed.

Any person making a false application or affidavit for the purpose of securing a refund to which he is not entitled under the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be fined not exceeding five hundred dollars ($500.00) or imprisoned not exceeding two years, in the discretion of the court. (1971, c. 1221, s. 1.)

Editor's Note. — Session Laws 1971, c. 1221, s. 3, provides: "This act shall become effective on July 1, 1971, and the first quarterly period for which refunds may be applied for hereunder shall be the months of July, August and September of 1971."

§ **105-447. Reports of carriers.**—Every person, firm or corporation engaged in the business of, or transporting motor fuel, whether common carrier or otherwise, and whether by rail, water, pipe line or over public highways, either in interstate or in intrastate commerce, to points within the State of North Carolina, and every person, firm or corporation transporting motor fuel by whatever manner to a point in the State of North Carolina from any point outside of said State shall be required to keep for a period of two years from the date of each delivery records on forms prescribed by, or satisfactory to, the Commissioner of Revenue of all receipts and deliveries of motor fuel so received or delivered to points within the State of North Carolina, including duplicate original copies of delivery tickets or invoices covering such receipts and deliveries, showing the date of the receipt or delivery, the name and address of the party to whom each delivery is made, and the amount of each delivery; and shall report, under oath, to the Commissioner of Revenue, on forms prescribed by said Commissioner of Revenue, all deliveries of motor fuel so made to points within the State of North Carolina. Such reports shall cover monthly periods, shall be submitted within the first 10 days of each month covering all shipments transported and delivered for the previous month, shall show the name and address of the person to whom the deliveries of motor fuel have actually and in fact been made, the name and address of the originally named consignee if motor fuel has been delivered to any other than the originally named consignee, the point of origin, the point of delivery, the date of delivery, and the number and initials of each tank car, and the number of gallons contained therein if shipped by rail; the name of the boat, barge or vessel, and the number of gallons contained therein, and the consignor and consignee if shipped by water; the license number of each tank truck and the number of gallons contained therein, and the consignor and consignee if transported by motor truck; if delivered by other means the manner in which such delivery is made; and such other additional information relative to shipments of motor fuel as the Commissioner of Revenue may require: Pro-

vided, that the Commissioner of Revenue may modify or suspend the provisions of this section with regard to reports of interstate or intrastate shipments or deliveries upon application of any licensed distributor: Provided, also, that the Commissioner of Revenue shall have full power to require any distributor to make additional reports and to produce for examination duplicate originals of delivery tickets or invoices covering both receipts and deliveries of products as herein provided. The reports herein provided for shall cover specifically gasoline, kerosene, benzine, naphtha, crude oil, or any distillates from crude petroleum. Any person, firm or corporation refusing, failing or neglecting to make such report shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned in the discretion of the court. (1929, c. 230; 1933, c. 137, s. 1.)

§ 105-448. Forwarding of information to other states.—The Commissioner of Revenue of the State of North Carolina shall, upon request duly received from the officials to whom are intrusted the enforcement of the motor fuel tax laws of any other state, forward to such officials any information which he may have in his possession relative to the manufacture, receipt, sale, use, transportation or shipment by any person of motor fuel. (1933, c. 137, s. 1.)

§ 105-449. Exemption of gasoline used in public school transportation; false returns, etc.—(a) Any person, firm or corporation holding a North Carolina State contract for the sale of gasoline to be used in public school transportation in North Carolina shall invoice gasoline so sold and delivered to the county or city boards of education at the prevailing contract price, less the State tax on gasoline. A copy of such invoice showing the board of education to whom the gasoline is delivered, the kind of gasoline sold, the gallons sold, and the contract price per gallon, shall be submitted to the North Carolina Department of Revenue each month, supported with an official purchase order from the board or boards of education, which invoice or invoices and supporting purchase order shall exempt the gasoline purchased by said board or boards of education for use in North Carolina public school transportation from the nine cents (9¢) tax per gallon State gasoline tax.

(b) The Commissioner of Revenue of North Carolina is hereby authorized and directed to accept such invoices and supporting purchase orders, duly notarized, in lieu of the nine cents (9¢) per gallon tax imposed by the laws of North Carolina upon said gasoline: Provided, when any authorized dealer has already paid the State gasoline gallon tax and furnishes the Commissioner of Revenue with proper invoices and supporting purchase orders as required in subsection (a) of this section, then such dealer shall be entitled to a refund by the Commissioner of Revenue of nine cents (9¢) per gallon from the gasoline fund for each gallon so sold and delivered to the county and city boards of education for use in public school transportation in school buses, service trucks, and gasoline delivery wagons used only for school purposes.

(c) It is the intent and purpose of this section to relieve gasoline used in the public school system of North Carolina from the nine cents (9¢) gasoline tax now imposed by the State and thereby to that extent reduce the cost of public school transportation.

(d) The gasoline tax exemption provided by this section shall include gasoline sold for use in automobiles owned by the school boards and furnished to school superintendents to be used only on official business, in public school activities buses, driver training vehicles, bookmobiles belonging to or operated by county libraries and in public school trucks, vehicles and implements used in public school buildings and grounds maintenance and repair as well as gasoline sold for use in school service trucks used to service school buses.

(e) Any person making a false return or affidavit for the purpose of securing a refund to which he is not entitled under the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not exceeding five hundred dollars ($500.00), or imprisoned not exceeding two years, in the discretion of the court. (1941, c. 119; 1949, c. 1250, s. 13; 1959, c. 155; 1969, c. 600, s. 20.)

Editor's Note. — The 1969 amendment, effective July 1, 1969, substituted "nine cents" for "seven cents" in subsections (a), (b) and (c).

Session Laws 1969, c. 600, s. 23 provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

Opinions of Attorney General.— Mr. Fred W. London, N.C. Department of Revenue, 40 N.C.A.G. 835 (1969).

§ **105-449.01. July 1, 1969, inventory.** — Every distributor of gasoline, both at wholesale and at retail, who shall have on hand or in his possession gasoline on which the seven cents (7¢) tax per gallon State gasoline tax has been paid or accrued shall take a true inventory of all such gasoline on hand or in his possession as of 12:01 A.M., July 1, 1969 and shall on or before July 20, 1969 report to the Commissioner of Revenue the amount of such fuels on hand and shall pay to the Commissioner an additional tax of two cents (2¢) per gallon. The report required shall be in such form as may be prescribed by the Commissioner. (1969, c. 600, s. 20.)

Editor's Note. — Session Laws 1969, c. 600, s. 25, makes this section effective July 1, 1969.

Session Laws 1969, c. 600, s. 23 provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

Article 36A.

Special Fuels Tax.

§ **105-449.1. Short title.** — This Article shall be known and may be cited as the "Special Fuels Tax Act." (1955, c. 822, s. 1.)

§ **105-449.2. Definitions.** — The following words, terms and phrases as used in this Article are, for the purposes thereof, hereby defined as follows:

(1) "Commissioner" shall mean the Commissioner of Revenue.

(2) "Motor vehicles" shall mean and include all vehicles, engines, machines or mechanical contrivances which are propelled by internal combustion engines or motors upon which or by which any person or property is or may be transported or drawn upon a public highway.

(3) "Fuel" or "fuels" shall mean and include all combustible gases and liquids, used, purchased or sold for use in an internal combustion engine or motor for the generation of power to propel motor vehicles on the public highways, except such fuels as are subject to the tax imposed by G.S. 105-434.

(4) "Highway" shall mean and include every way or place of whatever nature open to the use of the public for purposes of vehicular travel in this State, including the streets and alleys in towns and cities.

(5) "Person" shall mean and include natural persons and partnerships, firms, associations and corporations.

(6) "Use" shall mean and include, in addition to its original meaning, the receipt of fuel by any person into the fuel supply tank of a motor vehicle or into a receptacle for which fuel is supplied by any person to his own or other motor vehicles.

(7) "User" shall mean and include any person who owns or operates any diesel propelled motor vehicle or vehicles licensed under the motor vehicle laws of this State and who does not maintain storage facilities for fueling such vehicles. All such users shall be licensed hereunder. The licenses provision of this subdivision shall not apply to users whose use of diesel fuel is limited to private passenger vehicles.

(8) "User-seller" means any person who maintains storage facilities in

excess of 100 gallons and stores fuel therein, and who dispenses such fuel into the fuel tanks of, or attached to, motor vehicles and shall include any such person who so dispenses fuel for consumption in such motor vehicles owned, leased or operated by him.

(9) "Supplier" means any person who sells or delivers fuel to a user-seller as herein defined for resale or use; and any person who imports fuel into the State other than in the usual tank or receptacle connected with the engine of the motor vehicle in the operation of which the fuel is to be consumed, and uses the same in a motor vehicle owned or operated by such person.

(10) "Peddler" means any person who neither owns nor operates stationary storage facilities, and who transports fuel from place to place in any vehicle having thereon any tank or other container of more than 100 gallons capacity, and sells or offers to sell fuel and deliver the same from such vehicle to any user-seller or user as herein defined, and such peddler shall be deemed a supplier and as such be subject to all applicable provisions of this Article.

(11) "Liquid" means any substance which is liquid at temperature in excess of 60 degrees F. and a pressure of 14.7 pounds per square inch absolute. (1955, c. 822, s. 1; 1965, c. 1120, s. 1.)

§ 105-449.3. Requirements of licenses. — (a) It shall be unlawful for any person to sell or deliver fuel within this State to a user-seller as herein defined unless such person is the holder of an uncancelled license as a supplier issued by the Commissioner.

(b) It shall be unlawful for any person to maintain storage facilities for fuel and dispense fuel therefrom into any fuel tank attached to a motor vehicle unless such person is the holder of a license as a user-seller issued by the Commissioner.

(c) It shall be unlawful for any peddler to sell or offer for sale any fuel unless he is the holder of an uncancelled supplier's license issued by the Commissioner. (1955, c. 822, s. 1.)

§ 105-449.4. Application for license. — To procure such license every supplier shall file with the Commissioner an application upon oath in such form as the Commissioner may prescribe setting forth the name and address of the supplier and such other information as the Commissioner may require. (1955, c. 822, s. 1.)

§ 105-449.5. Supplier to file bond. — A supplier's license shall not be issued until the applicant has filed with the Commissioner a bond in the approximate sum of three times the average monthly tax due to be paid by such supplier, but the amount of the bond shall in no case be less than five hundred dollars ($500.00) nor more than twenty thousand dollars ($20,000). Such bond shall be in such form and with such surety or sureties as may be required by the Commissioner, conditioned upon making proper reports and paying the tax provided for in this Article, and otherwise complying with the provisions of this Article: Provided, however, that a licensed distributor who has already furnished a bond under the provisions of G.S. 105-433 shall not be required to furnish any additional bond by reason of this section, but the terms of such bond may be altered so as also to include compliance with the provisions of this Article as a condition thereof. The bonds provided for pursuant to this section shall be made payable to the State. (1955, c. 822, s. 1.)

§ 105-449.6. When application may be denied.—In the event that:

(1) Any application for a supplier's license shall be filed by any person whose license shall at any time theretofore have been cancelled for cause by the Commissioner, or

(2) The Commissioner shall be of the opinion that such application is not filed in good faith, or

(3) Such application is filed by some person as a subterfuge for the real person in interest whose license or registration shall theretofore have been cancelled for cause by the Commissioner:

Then and in any of such events the Commissioner after a hearing of which the applicant shall have been given five days' notice in writing and in which the applicant shall have the right to appear in person or by counsel and present testimony, may refuse to issue a license to such person. (1955, c. 822, s. 1.)

§ 105-449.7. Issue of supplier's license. — The application in proper form having been accepted for filing, and the other conditions and requirements of this Article having been complied with, the Commissioner shall issue to such supplier a license and such license shall remain in full force and effect, unless cancelled as provided in this Article. (1955, c. 822, s. 1.)

§ 105-449.8. License not assignable. — The license so issued by the Commissioner shall not be assignable and shall be valid only for the supplier in whose name issued. (1955, c. 822, s. 1.)

§ 105-449.9. License required of user or user-seller; application; termination. — After June 30, 1955, no user or user-seller, as defined in this Article, shall use, sell or deliver fuel unless he has secured a license from the Commissioner. Such license shall be issued upon the furnishing by the applicant of such reasonable information as shall be required by the Commissioner, and shall continue in full force and effect, unless cancelled as provided by this Article. (1955, c. 822, s. 1.)

§ 105-449.10. Records and reports required of user-seller or user.—Each user-seller or user licensed under this Article shall keep such records and make such reports to the Commissioner as shall be prescribed under regulations promulgated by the Commissioner. Such records and reports shall be such as are adequate to show all purchases, sales, deliveries and use of fuel by such seller or user, provided that persons licensed as users shall file such reports quarterly on or before the twenty-fifth day of the month immediately following the end of the quarter. The provision of this section shall not apply to users whose use of diesel fuel is limited to private passenger vehicles. (1955, c. 822, s. 1; 1965, c. 1120, s. 2.)

§ 105-449.11. Display of license.—Suppliers' and user-sellers' licenses so issued shall be displayed conspicuously by the licensee at his principal place of business. Each peddler shall display his license or an official duplicate thereof on each motor vehicle used by him for the sale or delivery of fuel. (1955, c. 822, s. 1.)

§ 105-449.12. Record of licenses. — The Commissioner shall keep and file all applications with an alphabetical index thereof, together with a record of all licensed suppliers and user-sellers. (1955, c. 822, s. 1.)

§ 105-449.13. Commissioner to furnish licensed supplier with list of licensed user-sellers. — The Commissioner shall upon request furnish to each licensed supplier a list showing the name and business address of each licensed user-seller as of the beginning of each fiscal year, and shall thereafter, during such year, supplement such list monthly. (1955, c. 822, s. 1.)

§ 105-449.14. Power of Commissioner to cancel licenses. — If a licensee shall at any time file a false report of any data or information required by this Article, or shall fail, refuse or neglect to file any report as required by this Article, or to pay the full amount of any tax required by this Article, or if a supplier fails to keep accurate records of quantities of fuel received, produced,

refined, manufactured, compounded, sold or used in this State, or if a user-seller fails to maintain accurately any required records, the Commissioner may forthwith cancel his license and notify him in writing of such cancellation by registered mail sent to his last address appearing on the files of the Commissioner.

The Commissioner may cancel any license upon the written request of the licensee. (1955, c. 822, s. 1.)

§ 105-449.15. Discontinuance as a licensed supplier. — Whenever any person ceases to be a supplier within the State by reason of the discontinuance, sale or transfer of the business of such supplier, such supplier shall notify the Commissioner in writing at the time the discontinuance, sale or transfer takes effect. Such notice shall give the date of discontinuance and, in the event of a sale or transfer of the business, the date thereof and the name and address of the purchaser or transferee thereof. All taxes for which such supplier has become liable under this Article, although not yet due and payable under other provisions of this Article, shall, notwithstanding such provisions, become due and payable concurrently with such discontinuance, sale or transfer and any such supplier shall make a report and pay all such taxes, interest and penalties and surrender to the Commissioner the license certificate theretofore issued to such supplier by the Commissioner.

Unless the notice above provided for shall have been given to the Commissioner as above provided, such purchaser or transferee shall be liable to the State for the amount of all taxes, penalties and interest under this Article accrued against any such supplier so selling or transferring his business on the date of such sale or transfer, but only to the extent of the value of the property thereby acquired from such supplier. (1955, c. 822, s. 1.)

§ 105-449.16. Levy of tax; purposes.—A tax at the rate of nine cents (9¢) per gallon is hereby imposed upon all fuel sold or delivered by any supplier to any licensed user-seller, or used by any such supplier in any motor vehicle owned, leased or operated by him, or delivered by such supplier directly into the fuel supply tank of a motor vehicle, or imported by a user-seller into, or acquired tax free by a user-seller or user in this State for resale or use for the propulsion of a motor vehicle. For the purpose of this section, "imported" shall not include fuels brought into this State in the usual tank or receptacle connected with the engine of a motor vehicle. The primary purposes of this levy and this Article are to provide a more efficient and effective method of collecting the tax now imposed and collected pursuant to G.S. 105-435, by providing for the collection of said tax from the supplier instead of the user. The tax herein provided for is levied for the same purposes as the tax provided for in G.S. 105-435. It is not intended that the tax collected pursuant to this Article shall be in addition to that provided in G.S. 105-435, but the payment of the tax as provided by this Article shall be deemed conclusively to constitute a compliance with the provisions of G.S. 105-435. The nine cents (9¢) per gallon tax, hereinabove provided for, shall be subject to the provisions of § 13 of Chapter 1250 of the Session Laws of 1949, relating to G.S. 105-435, in that one cent (1¢) out of every said nine cents (9¢) tax per gallon shall be applied exclusively to the payment of the principal of and the interest on the two hundred million dollars ($200,000,000) State of North Carolina Secondary Road Bonds therein provided for and as further provided in said Chapter 1250 of the Session Laws of 1949. (1955, c. 822, s. 1; 1969, c. 600, s. 21.)

Editor's Note. — The 1969 amendment, effective July 1, 1969, substituted "nine cents (9¢)" for "seven cents (7¢)" throughout the section.

Session Laws 1969, c. 600, s. 23 provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

§ 105-449.17. Certain exempt sales. — Sales of fuels to a user-seller shall

be exempt from the tax levied under the provisions of this Article when such user-seller purchases said fuel for nonhighway uses or for sale for nonhighway use and maintains storage facilities for such fuel separate and apart from facilities servicing motor vehicles, providing such storage facilities are plainly marked in such manner as the Commissioner may prescribe to indicate that nontaxpaid fuel is contained therein. Suppliers shall make reports of such sales, in such form as the Commissioner may require, each month on monthly tax report forms. Each user-seller shall maintain such records as the Commissioner may prescribe of all nontaxpaid fuel purchased pursuant to this section. All records of nontaxable sales and purchases made pursuant to this section shall be subject to audit by deputies, employees or other agents of the Commissioner. (1955, c. 822, s. 1.)

§ 105-449.18. Liability of unlicensed person for tax on nontaxpaid fuels sold or delivered to others than licensees. — Any person who shall, while not licensed under this Article, deliver to persons or firms other than licensees under this Article, any special fuels upon which the tax due hereunder has not been paid and which such person knows, or reasonably should know, is to be used or sold for the purpose of propelling motor vehicles on the public highways shall be liable for the tax imposed by this Article. (1955, c. 822, s. 1.)

§ 105-449.19. Tax reports; computation and payment of tax. — On or before the twenty-fifth day of each calendar month, each supplier of liquid fuel shall render to the Commissioner a statement on forms prepared and furnished by the Commissioner, which shall show the quantity of fuel on hand on the first and last days of the preceding calendar month, the quantity received during the month and the quantity sold to user-sellers; and each supplier of fuels which are not liquid shall keep such records and make such reports of inventory as the Commissioner shall by regulation prescribe in order to show accurately the quantity of such fuel used by such supplier or sold to user-sellers and pay a tax thereon which as calculated by the Commissioner, would be equivalent to the nine cents (9¢) per gallon tax levied on liquid fuels. Each such supplier shall at the time of rendering such report pay to the Commissioner the tax or taxes herein levied during the preceding calendar month. (1955, c. 822, s. 1; 1969, c. 600, s. 21.)

Editor's Note. — The 1969 amendment, effective July 1, 1969, substituted "nine cents (9¢)" for "seven cents (7¢)" near the end of the first sentence.

Session Laws 1969, c. 600, s. 23 provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

§ 105-449.20. When Commissioner may estimate fuel sold, delivered or used. — Whenever any person shall neglect or refuse to make and file any report for any calendar month as required by this Article or shall file an incorrect or fraudulent report, the Commissioner shall determine, from any information obtainable, the number of gallons of fuel with respect to which the person has incurred liability under the special fuels tax laws of the State. In all cases where a user-seller actually sells or uses an amount in addition to that reported to the Commissioner as having been purchased from a supplier licensed under this Article proof of such additional sales or use shall constitute prima facie evidence that all fuel in excess of that so reported was acquired tax-free. (1955, c. 822, s. 1; 1967, c. 1110, s. 14.)

§ 105-449.21. Report of purchases and payment of tax by user-seller. — On or before the twenty-fifth day of each calendar month, each user-seller not otherwise licensed as a supplier shall render to the Commissioner a statement on forms furnished by the Commissioner, which shall be signed by the user-seller. The statement shall show the quantity of fuel on hand at the beginning of the month, the quantity on hand at the end of the month, the quantity sold or used and each and every purchase made by the user-seller

during the preceding calendar month. Each purchase shall be specifically noted on the statement and the statement shall show the name and address of the supplier and the quantity and date of each purchase. Each user-seller shall at the time of rendering such statement pay to the Commissioner the tax or taxes for the preceding calendar month which may be due because of fuel imported or acquired tax-free in any manner whatsoever. (1955, c. 822, s. 1; 1967, c. 1110, s. 14.)

§ 105-449.22. Lease operations. — A lessee of a motor vehicle, and not the lessor thereof, shall make such reports and be liable for and pay such taxes as may become due under this Article with respect to all operations by a lessee pursuant to any lease of a motor vehicle. (1955, c. 822, s. 1.)

§ 105-449.23. Penalty for failure to file report on time. — When any user-seller or user shall fail to file a report within the time prescribed by this Article, he shall be subject to a penalty of not more than fifty dollars ($50.00) for the first offense and not more than one hundred dollars ($100.00) for any subsequent offense, and any penalty pursuant to this section shall be assessed and collected by the Commissioner in the same manner as any tax provided for in this Article and shall be subject to all other applicable provisions relating to the assessment and collection of taxes pursuant to this Article. (1955, c. 822, s. 1.)

§ 105-449.24. Exemptions, rebates, and refunds.—The provisions of G.S. 105-439, G.S. 105-446.1, G.S. 105-446.3 and G.S. 105-449 relating to exemptions from, and rebates and refunds of tax levied on gasoline shall also apply to the taxes levied by this Article on special fuels. (1967, c. 1110, s. 15; 1971, c. 1221, s. 2.)

Editor's Note. — The 1971 amendment inserted "G.S. 105-446.3."

Session Laws 1971, c. 1221, s. 3, provides: "This act shall become effective on July 1, 1971, and the first quarterly period for which refunds may be applied for hereunder shall be the months of July, August and September of 1971."

A former § 105-449.24 was enacted by Session Laws 1955, c. 822, and repealed by Session Laws 1963, c. 1169.

§ 105-449.25. Use of metered pumps by user-sellers. — Each user-seller shall dispense all liquid fuel sold by him to others from metered pumps which indicate the total amount of fuel measured through such pumps. Each such pump shall have marked thereon the words "Diesel Fuel"; or, if the fuel sold is not Diesel fuel, such other word or words descriptive of the type of fuel dispensed through such pump shall be prescribed by regulations promulgated by the Commissioner. (1955, c. 822, s. 1.)

§ 105-449.26. Invoices or delivery tickets. — (a) Each sale of liquid fuel by a user-seller shall be evidenced by an invoice or delivery ticket with the name and address of the user-seller printed or stamped thereon and showing the name and address of the purchaser, date of purchase, number of gallons, price per gallon, tax per gallon, and total amount. One copy of such invoice shall be delivered to the purchaser at the time of sale, and a copy thereof shall be retained by the user-seller and preserved as other records are required to be preserved under this Article.

(b) Not more than one original copy of any invoice for a single sale of fuel shall be prepared by any person. If an additional copy is required at any time, such copy shall be plainly marked "Duplicate," and the number of the original ticket or invoice shall be indicated thereon. (1955, c. 822, s. 1.)

§ 105-449.27. Article 9 of Revenue Act made applicable. — All the provisions of Article 9 of Chapter 105 of the General Statutes, relating to general administration, penalties and remedies pursuant to the State Revenue Act, shall insofar as practicable, and except when in a direct conflict with the

provisions of this Article, be applicable with respect to this Article. (1955, c. 822, s. 1.)

§ 105-449.28. Retention of records by licensees. — Each licensee shall maintain and keep for a period of two years such record or records of fuel received, produced, manufactured, refined, compounded, sold or used by such licensee together with invoices, bills of lading, and also such other pertinent records and papers as may reasonably be required by the Commissioner for the administration of this Article. (1955, c. 822, s. 1.)

§ 105-449.29. Inspection of records, etc. — The Commissioner or any deputy, employee or agent authorized by him may examine, during the usual business hours of the day, records, books, papers, storage tanks and any other equipment of any licensee, purchaser, refiner, fuel dealer or distributor, or common carrier pertaining to the quantity of fuel received, produced, manufactured, refined, compounded, used, sold, shipped or delivered, as the case may be, to verify the truth and accuracy of any statement, report or return or to ascertain whether the tax imposed by this Article has been paid. (1955, c. 822, s. 1.)

§ 105-449.30. Refund for nonhighway use. — Any person who shall purchase fuel and pay the tax thereon pursuant to this Article and use the same for purposes other than to propel vehicles operated or intended to be operated on the highway irrespective of whether originally purchased for such nonhighway use or not, shall, upon making application therefor as herein provided, be reimbursed at the rate of seven cents (7¢) per gallon for the year ending December 31, 1969, and at the rate of eight cents (8¢) per gallon for subsequent years ending December 31. Such refund shall be paid only to persons who secure refund permits and otherwise comply insofar as practicable with the provisions of G.S. 105-446, relating to refunds, as modified by regulations of the Commissioner. (1955, c. 822, s. 1; 1963, c. 1169, s. 5; 1969, c. 600, s. 21.)

Editor's Note. — The 1969 amendment, effective July 1, 1969, substituted "seven cents (7¢) per gallon for the year ending December 31, 1969, and at the rate of eight cents (8¢) per gallon for subsequent years ending December 31" for "six cents (6¢) per gallon" at the end of the first sentence.

Session Laws 1969, c. 600, s. 23 provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

§ 105-449.31. Refund where taxpaid fuels transported to another state for sale or use. — Any person, firm or corporation who purchases special fuels upon which the special fuels tax imposed by this Article has been paid and who subsequently exports the same to another state, for sale or use without this State and delivers the same without this State shall be entitled to a refund of the tax paid upon presentation to the Commissioner of an application for a refund setting forth the fact that such special fuels were transferred out of this State for sale or use, together with such other information as the Commissioner may require. For the purposes of this section, "exports" means transporting fuel out of this State in a cargo tank, tank car, barge, or barrel and does not include transporting fuel in any tank connected with or attached to the engine of a motor vehicle. (1955, c. 822, s. 1.)

§ 105-449.32. Rules and regulations; forms. — The Commissioner shall promulgate such reasonable rules and regulations and shall prescribe such forms as shall be necessary to effectuate and enforce the purposes of this Article. (1955, c. 822, s. 1.)

§ 105-449.33. Equipment of vehicle in which liquid fuel transported for sale or delivery. — No vehicle having attached thereto a tank in which liquid

fuel is transported for sale or delivery shall be equipped with any connection between the tank in which such fuel is transported for sale or delivery and the motor or fuel tank of the vehicle through which fuel may be supplied for consumption in the motor thereof. (1955, c. 822, s. 1.)

§ 105-449.34. Acts and omissions declared to be misdemeanors; penalties. — A person shall be guilty of a misdemeanor if he wilfully violates any of the provisions of this Article, a penalty for which is not otherwise provided, or if he shall:

(1) Wilfully fail or refuse to pay the tax imposed by this Article, or
(2) Engage in business in this State as a supplier or user-seller without being the holder of an uncancelled license to engage in such business, or
(3) Wilfully fail to make any of the reports required by this Article, or
(4) Make any false statement in any application, report or statement required by this Article, or
(5) Refuse to permit the Commissioner or any deputy to examine records as provided by this Article, or
(6) Fail to keep proper records of quantities of fuel received, produced, refined, manufactured, compounded, sold, used or delivered in this State as required by this Article, or
(7) Make any false statement on any delivery ticket or invoice as to the quantity of fuel delivered, sold or used; or make any false statement in connection with a report, or an application for the refund of any moneys or taxes provided in this Article. (1955, c. 822, s. 1.)

§ 105-449.35. Exchange of information among the states. — The Commissioner, may, in his discretion, upon request duly received from the officials to whom are entrusted the enforcement of the use fuel tax laws of any other state, forward to such officials any information which the Commissioner may have in his possession relative to the production, manufacture, refining, compounding, receipt, sale, use, transportation or shipment by any person of such fuel. (1955, c. 822, s. 1.)

§ 105-449.36. July 1, 1969, inventory. — Every supplier of special fuels, and every user-seller who is a retail distributor of special fuels who shall have on hand or in his possession special fuels on which the seven cents (7¢) tax has been paid or has accrued shall take a true inventory of all such special fuels on hand or in his possession as of 12:01 A.M., July 1, 1969 and shall on or before July 20, 1969 report to the Commissioner of Revenue the amount of such fuels on hand and shall pay to the Commissioner an additional tax of two cents (2¢) per gallon. The report required shall be in such form as may be prescribed by the Commissioner. (1955, c. 822, s. 1; 1969, c. 600, s. 21.)

Editor's Note. — The 1969 amendment, effective July 1, 1969, rewrote this section.

Session Laws 1969, c. 600, s. 23, provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

ARTICLE 36B.

Tax on Carriers Using Fuel Purchased Outside State.

§ 105-449.37. Definitions. — Whenever used in this Article, the word "Commissioner" means Commissioner of Revenue except when the Commissioner of Motor Vehicles is specifically designated. Whenever used in this Article, the term "motor carrier" means every person, firm or corporation who operates or causes to be operated on any highway in this State any passenger vehicle, other than public school buses, that has seats for more than seven passengers in addition to the driver, or any road tractor, or any tractor truck, or any truck having more than two axles.

The word "operations," when applied to a motor carrier who transports passengers or property for compensation, means operations of all vehicles, whether loaded or empty, regardless of size or kind, for compensation.

The word "operations," when applied to a motor carrier who transports property not for compensation, means operations of all road tractors, tractor trucks, and trucks having more than two axles, whether loaded or empty, for the transportation of property into or out of or through this State.

Any motor carrier who operates or causes to be operated any such passenger vehicle, or any road tractor, or any tractor truck, or any truck having more than two axles on one or more days of any quarter of the year, as hereinafter described, is liable for the tax imposed by this Article for that quarter and is entitled to the credits allowed for that quarter. (1955, c. 823, s. 1.)

§ 105-449.38. Tax levied. — A road tax for the privilege of using the streets and highways of this State is hereby imposed upon every motor carrier, which tax shall be equivalent to nine cents (9¢) per gallon calculated on the amount of gasoline or other motor fuel used by such motor carrier in its operations within this State. Except as credit for certain taxes as hereinafter provided for in this Article, taxes imposed on motor carriers by this Article are in addition to any taxes imposed on such carriers by any other provisions of law. The tax herein levied is for the same purposes as the tax imposed under the provisions of G.S. 105-434. (1955, c. 823, s. 2; 1969, c. 600, s. 22.)

Editor's Note. — The 1969 amendment increased the tax from seven cents to nine cents per gallon.

Session Laws 1969, c. 1056, s. 2, amended Session Laws 1969, c. 600, s. 25, so as to make the 1969 amendment to this section effective July 1, 1969.

Session Laws 1969, c. 600, s. 23, provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

§ 105-449.39. Credit for payment of motor fuel tax. — Every motor carrier subject to the tax hereby imposed shall be entitled to a credit on such tax equivalent to nine cents (9¢) per gallon on all gasoline or other motor fuels purchased, on and after July 1, 1969, by such carrier in this State for use in their operations either within or without this State and upon which gasoline or other motor fuels the tax imposed by the laws of this State have been paid by such carrier. Carriers who have inventory on hand as of 12:01 A.M., July 1, 1969, on which the seven cents (7¢) tax has been paid shall take credit for seven cents (7¢) per gallon on all such gasoline and other motor fuels when filing tax report required under G.S. 105-449.45. Evidence of the payment of such tax in such form as may be required by, or is satisfactory to, the Commissioner shall be furnished by each such carrier claiming the credit herein allowed. When the amount of the credit herein provided to which any motor carrier is entitled for any quarter exceeds the amount of the tax for which such carrier is liable for the same quarter, such excess may under regulations of the Commissioner be allowed as a credit on the tax for which such carrier would be otherwise liable for another quarter or quarters; or upon application within 180 days from the end of any quarter, duly verified and presented, in accordance with regulations promulgated by the Commissioner and supported by such evidence as may be satisfactory to the Commissioner, such excess may be refunded to said motor carrier.

The Commissioner shall not allow such refund except after an audit of the applicant's records and shall audit the records of an applicant at least once a year. (1955, c. 823, s. 3; 1969, c. 600, s. 22; c. 1098.)

Editor's Note. — The first 1969 amendment substituted "nine cents (9¢)" for "seven cents (7¢)" and inserted "on and after July 1, 1969" in the first sentence and added the second sentence.

The second 1969 amendment substituted "to

said motor carrier" at the end of the first paragraph for a provision requiring that the applicant has paid to another state a tax on motor fuel purchased in North Carolina, and limiting the amount of the refund.

Session Laws 1969, c. 1056, s. 2, amended Session Laws 1969, c. 600, s. 25, so as to make the first 1969 amendment to this section effective July 1, 1969.

Session Laws 1969, c. 600, s. 23, provides: "This act shall not affect the liability of any taxpayer arising prior to the effective date of the applicable section hereof."

§ 105-449.40. Refunds to motor carriers who give bond.—A motor carrier may give a bond in an amount no less than five hundred dollars ($500.00) nor more than ten thousand dollars ($10,000) payable to the State and conditioned that the motor carrier will pay all taxes due and to become due under this Article. So long as the bond remains in force the Commissioner may order refunds to the motor carrier in the amounts appearing to be due on applications duly filed by the carrier under G.S. 105-449.39 without first auditing the records of the carrier. Such bond shall be in such form and with such surety or sureties as may be required by the Commissioner. (1955, c. 823, s. 4; 1967, c. 1110, s. 15.)

§ 105-449.41. Penalty for false statements.—Any person who wilfully and knowingly makes a false statement orally, or in writing, or in the form of a receipt for the sale of motor fuel, for the purpose of obtaining or attempting to obtain or to assist any other person, partnership or corporation to obtain or attempt to obtain a credit or refund or reduction of liability for taxes under this Article shall be guilty of a misdemeanor. (1955, c. 823, s. 5.)

§ 105-449.42. Payment of tax.—For the purposes of making payment of taxes pursuant to this Article and making reports pursuant to this Article, the year is divided into four quarters of three consecutive months each, and the first quarter shall consist of the months of January, February and March. The tax herein imposed shall be paid by each motor carrier to the Commissioner on or before the twentieth day of the month immediately following the quarter with respect to which tax liability hereunder accrues and shall be calculated upon the amount of gasoline or other motor fuel used in its operations within this State by each such carrier during the quarter ending with the last day of the preceding month. A lessee of a motor vehicle, and not the lessor thereof, shall make such reports and be liable for and pay such taxes as may become due under this Article with respect to all operations by a lessee pursuant to any lease of a motor vehicle. (1955, c. 823, s. 6.)

§ 105-449.43. Taxes to be paid into State Highway Fund.—All taxes collected pursuant to the provisions of this Article shall be paid into the State Highway and Public Works Fund. (1955, 823, s. 7.)

Editor's Note. — The correct name of the fund mentioned in this section is State Highway Fund. See §§ 105-436, 136-16.

§ 105-449.44. How amount of fuel used in State ascertained.—The amount of gasoline or other motor fuel used in the operations of any motor carrier within this State shall be such proportion of the total amount of such gasoline or other motor fuel used in its entire operations within and without this State as the total number of miles traveled within this State bears to the total number of miles traveled within and without this State. (1955, c. 823, s. 8.)

§ 105-449.45. Reports of carriers.—Every motor carrier subject to the tax imposed by this Article shall on or before the twentieth day of April, July, October and January of every year make to the Commissioner such reports of its operations during the quarter of the year ending the last day of the preceding month as the Commissioner may require and such other reports

from time to time as the Commissioner may deem necessary. When any person required to file a report as provided by this Article fails to file such report within the time prescribed by this Article, he shall be subject to a penalty of not more than fifty dollars ($50.00) for the first failure, and not more than one hundred dollars ($100.00) for any subsequent failure, and any penalty pursuant to this section shall be assessed and collected by the Commissioner in the same manner as is provided in this Article with respect to any tax deficiency, and shall be subject to all other applicable provisions relating to the assessment and collection of taxes pursuant to this Article. However, motor carriers are not required to make any reports with respect to vehicles used exclusively in intrastate operations in this State except as the Commissioner may specifically from time to time require, but this is not to be construed to eliminate the requirements as to registration and identification markers with respect to all such vehicles as provided in G.S. 105-449.47. (1955, c. 823, s. 9.)

§ **105-449.46. Inspection of books and records.**—The Commissioner and his authorized agents and representatives shall have the right at any reasonable time to inspect the books and records of any motor carrier subject to the tax imposed by this Article. (1955, c. 823, s. 10.)

§ **105-449.47. Registration cards and vehicle identifications.**—No motor carrier shall operate or cause to be operated in this State any vehicle listed or described in G.S. 105-449.37, and not excluded therein from the scope of this Article, unless and until he has secured from the Commissioner a registration card and an identification marker for such vehicle. The registration card shall be of such form and design as the Commissioner may prescribe. The registration card shall be carried in the vehicle for which it was issued at all times when the vehicle is in this State. The identification marker shall be in such form and of such size as the Commissioner may prescribe, and such marker may be either a plate, sticker, or such other form of identification marker as the Commissioner may prescribe. Such identification marker shall be attached or affixed to the vehicle in the place and manner prescribed by the Commissioner so that the same is clearly displayed at all times. Each identification marker for a particular vehicle shall bear a number which number shall be the same as that appearing on the registration card for the same vehicle. The registration cards and markers herein provided for shall be issued on an annual basis as of January one each year and shall be valid through the next succeeding December 31. However, the Commissioner, in his discretion, may authorize renewal of registration cards and identification markers without the necessity of issuing new cards and markers. All identification markers issued by the Commissioner shall remain the property of the State. (1955, c. 823, s. 11.)

§ **105-449.48. Fees.**—For issuing each registration card, a fee of one dollar ($1.00) shall be paid to the Commissioner and no registration card shall be issued unless the applicant pays such fee upon making application for the registration card. Such fees shall be paid into the State Highway and Public Works Fund. (1955, 823, s. 12.)

Editor's Note. — The correct name of the fund mentioned in this section is State Highway Fund. See §§ 105-436, 136-16.

§ **105-449.49. Temporary emergency operation.**—In an emergency, the Commissioner, by letter or telegram, may authorize a vehicle to be operated without a registration card or identification marker for not more than 10 days. (1955, c. 823, s. 13.)

§ **105-449.50. Application blanks.**—The Commissioner shall prepare forms to be used in making applications in accordance with this Article and the

applicant shall furnish all information required by such forms. (1955, c. 823, s. 14.)

§ 105-449.51. Violations declared to be misdemeanors.—Any person who operates or causes to be operated on any highway in this State any motor vehicle that does not carry the registration card that this Article requires it to carry, or any motor vehicle that does not display in such manner as is prescribed by the Commissioner the identification marker that this Article requires to be displayed, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than ten dollars ($10.00) nor more than two hundred dollars ($200.00). Each day's operation in violation of any provision of this section shall constitute a separate offense. (1955, c. 823, s. 15.)

§ 105-449.52. Violators to pay penalty and furnish bond.—When any person is discovered in this State operating a vehicle in violation of the provisions of this Article, it shall be unlawful for anyone thereafter to operate said vehicle on the streets or highways of this State, except to remove it from the street or highway for purposes of parking or storing said vehicle, until he shall pay to the Department of Revenue a penalty of twenty-five dollars ($25.00). Such penalty may be paid to an agent of the Department of Motor Vehicles. All penalties received by the Department of Revenue under this section shall be paid into the Highway Fund. Any person denying his liability for such penalty may pay the same under protest. He may apply to the Department of Revenue for a hearing, and said hearing shall be granted before a duly designated employee or agent of the Department within 30 days after receipt of the request for such hearing. If after said hearing the Department determines that the person was not liable for the penalty, the amount collected shall be refunded to him. If after said hearing the Department determines that the person was liable for said penalty, the person paying the penalty may bring an action in the Superior Court of Wake County against the Commissioner of Revenue for refund of the penalty. No restraining order or injunction shall issue from any court of the State to restrain or enjoin the collection of the penalty or to permit the operation of said vehicle without payment of the penalty prescribed herein.

In addition, the Commissioner may, if he deems it desirable or necessary to secure compliance with the provisions of this Article, require the furnishing of a bond to the Commissioner in the amount of two hundred dollars ($200.00), in such form and with such surety or sureties as he may prescribe, conditioned on a proper registration card and identification marker being applied for within 10 days and conditioned on the payment of any taxes found to be due pursuant to this Article. In cases where the Commissioner shall require such bond, it shall be unlawful for anyone thereafter to operate said vehicle on the streets or highways of this State, except to remove it from the street or highway for purposes of parking or storing said vehicle, unless and until said bond is furnished.

Whenever the Commissioner is required to exercise his discretion under the provisions of this section, such discretion may be exercised by him or by a duly designated agent or employee of the Department of Motor Vehicles or the Department of Revenue. (1955, c. 823, s. 16; 1957, c. 948.)

§ 105-449.53: Repealed by Session Laws 1963, c. 1169, s. 6, effective July 1, 1963.

§ 105-449.54. Commissioner of Motor Vehicles made process agent of nonresident motor carriers.—The acceptance by a nonresident motor carrier of the rights and privileges conferred by the laws now or hereafter in force in this State permitting the operation of motor vehicles, as evidenced by the

operation of a motor vehicle by such nonresident, either personally or through an agent or employee, on the public highways of this State, or the operation by such nonresident, either personally or through an agent or employee, of a motor vehicle on the public highways of this State other than as so permitted or regulated, shall be deemed equivalent to the appointment by such nonresident motor carrier of the Commissioner of Motor Vehicles, or his successor in office, to be his true and lawful attorney and the attorney of his executor or administrator, upon whom may be served all summonses or other lawful process or notice in any action, assessment proceeding or other proceeding against him or his executor or administrator, arising out of or by reason of any provisions of this Article relating to such vehicle or relating to the liability for tax with respect to operation of such vehicle on the highways of this State. Said acceptance or operation shall be a signification by such nonresident motor carrier of his agreement that any such process against or notice to him or his executor or administrator shall be of the same legal force and validity as if served on him personally, or on his executor or administrator. All of the provisions of G.S. 1-105 following the first paragraph thereof shall be applicable with respect to the service of process or notice pursuant to this section. (1955, c. 823, s. 18.)

§ 105-449.55. Commissioner of Motor Vehicles to aid in enforcement of Article.—The Commissioner of Motor Vehicles is hereby authorized and directed to utilize the State Highway Patrol, uniformed officers assigned to the various permanent weighing stations of the Department of Motor Vehicles, and such other personnel of the Department of Motor Vehicles as he may deem wise, to assist in enforcing the provisions of this Article. (1955, c. 823, s. 19.)

§ 105-449.56. Enforcement powers of weigh station officers of Motor Vehicle Department.—The uniformed officers assigned to the various permanent weighing stations of the Department of Motor Vehicles shall, in addition to the powers set out in G.S. 20-183.10, have the powers of peace officers, including the power of making arrests, serving process, and appearing in court, in all matters and things relating to this Article and the administration and enforcement thereof. (1955, c. 823, s. 20.)

SUBCHAPTER VI. TAX RESEARCH.

ARTICLE 37.

Department of Tax Research.

§ 105-450. Provision for Department of Tax Research.—The Department of Tax Research is hereby declared to be a separate and independent department of the State government. (1941, c. 327, s. 1; 1953, c. 1125, s. 1.)

Cross References.—As to Director of Department of Tax Research being an ex officio member of State Board of Assessment, see § 105-288. As to Director of Department of Tax Research as an ex officio member of the Tax Review Board, see § 105-269.2.

Editor's Note. — For comment on this Article, see 19 N.C.L. Rev. 443.

State Government Reorganization. — The Department of Tax Research was transferred to the Department of Revenue by § 143A-189, enacted by Session Laws 1971, c. 864.

§ 105-451. Appointment of Director; salary.—When so designated the Department shall be directed by an officer to be designated as the Director of the Department of Tax Research, who shall be appointed by and responsible to the Governor, and shall serve at the will of the Governor. The Director shall be paid an annual salary to be fixed by the Governor with the approval of the Advisory Budget Commission, payable in monthly installments, and shall likewise be allowed his traveling expenses when away from Raleigh on official business. (1941, c. 327, s. 2.)

§ 105-452. Clerical assistants and office equipment.—The Director is authorized to employ such additional clerical assistants and to obtain such additional office equipment as may be approved by the Governor and the Advisory Budget Commission. (1941, c. 327, s. 3.)

§ 105-453. Study of taxation; data for Governor and General Assembly; reports from officials, boards and agencies; examination of persons, papers, etc.—It shall be the duty of the Director to make a statistical analysis by groups and by counties of receipts under each Article of the Revenue Act, and to make a thorough study of the subject of taxation as it relates to taxation within and by the State of North Carolina, including cities, counties, and subdivisions, their exercise and power of taxation; and to make a study of the taxation in other states, including the subjects of listing property for taxation, the classification of property for taxation, exemption, and tax collections and tax collecting, and he shall have the power and authority to make a comparative study of the subject of taxation in all its phases, including the relation between State taxation and federal taxation, and said Director shall assemble, classify and digest for practical use all available data on the subject of taxation, to the end that the same may be submitted to the Governor and General Assembly and may also be available for all citizens and officials of the State who are interested therein.

To the end that the Director of the Department of Tax Research may properly discharge the duties placed upon him by law, he is hereby accorded the following powers:

(1) He shall have authority to require from the Commissioner of Revenue, the Tax Review Board, other State officials, boards, and agencies, and from county tax supervisors, municipal clerks, and other county and municipal officers, on forms prepared and prescribed by the said Director, such annual and other reports as shall enable the Director to ascertain such information as he may require, to the end that he may have full, complete, and accurate statistical information as to the practical operation of the tax and revenue laws of the State.

(2) He shall have the same authority as is given the State Board of Assessment in G.S. 105-276 to examine persons, papers, and records. (1941, c. 327, s. 4; 1955, c. 1350, s. 12.)

§ 105-454. Purpose of creation of Department.—The creation of the Department of Tax Research is for the purpose of securing for the public and the General Assembly, as well as for the Executive Department of the State, at a minimum cost, all such information that the public and the General Assembly and the Executive Department should have relative to tax matters, including methods and systems of taxation in other states, to the end that the Executive Department and the General Assembly in dealing with matters of revenue and taxation may have such information and tax data available for consideration. (1941, c. 327, s. 5.)

§ 105-455. Submission of proposed amendments and information to Advisory Budget Commission; continuing study of economic conditions.—The Director of the Department of Tax Research shall prepare and submit to the Advisory Budget Commission such amendments to the Revenue and Machinery Acts as the survey made by the Director indicates should be made, for their consideration in repairing amendatory Revenue and Machinery Acts for the General Assembly.

The Advisory Budget Commission is hereby authorized, empowered and directed to call upon the Director for such amendments and such recommendations as the Director shall make with respect to any needed changes in the Revenue and Machinery Acts. The Advisory Budget Commission

is authorized, empowered and directed to consider such a report and shall make to the next session of the General Assembly a report on its findings with respect to such recommendations as it shall see fit to make and shall also report to the General Assembly the content of the report filed with it by the Department of Tax Research.

It shall be the duty of the Director of the Department of Tax Research to make a continuing study of economic conditions, and to evaluate the effect of these conditions on the tax bases and prospective collections therefrom. The Director shall submit estimates of revenue to the Advisory Budget Commission for its information. (1941, c. 327, s. 7; 1953, c. 1125, s. 2.)

§ **105-456. Biennial report.**—The Director of the Department of Tax Research shall make and publish 2,000 copies of a biennial report of such scope as may be approved by the Governor, which shall include recommendations and a digest of the most important factual statistics of State and local taxation. (1941, c. 327, s. 8; 1955, c. 980; c. 1350, s. 13.)

§ **105-457. Expenses of Department of Tax Research.**—All expenses of the Department of Tax Research, except the appropriation for the statistical and research unit and such allotments as may be made by the Governor from the Contingency and Emergency Fund, shall be borne by the State Department of Revenue and all accounts kept by, and vouchers issued by, the accounting division of the Department of Revenue. (1941, c. 327, s. 9.)

SUBCHAPTER VII. PAYMENTS RECEIVED FROM TENNESSEE VALLEY AUTHORITY IN LIEU OF TAXES.

ARTICLE 38.

Equitable Distribution between Local Governments.

§ **105-458. Apportionment of payments in lieu of taxes between local units.**—The payments received by the State and local governments from the Tennessee Valley Authority in lieu of taxes under section 13 of the Act of Congress creating it, and as amended, shall be apportioned between the local governments in which the property is owned or an operation is carried on, on the basis of the percentage of loss of taxes to each, determined as hereinafter provided: Provided, however, that the minimum annual payment to any local government from said fund, including the amounts paid direct to said local government by the Authority, shall not be less than the amount of annual actual tax loss to such local government based upon the two-year average on said property next prior to it being taken over by the Authority. (1941, c. 85, s. 1; 1959, c. 1060.)

§ **105-459. Determination of amount of taxes lost by virtue of T.V.A. operation of property; proration of funds.**—The State Board of Assessment shall determine each year, on the basis of current tax laws, the total taxes that would be due to both the State of North Carolina and the local governments in the same manner as if the property owned and/or operated by the Authority were owned and/or operated by a privately owned public utility: Provided, however, in making said calculations the State Board of Assessment shall use the tax rate fixed by the local government unit and taxing district involved for the tax year next preceding such calculations. The State Board of Assessment and the Treasurer of the State of North Carolina shall then prorate the funds received from the Authority by the State and local governments between the local governments upon the basis of the foregoing calculations. (1941, c. 85, s. 2; 1959, c. 1060.)

§ **105-460. Distribution of funds by State Treasurer.**—The Treasurer of the State of North Carolina shall then ascertain the payments to be made to

the local governments upon the basis of the provisions of G.S. 105-459 and he is authorized and directed to distribute the same between the local governments in accordance with the foregoing provisions of G.S. 105-459. The Treasurer of the State of North Carolina is further authorized and directed to pay said sums to the local governments each month or so often as he shall receive payments from the Authority, but not more often than once each month, after first deducting from any sum to be paid a local government such amount as has theretofore been paid direct to said local government by the Authority for the same period: Provided, however, that the minimum annual payment to any local government from said fund shall not be less than the average annual tax on the property taken by the Authority for the two years next preceding the taking. (1941, c. 85, s. 3; 1959, c. 1060.)

§ 105-461. Duty of county accountant, etc.—The county accountant or other proper officer of each local government to which this Subchapter is applicable shall:

(1) Certify to the State Board of Assessment and the Treasurer of the State of North Carolina the tax rate fixed by the governing body of such local government immediately upon the fixing of the same;

(2) Certify each month to the Treasurer of the State of North Carolina a statement of the amount received by the local government direct from the Authority.

No local government shall be entitled to receive its distributive share of said fund from the Treasurer of the State of North Carolina until the foregoing information has been properly furnished. If any such local government shall fail to furnish the information herein required within 10 days from and after receipt by it from the State Board of Assessment of request for the same, forwarded by registered mail, then and in that event it shall be barred from participating in the benefits provided for the period for which the same is requested. (1941, c. 85, s. 4.)

§ 105-462. Local units entitled to benefits; prerequisite for payments.—Any local governments within the State in which the Authority now or may hereafter own property or carry on an operation shall be entitled to the benefits arising under this Subchapter: Provided, however, that no payment shall be made to them by the Treasurer of the State of North Carolina until such time as such local governments shall have certified to the State Board of Assessment and the Treasurer of the State of North Carolina the average annual tax loss it has sustained by the taking of said property for the two years immediately preceding the taking thereof: Provided, further, that in the event of any disagreement between said local governments and the Treasurer of the State of North Carolina as to such annual tax loss, then the same shall be determined by the State Board of Assessment, and its decision thereon shall be final. (1941, c. 85, s. 5.)

SUBCHAPTER VIII. LOCAL GOVERNMENT SALES AND USE TAX.

ARTICLE 39.

Local Government Sales and Use Tax.

§ 105-463. Short title.—This Article shall be known as the "Local Government Sales and Use Tax Act." (1971, c. 77, s. 2.)

Local Modification. — Edgecombe: 1971, c. 782; Nash: 1971, c. 781.

Former Local Option Sales and Use Tax Act Held Unconstitutional for Lack of Uniformity. — See Hajoca Corp. v. Clayton, 277 N.C. 560, 178 S.E.2d 481 (1971) (considering former §§ 105-164 to 105-164.58.)

§ 105-464. Purpose and intent.—It is the purpose of this Article to afford the counties and municipalities of this State with opportunity to obtain an

added source of revenue with which to meet their growing financial needs by providing all counties of the State with authority to levy a one percent (1%) sales and use tax as hereinafter provided. (1971, c. 77, s. 2.)

Local Modification. — Edgecombe: 1971, c. 782; Nash: 1971, c. 781.

§ 105-465. County election as to adoption of local sales and use tax.—The board of elections of any county, upon the written request of the board of county commissioners thereof, or upon receipt of a petition signed by qualified voters of the county equal in number to at least fifteen percent (15%) of the total number of votes cast in the county, at the last preceding election for the office of Governor, shall call a special election for the purpose of submitting to the voters of the county the question of whether a one percent (1%) sales and use tax as hereinafter provided will be levied.

The special election shall be held under the same rules and regulations applicable to the election of members of the General Assembly, except that no absentee ballots may be used. No new registration of voters shall be required. All qualified voters in the county who are properly registered not later than 21 days (excluding Saturdays and Sundays) prior to the election shall be entitled to vote at said election. The county board of elections shall give at least 20 days' public notice prior to the closing of the registration books for the special election.

The county board of elections shall prepare ballots for the special election which shall contain the words, "FOR the one percent (1%) local sales and use tax only on those items presently covered by the three percent (3%) sales and use tax," and the words, "AGAINST the one percent (1%) local sales and use tax only on those items presently covered by the three percent (3%) sales and use tax," with appropriate squares so that each voter may designate his vote by his cross (X) mark.

The county board of elections shall fix the date of the special election; provided, however, that the special election shall not be held on the day of any biennial election for county officers, nor within 60 days thereof, nor within one year from the date of the last preceding special election under this section. (1971, c. 77, s. 2.)

Local Modification. — Edgecombe: 1971, c. 782; Nash: 1971, c. 781.

§ 105-466. Levy of tax.—(a) In the event a majority of those voting in a special election held pursuant to G.S. 105-465 shall approve the levy of the local sales and use tax, the board of county commissioners may, by resolution, proceed to levy the tax.

(b) In addition, the board of county commissioners may, in the event no election has been held under the provisions of G.S. 105-465 in which the tax has been defeated, after not less than 10 days' public notice and after a public hearing held pursuant thereto, by resolution, impose and levy the local sales and use tax to the same extent and with the same effect as if the levy of the tax had been approved in an election held pursuant to G.S. 105-465 except that in such case, the revenue produced thereby shall be expended for necessary expenses only.

(c) Collection of the tax, and liability therefor, shall begin and continue only on and after the first day of a calendar month set by the board of county commissioners in the resolution levying the tax, which shall in no case be earlier than the first day of the second succeeding calendar month after the date of the adoption of the resolution.

(d) The board of county commissioners, upon adoption of said resolution, shall cause a certified copy of the resolution to be delivered immediately to the Commissioner of Revenue, accompanied by a certified statement from the county board of elections, if applicable, setting forth the results of any special

election approving the tax in the county. Thereupon, the Commissioner of Revenue shall proceed as authorized in this Article to administer the tax in such county, unless said county board of commissioners shall notify the Commissioner of Revenue in writing that, pursuant to a resolution duly adopted by said board, the tax will be collected and administered by the taxing county. (1971, c. 77, s. 2.)

Local Modification. — Edgecombe: 1971, c. 782; Nash: 1971, c. 781.

§ 105-467. Sales tax imposed; limited to items on which the State now imposes a three percent (3%) sales tax.—The sales tax which may be imposed under this Article is limited to a tax at the rate of one percent (1%) of:

(1) The sales price of those articles of tangible personal property now subject to the three percent (3%) sales tax imposed by the State under G.S. 105-164.4(1);

(2) The gross receipts derived from the lease or rental of tangible personal property where the lease or rental of such property is an established business now subject to the three percent (3%) sales tax imposed by the State under G.S. 105-164.4(2);

(3) The gross receipts derived from the rental of any room or lodging furnished by any hotel, motel, inn, tourist camp or other similar accommodations now subject to the three percent (3%) sales tax imposed by the State under G.S. 105-164.4(3); and

(4) The gross receipts derived from services rendered by laundries, dry cleaners, cleaning plants and similar type businesses now subject to the three percent (3%) sales tax imposed by the State under G.S. 105-164.4(4).

The exemptions and exclusions contained in G.S. 105-164.13 and the refund provisions contained in G.S. 105-164.14 shall apply with equal force and in like manner to the local sales and use tax authorized to be levied and imposed under this Article. A taxing county shall have no authority, with respect to the local sales and use tax imposed under this Article to change, alter, add to or delete any refund provisions contained in G.S. 105-164.14, or any exemptions or exclusions contained in G.S. 105-164.13, or which are elsewhere provided for.

The local sales tax authorized to be imposed and levied under the provisions of this Article shall be applicable to such retail sales, leases, rentals, rendering of services, furnishing of rooms, lodgings or accommodations and other taxable transactions which are made, furnished or rendered by retailers whose place of business is located within the taxing county. The tax imposed shall apply to the furnishing of rooms, lodging or other accommodations within the county which are rented to transients. However no tax shall be imposed where the tangible personal property sold is delivered to the purchaser at a point outside the taxing county by the retailer or his agent, or by a common carrier. (1971, c. 77, s. 2.)

Local Modification. — Edgecombe: 1971, c. 782; Nash: 1971, c. 781.

Situs of Sale.—See opinion of Attorney General to Honorable I. L. Clayton, Commissioner of Revenue, 40 N.C.A.G. 881 (1970) (issued under former § 105-164.51).

§ 105-468. Use tax imposed; limited to items upon which the State now imposes a three percent (3%) use tax.—The use tax which may be imposed under this Article shall be at the rate of one percent (1%) of the cost price of each item or article of tangible personal property when the same is not sold but used, consumed or stored for use or consumption in the taxing county, except that no tax shall be imposed upon such tangible personal property when, if the property were subject to the use tax imposed by G.S. 105-164.6, such property would be taxed by the State of North Carolina at a rate less than three percent (3%).

Every retailer engaged in business in this State and in the taxing county and

required to collect the use tax levied by G.S. 105-164.6 shall also collect the one percent (1%) use tax when such property is to be used, consumed or stored in the taxing county, said one percent (1%) use tax to be collected concurrently with the State's use tax; but no retailer not required to collect the use tax levied by G.S. 105-164.6 shall be required to collect the one percent (1%) use tax. The use tax contemplated by this section shall be levied against the purchaser, and his liability for such use tax shall be extinguished only upon his payment of the use tax to the retailer, where the retailer is required to collect the tax, or to the Commissioner of Revenue, or to the taxing county, as appropriate, where the retailer is not required to collect the tax.

Where a local sales or use tax has been paid with respect to said tangible personal property by the purchaser thereof, either in another taxing county within the State, or in a taxing jurisdiction outside the State where the purpose of the tax is similar in purpose and intent to the tax which may be imposed pursuant to this Article, said tax may be credited against the tax imposed under this section by a taxing county upon the same property. If the amount of sales or use tax so paid is less than the amount of the use tax due the taxing county under this section, the purchaser shall pay to the Commissioner of Revenue or to the taxing county, as appropriate, an amount equal to the difference between the amount so paid in the other taxing county or jurisdiction and the amount due in the taxing county hereunder. The Commissioner of Revenue or the taxing county, as appropriate, may require such proof of payment in another taxing county or jurisdiction as is deemed to be necessary and proper. The use tax levied hereunder shall not be subject to credit for payment of any State sales or use tax not imposed for the benefit and use of counties and municipalities. (1971, c. 77, s. 2.)

Local Modification. — Edgecombe: 1971, c. 782; Nash: 1971, c. 781.

§ 105-468.1. Certain building materials exempt from sales and use taxes.—The provisions of this Article shall not be applicable with respect to any building materials purchased for the purpose of fulfilling any lump sum or unit price contract entered into or awarded, or entered into or awarded pursuant to any bid made, before the effective date of the tax imposed by a taxing county when, absent the provisions of this section, such building materials would otherwise be subject to tax under the provisions of this Article. (1971, c. 77, s. 3.)

Local Modification. — Edgecombe: 1971, c. 782; Nash: 1971, c. 781.

§ 105-469. Collection and administration of local sales and use tax; authorization to promulgate rules and regulations.—Unless the county board of commissioners shall have notified the Commissioner to the contrary, as provided in G.S. 105-466(d), the Commissioner of Revenue shall collect the local sales and use tax imposed by a taxing county pursuant to the provisions of this Article and shall be charged with the duty of administering the local sales and use tax authorized to be imposed by this Article. In addition to the present statutory provisions authorizing the Commissioner of Revenue to adopt and promulgate rules and regulations pertaining to the administration and collection of taxes, the Commissioner of Revenue is empowered to promulgate such additional rules and regulations as are necessary and proper for the implementation of this Article. (1971, c. 77, s. 2.)

Local Modification. — Edgecombe: 1971, c. 782; Nash: 1971, c. 781.

§ 105-470. Retail bracket system; application to local sales and use tax.—For the convenience of the retailer in collecting the State sales or use tax due at the rate of three percent (3%) and the local sales or use tax due at the rate of one percent (1%), and to facilitate the administration of this Article,

every retailer engaged in or continuing in business in any county wherein the tax imposed and levied herein shall be applicable, is required by this Article to add to the sales price and collect from the purchaser on all taxable sales an amount equal to the following:

No amount on sales of less than 10¢
1¢ on sales of 10¢ to 29¢
2¢ on sales of 30¢ to 59¢
3¢ on sales of 60¢ to 84¢
4¢ on sales of 85¢ to $1.12

Sales over $1.12—straight four percent (4%) with major fractions governing.

The use of the bracket system, set out above, shall not relieve the retailer from the duty and liability of collecting and remitting to the Commissioner of Revenue, or to a taxing county, as appropriate, an amount equal to the tax imposed by the taxing county under this Article. (1971, c. 77, s. 2.)

Local Modification. — Edgecombe: 1971, c. 782; Nash: 1971, c. 781.

§ 105-471. Retailer to collect sales tax.—Every retailer whose place of business is in a taxing county shall on and after the levy of the tax herein authorized collect the one percent (1%) local sales tax provided by this Article.

The tax to be collected under this Article shall be collected as a part of the sales price of the item of tangible personal property sold, the cost price of the item of tangible personal property used, or as a part of the charge for the rendering of any services, renting or leasing of tangible personal property, or the furnishing of any accommodation taxable hereunder. The tax shall be stated and charged separately from the sales price or cost price and shall be shown separately on the retailer's sales record and shall be paid by the purchaser to the retailer as trustee for and on account of the State or county wherein the tax is imposed. It is the intent and purpose of this Article that the local sales and use tax herein authorized to be imposed and levied by a taxing county shall be added to the sales price and that the tax shall be passed on to the purchaser instead of being borne by the retailer. The Commissioner of Revenue shall design, print and furnish to all retailers in a taxing county in which he shall collect and administer the tax the necessary forms for filing returns and instructions to insure the full collection from retailers, and the Commissioner may adapt the present form used for the reporting and collecting of the State sales and use tax to this purpose. (1971, c. 77, s. 2.)

Local Modification. — Edgecombe: 1971, c. 782; Nash: 1971, c. 781.

§ 105-472. Disposition and distribution of taxes collected.—With respect to the counties in which he shall collect and administer the tax, the Commissioner of Revenue shall, on a quarterly basis, distribute to each taxing county and to the municipalities therein the net proceeds of the tax collected in that county under this Article which amount shall be determined by deducting taxes refunded, the cost to the State of collecting and administering the tax in the taxing county and such other deductions as may be properly charged to the taxing county, from the gross amount of the tax remitted to the Commissioner of Revenue from the taxing county. The Commissioner shall determine the cost of collection and administration, and that amount shall be retained by the State before distribution of the net proceeds of the tax. For the purposes of this Article, "municipalities" shall mean "incorporated cities and towns."

The board of county commissioners shall, in the resolution levying the tax, determine that the net proceeds of the tax shall be distributed in one of the following methods and thereafter said proceeds shall be distributed in accordance therewith:

(1) The amount distributable to a taxing county and to the municipalities therein from the net proceeds of the tax collected therein shall be determined upon the following basis: The net

proceeds of the tax collected in a taxing county shall be distributed to that taxing county and to the municipalities therein upon a per capita basis according to the total population of the taxing county, plus the total population of the municipalities therein; provided, however, that "total population" of a municipality lying within more than one county shall be only that part of its population which lives within the taxing county. For this purpose, the Commissioner of Revenue shall determine a per capita figure by dividing the net proceeds of the tax collected under this Article for the preceding quarter within a taxing county by the total population of that taxing county plus the total population of all municipalities therein according to the most recent annual estimates of population as certified to the Commissioner of Revenue by the Director of the North Carolina Department of Administration. The per capita figure thus derived shall be multiplied by the population of the taxing county and each respective municipality therein according to the most recent annual estimates of population as certified to the Commissioner of Revenue by the Director of the Department of Administration, and each respective product shall be the amount to be distributed to each taxing county and to each municipality therein. The Director of the Department of Administration shall annually cause to be prepared and shall certify to the Commissioner of Revenue such reasonably accurate population estimates of all counties and municipalities in the State as may be practicably developed; or

(2) The net proceeds of the tax collected in a taxing county shall be divided between the county and the municipalities therein in proportion to the total amount of ad valorem taxes levied by each on property having a tax situs in the taxing county during the fiscal year next preceding such distribution. For purposes of this section, the amount of the ad valorem taxes levied by such county or municipality shall include any ad valorem taxes levied by such county or municipality in behalf of a taxing district or districts and collected by the county or municipality. In computing the amount of tax proceeds to be distributed to any county or municipality, the amount of any ad valorem taxes levied but not substantially collected shall be ignored. Each county and municipality receiving a distributable share of the sales and use tax levied under this Article shall in turn immediately share the proceeds with any district or districts in behalf of which the county or municipality levied ad valorem taxes in the proportion that the district levy bears to the total levy of the county or municipality.

Where local use taxes, levied pursuant to this Article, or to any other local sales tax act, which cannot be identified as being attributable to any particular taxing county are collected and remitted to the Commissioner, he shall apportion said taxes to the taxing counties in the same proportion that the local sales and use taxes collected each month in a taxing county bears to the total local sales and use taxes collected in all taxing counties each month during the quarter for which a distribution is to be made, and the total net proceeds shall then be distributed as above provided. (1971, c. 77, s. 2.)

Local Modification. — Edgecombe: 1971, c. 782; Nash: 1971, c. 781.

§ **105-473. Repeal of levy.**—(a) The board of elections of any county, upon the written request of the board of county commissioners thereof, or upon receipt of a petition signed by qualified voters of the county equal in number to at least fifteen percent (15%) of the total number of votes cast in the county at the last preceding election for the office of Governor, shall call a special election for the purpose of submitting to the voters of the county the question

of whether the levy of a one percent (1%) sales and use tax theretofore levied should be repealed.

The special election shall be held under the same rules and regulations applicable to the election of members of the General Assembly, except that no absentee ballots may be used. No new registration of voters shall be required. All qualified voters in the county who are properly registered not later than 21 days (excluding Saturdays and Sundays) prior to the election shall be entitled to vote at said election. The county board of elections shall give at least 20 days' public notice prior to the closing of the registration books for the special election.

The county board of elections shall prepare ballots for the special election which shall contain the words "FOR repeal of the one percent (1%) local sales and use tax levy," and the words "AGAINST repeal of the one percent (1%) local sales and use tax levy," with appropriate squares so that each voter may designate his vote by his cross (X) mark.

The county board of elections shall fix the date of the special election; provided, however, that the special election shall not be held on the day of any biennial election for county officers, nor within 60 days thereof, nor within one year from the date of the last preceding special election held under this section.

(b) In the event a majority of those voting in a special election held pursuant to this section shall approve the repeal of the levy, the board of county commissioners shall, by resolution, proceed to terminate the levy and the imposition of the tax in the taxing county unless and until the tax is levied again as provided in G.S. 105-466(a).

(c) In addition, the board of county commissioners may, by resolution and without the necessity of an election proceed to terminate the levy and the imposition of the tax in the taxing county if the tax was levied under the provisions of G.S. 105-466(b).

(d) No termination of taxes levied and imposed under this Article shall be effective until the end of the fiscal year in which the repeal election was held.

(e) If the Commissioner of Revenue collects and administers the tax in a taxing county, the board of county commissioners, upon adoption of said resolution, shall cause a certified copy of the resolution to be delivered immediately to the Commissioner of Revenue, accompanied by a certified statement from the county board of elections, if applicable, setting forth the results of any special election approving the repeal of the tax in the county.

(f) No liability for any tax levied under this Article which shall have attached prior to the effective date on which a levy is terminated shall be discharged as a result of such termination, and no right to a refund of tax or otherwise, which shall have accrued prior to the effective date on which a levy is terminated shall be denied as a result of such termination. (1971, c. 77, s. 2.)

Local Modification. — Edgecombe: 1971, c. 782; Nash: 1971, c. 781.

§ 105-474. Definitions; construction of Article; remedies and penalties.—The definitions set forth in G.S. 105-164.3 shall apply to this Article insofar as such definitions are not inconsistent with the provisions of this Article, and all other provisions of Article 5 and of Article 9 of Subchapter 1, Chapter 105 of the General Statutes, as the same relate to the North Carolina Sales and Use Tax Act shall be applicable to this Article unless such provisions are inconsistent with the provisions of this Article. The administrative interpretations made by the Commissioner of Revenue with respect to the North Carolina Sales and Use Tax Act, to the extent not inconsistent with the provisions of this Article, may be uniformly applied in the construction and interpretation of this Article. It is the intention of this Article that the provisions of this Article and the provisions of the North Carolina Sales and Use Tax Act, insofar as practicable, shall be harmonized.

The provisions with respect to remedies and penalties applicable to the

North Carolina Sales and Use Tax Act, as contained in Article 5 and Article 9, Subchapter 1, Chapter 105 of the General Statutes, shall be applicable in like manner to the tax authorized to be levied and collected under this Article, to the extent that the same are not inconsistent with the provisions of this Article. (1971, c. 77, s. 2.)

Local Modification. — Edgecombe: 1971, c. 782; Nash: 1971, c. 781.

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

March 8, 1972

I, Robert Morgan, Attorney General of North Carolina, do hereby certify that the foregoing recompilation of the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Division of Legislative Drafting and Codification of Statutes of the Department of Justice of the State of North Carolina.

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